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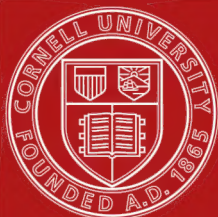
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The law of contracts.



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THE

LAW OF CONTRACTS.

BY

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AUTHOR OF TREATISES ON THE ELEMENTS OF MERCANTILE LAW, ON THE LAW OF
SHIPPING AND ADMIRALTY, ON MARINE INSURANCE, ON PARTNERSHIP,
ON NOTES AND BILLS, AND ON THE LAWS OF
BUSINESS AND BUSINESS MEN.

VOLUME I.

NINTH EDITION,

EDITED BY

JOHN M. GOULD

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TO
WILLIAM H. PRESCOTT, ESQ.,

THE HISTORIAN OF SPAIN, MEXICO, AND PERU.

I MIGHT, perhaps, find some excuse for dedicating this work to you, in the natural desire of connecting my own labors with those which have won for you and for our country so much renown. And even more in the friendship, which began so long ago we cannot remember its beginning; and in the long years, that through childhood, youth, and manhood, have brought us upon the confines of age, if not beyond them, has never for a moment been broken.

But neither of these is my principal motive. That, I must confess to be, a strong and irrepressible desire to speak of your father; to express, however imperfectly, my gratitude to him; and to execute, even in this slight degree, the purpose I have long had, of putting on record my testimony to the excellence of one who stood for many years at the head of his profession, who was my master during my apprenticeship to the law, and ever after my revered instructor and invaluable friend.

It was in 1815 that I entered his office as a student. I had been accustomed all my life to see him often, and hear him often spoken of, for our families were intimate, and he was among my father's most valued friends; and I had always heard him mentioned with a kind and degree of respect that seemed to be paid to him alone. I knew that he had held the highest place in his profession for some years; but the regard and reverence generally accorded to him were more than any mere professional success could win. When I entered his office, he had already given up a large part of

his business. He did not go often into court; but I heard him in some important cases, and was a constant observer of the relations between him and his numerous clients. And it was not long before I learned the grounds of his high social and professional position.

In the first place, let me speak of his judgment and sagacity. I cannot conceive of any person possessing, in greater perfection, that admirable thing we call *good sense*. I doubt whether, in his long and active life, he ever made any one mistake of importance. Whoever employed him in any business, soon saw that the wisest thing that could be done in his case, and at every step of it, was always the very thing that was done. Hence a confidence without limit was reposed in his opinion; and his advice was accepted and followed by all who received it, as if it made further inquiry or consideration wholly unnecessary.

The next quality I would mention, was a kindred and connected one; I mean his perfect truthfulness. It seemed as if he could not deceive; and if he had the faculty originally he must have lost it by *non-user*. It made no difference on which side of a question the party propounding it to him stood; for his answer was to the question, and not to the man. Whether he dealt with a client, an adverse party, a witness, the jury, or the court, he dealt with them all honestly. He had, what I am sorry to call the rare quality, of loving truth so well, that his view of it was not to be distorted or obstructed, either by any interest or any feeling of his own or of those whom he represented, or by any disturbing influences of circumstances or position.

I speak last of his learning, although this was perhaps more frequently remarked upon than his moral qualities, however deeply they were felt. He had passed many years in laborious and well-directed study; for he was led to this, both by his sense of duty to his clients, and by his sagacity, which told him that here he must find the means of sound judgment and usefulness and success; and also by the love of his profession and of the law as a science. For many years after he had withdrawn from the pro-

fession, both as advocate and chamber-counsel, he still continued his legal studies; and often when I have called upon him and stated some difficult question which had occurred in my practice, he would — not for a fee — but in his kindness to me, and his love of the law, enter upon the investigation with the zeal of earlier days, and give me the whole benefit of his vast knowledge and his unerring sagacity.

To these qualities I must add that of universal kindness and unfailing courtesy. And certainly I have given good reasons why he held so long the headship of a profession in which it is not easy to climb to the high places, and very difficult to hold them; and also, why, outside of his profession and by society at large, he was venerated during his long life as few men among us have ever been. Let me add, that while he manifested, wherever in the conduct of his affairs it was needed, the firmness and fearlessness that he inherited from a father who stood like a tower of strength in command of the American forces at Bunker Hill, he was ever, and remarkably, unassuming, retiring, and modest. It is difficult to believe that he could not measure his own success, or that he did not know his high position; but no one ever heard a word or a tone from him which indicated such knowledge.

He was not eloquent, and never, to my knowledge, attempted to be; and yet he was a most successful advocate. It was his purpose and endeavor to do for every client, and in every case, all that could be done by learning, sense, industry, and honesty; this he knew he could do, and did. And more than this he had no desire to do.

Such was WILLIAM PRESCOTT. When he died in 1844, at the age of 82, I had known him intimately for twenty-nine years, and had known of him many more. And I never yet heard a word spoken, and I never heard *of* a word spoken, to his disparagement or dispraise, during his long life or since its close, by any person whomsoever; nor even have I heard the “but” or “if” with which many indulge themselves in qualifying and clouding the commendation they cannot but render. He has left behind him

no brilliant speeches to be remembered and quoted ; no books in which the fruits of his learning and wisdom were gathered and preserved ; and they who knew him are passing away, and already his reputation is becoming traditional. And very glad shall I be, if, by this slight memorial, I may, for a single moment, arrest the waves of time, in their advancing flow over the sands in which are written his name, and the names of many others of our best and greatest.

THEOPHILUS PARSONS.

CAMBRIDGE, October, 1853.

PREFACE TO THE NINTH EDITION.

PROFESSOR PARSONS' learned treatise upon the Law of Contracts has now become, by quotation therefrom and frequent reference thereto, so imbedded in judicial decisions that it is itself a monument in the law. If, as has been said, contract is half of life, no book upon so vast a theme can be called exhaustive; but this work is doubtless more nearly so than any other, since to the author's labors have been added the thoughtful attention and research of such eminent writers and teachers as Hon. Edmund H. Bennett, Dean Langdell and Professor Williston of the Harvard Law School, Edward L. Pierce, and others.

In the present edition about six thousand authorities are added, including, beside the decisions cited, which are usually the very latest, numerous references to monographic articles and notes, some of which are of the highest value. The author's text has in some cases been shortened, where it appeared somewhat antiquated or too discursive as to points settled by more recent decisions, and many of the extended statements of facts in, or quotations from a single case in the notes have been so reduced as to show only the points decided, in order to secure space for the new notes and the increase in both the Table of Cases Cited and the Index. The notes of the two preceding

editors have been preserved without material change,—those of Mr. Kellen being followed by the letter K., and those of Professor Williston by the letter W.

The State statutes relating to interest and usury, and those relating to the ever-changing rights and powers of married women, have been carefully revised and brought thoroughly up to this time; and, besides the new citations added to each chapter and section, the notes of the present editor, which are often quite extensive, discuss, from the standpoint of the latest decisions, such important topics as public policy and illegal contracts, freedom of contract, privity and entirety of agreements, good-will, sales, the Statutes of Frauds and of Limitations, warranties and conditions, specific performance, trade-marks, patents and copyright, interpretation of contracts, the impairment of their obligation and damages for their breach.

JOHN M. GOULD.

Boston, October, 1903.

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PART I.

THE LAW OF CONTRACTS

CONSIDERED IN REFERENCE TO

THE OBLIGATIONS

ASSUMED BY

THE PARTIES.

THE LAW OF CONTRACTS.

PRELIMINARY CHAPTER.

SECTION I.

OF THE EXTENT AND SCOPE OF THE LAW OF CONTRACTS.

THE Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfilment of contracts.

Even those duties, or those acts of kindness and affection, which may seem most remote from contract or compulsion of any kind, are nevertheless within the scope of the obligation of contracts. The parental love which provides for the infant when, in the beginning of its life, it can do nothing for itself, nor care for itself, would seem to be so pure an offering of affection, that the idea of a contract could in no way belong to it. But even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of obligation, there is still such an obligation. It is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes * the perform- * 4
ance of these duties the condition of the preservation of human life; and by the implied obligation on the part of the unconscious objects of this care, that when, by its means, they shall have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt. Indeed, the law recognizes and enforces

this obligation, to a certain degree, on both sides, as will be shown hereafter.

Further, in all the relations of social life, its good order and prosperity depend upon the due fulfilment of the contracts which bind all to all. Sometimes these contracts are deliberately expressed with all the precision of law, and are armed with all its sanctions. More frequently they are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of the parties. Far more frequently they are not expressed at all; and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge. In this sense, *contract* is co-ordinate and commensurate with *duty*; and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide, though far from a universal application, that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do. "Implied contracts," says Blackstone (vol. ii. p. 443), "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." These contracts form the warp and woof of actual life. If they were wholly disregarded, the movement of society would be arrested. And in so far as they are disregarded, that movement is impeded or disordered. (x)

(x) See *e.g.* Fort Payne Coal & Iron Co. v. Webster, 163 Mass. 134, 136, 39 N. E. 786. A contract is implied to pay for services accepted by the defendant under such circumstances as to raise a presumption that he expected, or ought to have expected, that they were to be paid for. Sawyer v. Pawnors' Bank, 6 Allen (Mass.), 207; Pew v. First Nat. Bank, 130 Mass. 391, 395; Bartlett v. Mystic River Corp., 151 Mass. 433, 435, 24 N. E. 780; see Johnson v. Kimball, 172 Mass. 398, 52 N. E. 386; Weaver v. Norway Tack Co., 80 Fed. 700. Whether, under an implied contract for compensation, the rate thereof is limited to that previously paid, is a question of fact rather than of law, but *prima facie* it continues the same as before. Bartlett v. Mystic River Corp., *supra*; Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 26 N. E. 97, 10 L. R. A. 122.

Work that is not usually bestowed in charity is not presumed to have been performed gratuitously merely because at the time the recipient has no pecuniary resources. Worthington v. Plymouth County R. Co., 168 Mass. 474, 478, 47 N. E. 403.

A contract is express even when it depends more upon conduct than upon words. Gallagher v. Hathaway Manuf. Corp., 172 Mass. 230, 51 N. E. 1086. And, while an express contract may be proved by circumstantial as well as direct evidence, an implied contract may be established by proof of circumstances showing that the parties intended to contract, or by a general course of dealing between them. Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; Heffron v. Brown, 155 Ill. 322, 40 N. E. 583. If, for instance, one pays a debt which another is legally compellable to pay, as the only means of getting possession of a chattel to which he is entitled, the law implies a promise on the other's part to repay him what he so disburses. The Orchis, 15 P. D. 38, 5 Asp. M. C. 501. So an implied contract may arise from acquiescence; as when an account rendered becomes an account stated by acquiescence: see *e.g.* Allen-West Commission Co. v. Patillo, 90 Fed. 628; or from conduct implying consent to improvements upon the defendant's real estate. See *e.g.*, National Wall Paper Co. v. Sire, 163 N. Y. 122, 131, 57 N. E. 293; Powers' Appeal, 125 Penn. St. 175,

If all contracts, express or implied, were carried into full effect, the law would have no office but that of instructor or adviser. It is because they are not all carried into effect, and it is that they may be carried into effect, that the law exercises a compulsory power.

Hence is the necessity of law; and the well-being of society depends upon, and may be measured by, the degree in which * the law construes and interprets all contracts wisely; elim- * 5 inates from them whatever is of fraud or error, or otherwise wrongful; and carries them out into their full and proper effect and execution. These, then, are the results which the law seeks. And it seeks these results by means of *principles*; that is, by means of truths, ascertained, defined, and so expressed as to be practical and operative. There are many of the rules of law which do not come within this definition of *principles*. They are formal or technical; but they are in force because they are believed to be subsidiary to, and needed or useful for the comprehension, application, and enforcement of principles; and these formal rules derive their whole power and value from the principles which they explain or enforce and carry into effect.

It is said that the law seeks these results by means of principles; and these again, in their most general form, may be said to be, first, those rules of construction and interpretation which have for their object to find in a contract a meaning which is honest, sensible, and just, without doing violence to the expressions of the parties, or making a new contract for them; and, secondly, those which discharge from a contract whatever would bring upon it the fatal taint of fraud, or is founded upon error or accident, or would work an injury. And if these elements of wrong are so far vital to any contract, that when they are removed it perishes, then the law annuls or refuses to enforce that contract, unless a still greater mischief would thereby be done.

23 W. N. C. 485, 17 Atl. 254; *Morrison v. Winn*, 18 Utah, 15, 54 Pac. 761; *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; *Ragan v. Kansas City & S. E. R. Co.*, 144 Mo. 623, 46 S. W. 602; *Curtis v. La Grange Water Co.*, 20 Oregon, 34, 23 Pac. 808, 10 L. R. A. 484; *Louisville & N. R. Co. v. Daugherty* (Ky.), 36 S. W. 5. A contract by a corporation will never be construed, without plain terms, and by mere implication, as if it had contracted itself out of the powers vested in it by statute. *Ellis v. Dadson*, 60 L. J. Ch. 353. In general, terms may

be properly implied in a contract which are necessary to give the transaction such efficiency as both parties must have intended it to have, and to prevent such a failure of consideration as cannot have been within either party's contemplation. *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488. And court or jury may always infer a contract to exist, though no express contract is proved. *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. 196, affirmed [1901] W. N. 241; *In re Henry, Willmot v. Gardner*, [1901] 2 Ch. 548.

Subsidiary to these are the rules and processes of the law, by means whereof a contract, which in itself is good, and has been properly construed, and is free from all removable elements of wrong, is enforced, or carried into execution.

DEFINITION OF CONTRACTS.

A contract, in legal contemplation, is an agreement between two or more parties, for the doing or the not doing of some particular thing. (a)

It has been said that the word "agreement" is derived from the phrase "*aggregatio mentium*." (b) This is at least doubtful, and was probably suggested by the wish to illustrate that principle of the law of contracts which makes an agreement of the minds of the parties or the consent and harmony of their intentions, essential. We shall presently see that they must propose and mean the same thing, and in the same sense.

The word "contract" is of comparatively recent use, as a law term. Formerly, courts and lawyers spoke only of "obligations," (c) — meaning thereby "bonds," in which the word "oblige" is commonly used as one of the technical and formal terms, — "covenants," and "agreements," which last word was used as we now use the word "contract." The word "promise" is often used in instruments, and sometimes in legal proceedings. "Agreement" is seldom applied to specialties; "contract" is generally confined to simple contracts; and "promise" refers to

(a) "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." *Marshall, C. J., Sturges v. Crowninshield*, 4 Wheat. 197. — "A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 Bl. Com. 446. — In *Sidenham and Worlington's case*, 2 Leon. 224, 225, which was an *assumpsit*, founded upon an executed consideration, *Periam, J.*, conceived that the action did well lie, and he said there was a great difference between *contracts* and that case. "For in contracts upon sale, the consideration, and the promise, and the sale, ought to meet together, for a contract is

derived from *con* and *trahere*, which is a drawing together, so as in contracts everything which is requisite ought to concur and meet together; namely, the consideration, of the one side, and the sale or the promise on the other side. But to maintain an action upon an *assumpsit*, the same is not requisite, for it is sufficient if there be a moving cause, or consideration precedent, for which cause or consideration the promise was made."

(b) Per *Pollard*, serjeant, *arguendo* in *Reniger v. Fogossa*, Plowd. 17.

(c) See the Abridgments of Brooke, Rolle, Bacon, &c.

the engagement of a party * without reference to the reasons * 7 or considerations for it, or the duties of other parties. (x)

In the above definition of a contract, no mention is made of the consideration. The Statute of Frauds requires, in many cases, and for many purposes, that the "agreement" shall be in writing, and some note or memorandum thereof be signed by the party sought to be charged. Under this provision, it has been much controverted whether the word "agreement" so far implies a "consideration," that this also must be in writing. This question will be considered in a subsequent part of this work. (d) We have not included the consideration in the definition of the contract, because we do not regard it as, of itself, an essential part thereof. But for practical purposes it is made so by some important and very influential rules, and we shall treat of the consideration as one of the elements of a legal contract.

SECTION III.

CLASSIFICATION OF CONTRACTS.

The most general division of contracts is into contracts by specialty, and simple contracts.¹

(d) Vol. III. *14-*16.

¹ Contracts are also divided into express contracts and implied contracts. Contracts are express when their terms are stated by the parties in writing or verbally. Contracts are implied when their terms must be gathered wholly or in part from the acts of the parties. The distinction between the two classes relates simply to the

(x) Sureties signing a bond to dissolve an attachment enter into a contract. *Hussey v. Crawford*, 152 Mass. 596, 26 N. E. 424. "Contract" in a statute, or elsewhere, may include not only formal bilateral contracts, oral or written, but also contracts created by an agreement on one side and action under it on the other side, such as to bring the parties into a contractual relation. *Batchelder v. Hutchinson*, 161 Mass. 462, 466, 37 N. E. 452; see *First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275. When proposals and an award made thereon look to the future execution of a contract, such award is not necessarily a contract of any kind, nor an agreement to enter into a contract based upon the proposals. And especially when the proposed contract is found only in a vote passed by a board of public officers, which looks to the preparation and execution of a formal contract in the future, that will not be held a contract which was intended only to signify an intention to enter into a contract. *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528, 532, 49 N. E. 918; *Benton v. Springfield Y. M. C. Ass'n*, 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320. Proof also that the alleged agreement was offered and accepted as a contract between the parties is equally necessary, whether such agreement be a vote, a specialty, or merely a written or unwritten contract. *Sears v. Kings County El. Ry. Co.*, 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 115. It is essential to the validity of the agreement, when completed, that it be definite and not too vague or general. *Marble v. Standard Oil Co.*, 169 Mass. 553, 48 N. E. 783; *Gassett v. Glazier*, 165 Mass. 473, 48 N. E. 193.

Contracts by specialty are those which are reduced to writing and attested by a seal — or, to use the common phrase, contracts under seal; and contracts of record. These last are judgments, recognizances, and statutes staple. But the term “contracts by specialty” is sometimes confined to contracts under seal.

Simple contracts are all those which are not contracts by specialty. It is not accurate in point of language to distinguish between *verbal* contracts and *written* contracts; for whether the words are written or spoken, the contracts are equally *verbal*, or expressed in words. Nor is it accurate in point of law to

* 8 * distinguish between written and parol contracts. (e) For whether they be written or only spoken, they are, in law, if not sealed, equally and only parol contracts. For some purposes, and especially by the requirements of the Statute of Frauds, the evidence of the contract must be in writing; and when it is in writing, some peculiar rules of law apply to it. (f) But it is a mistake to rest upon this a legal distinction between written and oral contracts; and from this mistake some confusion has arisen. (g)

(e) “The law makes no distinction in contracts, except between contracts which are, and contracts which are not, under seal. I recollect one of the most learned judges who ever sat upon this or any other bench, being very angry when a distinction was attempted to be taken between parol and written contracts, and saying, ‘They are all parol, unless under seal.’” Lord *Abinger*, C.B., in *Beckham v. Drake*, 9 M. & W. 92.

(f) And independently of the statute, a familiar rule of judicial procedure forbids the contradiction, by one sort of evidence, of a state of things declared to exist by a

higher sort. In this sense it is unquestionably true, as Lord *Ellenborough* said in *Hoare v. Graham*, 3 Camp. 57, that to incorporate with a written contract an incongruous parol condition, is contrary to first principles.

(g) *Wilmot*, J., *Pillans v. Van Mierop*, 3 Burr. 1670-1, and *Parker*, J., *Stackpole v. Arnold*, 11 Mass. 27, 30, recognize three classes of contracts, but are not sustained by the authorities. See *Rann v. Hughes*, 7 T. R. 350, n; *Thacher v. Dinsmore*, 5 Mass. 299, 301; *Cook v. Bradley*, 7 Conn. 57; *Union Turnpike Co. v. Jenkins*, 1 Caines, 386.

manner in which the parties have expressed their agreement, and consequently affects the nature of the evidence by which the agreement can be proved rather than the nature of the contract itself. Some confusion has arisen by the use of the words “implied contracts” in a broader sense, as by Blackstone in the passage quoted *supra*. *4, to include obligations imposed by law regardless of the intention of the parties, and the phrase, contracts implied in law, has been applied to such obligations to distinguish them from contracts implied from the acts of the parties. As the only resemblance such obligations bear to contracts properly so called is in the form of remedy allowed for their enforcement, quasi contracts is a more accurate name for them. As to the nature of quasi contracts and the importance of distinguishing them from true contracts, see *Speake v. Richards*, Hob. 206; *Hodsden v. Harridge*, 2 Saund. 64; *Cockram v. Welby*, 2 Mod. 212; *Phillips v. Homfray*, 24 Ch. D. 439; *Steamship Co. v. Joliffe*, 2 Wall. 450; *State of Louisiana v. Mayor and Administrators of New Orleans*, 109 U. S. 285; *Milford v. Commonwealth*, 144 Mass. 64; *Woods v. Ayres*, 39 Mich. 345; *Sceva v. True*, 53 N. H. 627; *People v. Speir*, 77 N. Y. 144; *Maine*, Ancient Law, 4th ed., 343-344; 2 *Austin's Jurisprudence*, 4th ed., 944; *Ames*, History of Assumpsit, 2 *Harvard Law Review*, 63, 64. — W.

The essentials of a legal contract, of which we shall now proceed to treat, are first, the Parties, for we cannot conceive of a contract which has no parties; secondly, the Consideration, for this is, in legal contemplation, the cause of the contract; thirdly, the Assent of the Parties, without which there is in law no contract; and fourthly, the Subject-Matter of the Contract, or what the parties to it propose as its effect.

OF PARTIES TO A CONTRACT.

CHAPTER I.

CLASSIFICATION OF PARTIES.

PARTIES may act independently and severally, or jointly, or jointly and severally.

They may act as representative of others, as

Agents,
Factors or Brokers,
Servants,
Attorneys,
Trustees,
Executors or Administrators,
Guardians.

They may act in a collective capacity, as

Corporations,
Joint-Stock Companies,
Partnerships.

They may be New Parties,

By Novation,
By Assignment,
By Indorsement.

They may be Parties disabled in whole or in part, as

Infants,
Married Women,
* Non Compotes Mentis,
Drunkards,
Spendthrifts,
Seamen,
Persons under Duress,
Aliens,
Outlaws,
Attained,
Excommunicated.

* 10

These subjects we will proceed to consider separately.

* CHAPTER II.

OF JOINT PARTIES.

SECT. I. — *Whether Parties are Joint or Several.*

WHEREVER an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. (a) (x)

(a) *Hill v. Tucker*, 1 Taunt. 7; *Hatsall v. Griffith*, 4 Tyr. 487; *King v. Hoare*, 13 M. & W. 499, per *Parke, B.*; *English v. Blundell*, 8 C. & P. 332; *Yorks v. Peck*, 14 Barb. 644. — With respect to instruments under seal, it is said in *Shep. Touch.* 375: "If two, three, or more bind themselves in an obligation, thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be, joint only, and not several." And see *Ehle v. Purdy*, 6 Wend. 629. — If an instrument, worded in the singular, is executed by several, the obligation is a *joint and several* one; and those who thus execute it may be sued either separately or together. *Hemmenway v. Stone*, 7 Mass. 58; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Wallace v. Jewell*, 21 Ohio St. 163; *Powell, J.*, *Sayer v. Chaytor*, 1 Lutw. 695, 697; *Marsh v. Ward, Peake*, Cas. 130; *Clerk v. Blackstock*, Holt. 474; and see *Hall v. Smith*,

1 B. & C. 407. See also *Crosby v. Jeroloman*, 37 Ind. 264, 274, citing the text with approval. But, in *Slater v. Magraw*, 12 G. & J. 265, where (on the sale of a negro) the form of the covenant was, "I do hereby obligate to give the said William Slater a good title for said boy when called on. W. M. F. Magraw (seal). Security: George H. Dutton (seal)," — a demurrer to a count declaring on this as a joint and several covenant, was sustained, and the court held that the covenant to convey the title was the covenant of Magraw alone; that the covenant of Dutton was a several covenant as surety that Magraw would make the title when called on for that purpose; and that therefore an action on the covenant to convey could not be maintained against them jointly. See, also, *De Ridder v. Schermerhorn*, 10 Barb. 638; *Allen v. Fosgate*, 11 How. Pr. 218.

(x) Where, as in Massachusetts, the courts enforce the personal liability, as a contractual relation, of the stockholders in a foreign corporation, under the statutes of another State providing therefor, though no notice or opportunity may be given them to investigate the foreign judgment obtained against the corporation, the liability of the stockholders is held to be several and not joint. *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603. See *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 S. Ct.

477, 44 L. Ed. 587; *Kirtley v. Holmes*, 107 Fed. 1, 46 C. C. A. 102; and *contra*, in New York, *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419; *Brookman v. Merchants' Sav. Bank*, 65 N. Y. S. 54, 31 Misc. Rep. 191. So the liability of stockholders upon unpaid subscriptions for stock, when sued by a creditor of their corporation to collect an unsatisfied judgment, is several, and they need not all be defendants. *Hatch v. Dana*, 101 U. S. 205; 25 L. Ed. 885; *Glenn v. Liggett*, 135 U. S. 533, 546, 10 S. Ct. 867, 34 L. Ed. 262; *Baines v. Babcock* (Cal.), 30 Pac. 776; *Baines v. Babcock*

Whether the LIABILITY incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express; and where they are not express, upon the intention of the parties as gathered from all

* 12 the circumstances of the case. (b) (x) It may * be doubted,

(b) *Wilde, J.*, in *Peckham v. North Parish in Haverhill*, 16 Pick. 274, 283. In the following cases the liability was held to be *joint*; *Wigmore and Wells' case*, 3 Leon. 206; *Wightman v. Chartman*, Gould, 83; *Anonymous*, Moore, 260; *Coleman v. Sherwin*, 1 Salk. 137, 1 Show. 79; *Byers v. Dobe*, 1 H. Bl. 236; *Exall v. Partridge*, 8 T. R. 308; *Wathen v. Sandys*, 2 Camp. 640; *Forster v. Taylor*, 3 id. 49; *Eaden v. Titchmarsh*, 1 A. & E. 691; *London Gas Light Co. v. Nicholas*, 2 C. & P. 365; *Phillips v. Bonsall*, 2 Binn. 138. In the following cases the liability was held to be *several*: 39 H. 6, 9, pl. 15; *Bro. Abr. Covenant*, pl. 27; s. c. *Viner Abr. Covenant (M. a.)*, pl. 1, 2; s. c. *Mathewson's case*, 5 Rep. 22; *Brown v. Doyle*, 3 Camp. 51, n.; *Gibson v. Lupton*, 9 Bing. 303; *Collins v. Prosser*, 1 B. & C. 682; *Hudson v. Robinson*, 4 M. & Sel. 475; *Smith v. Pocklington*, 1 Cr. & J. 445; *Fell v. Goslin*, 7 Exch. 185; *Harris v. Campbell*, 4 Dana, 586; *M'Cready v. Freedly*,

(Cal.), 27 id. 674; *Baines v. Story*, id. 676. So of their costs, *Burnap v. Haskins Steam-Engine Co.*, 127 Mass. 586.

One or all the parties to a joint and several obligation may be sued, but not any other number of them. *Scanlon v. People*, 95 Ill. App. 348. All joint parties must be made parties to a suit which grows out of the common demand. *White v. Dyer*, 81 Mo. App. 643; *Culver v. Smith*, 82 id. 390; *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376. Joint owners cannot obtain the right to sue separately by waiving a tort and suing in *assumpsit*. *Seay v. Sanders*, 88 Mo. App. 478, 486.

(c) When a written instrument does not show whether the parties thereto are all principals, oral evidence is, it seems, admissible to prove that one of them was a surety. *Parsons v. Harrold*, 46 W. Va. 122, 125, 23 S. E. 1002. Partners are properly liable jointly when they contract as a firm, though their liability has sometimes been treated as joint and several in equity. See *Kendall v. Hamilton*, 4 A. C. 504, 3 C. P. D. 403; *Blyth v. Fladgate*, 63 L. T. 546; *Streichen v. Fehleisen*, 112 Iowa, 612, 84 N. W. 715; *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815. The Illinois statute

3 Rawle, 251; *Ernst v. Bartle*, 1 Johns. Cas. 319; *Ludlow v. McCrea*, 1 Wend. 228; *Howe v. Handley*, 25 Me. 116; *Commercial Bank v. Gorham*, 11 R. I. 162. In the following cases the liability was held to be *joint and several*: *Constable v. Clobbery*, Pop. 161; *Burden v. Ferrers*, 1 Sid. 189; *Hankinson v. Sandilau*, Cro. J. 322; *Linn v. Crossing*, 2 Roll. Abr. 148, *Obligation (G)*; *Lilly v. Hodges*, 1 Stra. 553, 8 Mod. 166; *Robinson v. Walker*, 1 Salk. 393, 7 Mod. 153. The words there were, *convenient pro se et quolibet eorum*. But *Holt, C. J.*, dissenting from the majority, thought this might be considered *joint* by reason of the word of agreement (*convenient*) being in the plural, and not being repeated in the singular, so as to express a distinct several promise. *Bolton v. Lee*, 2 Lev. 56; *Sewer v. Bradfield*, Cro. E. 422; *May v. Woodward*, Freem. 248; *Enys v. Donnithorne*, 2 Burr. 1190; *Mansell v. Burridge*, 7 T. R. 352; *Bangor Bank v. Treat*, 6 Greenl. 207.

(Rev. Stats. 1874, p. 620), providing that "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants," applies only to individual transactions, and not to partnership obligations. *Sandusky v. Sidwell*, 173 Ill. 493, 50 N. E. 1003. Such a statute changes the common-law rule by which the contract of several persons was presumed to be joint rather than joint and several. See *White v. Tyndall*, 13 A. C. 263; *National Society v. Gibbs*, [1900] 2 Ch. 280, [1899] 2 Ch. 289; *Duncan v. Willis*, 51 Ohio St. 433, 38 N. E. 13; *Alpaugh v. Wood*, 53 N. J. L. 638, 23 Atl. 261; *Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088; *Streichen v. Fehleisen*, 112 Iowa, 612, 84 N. W. 715; *Elliott v. Bell*, 37 W. Va. 884, 17 S. E. 399; *Curry v. Kansas & Col. Pac. Ry. Co.*, 58 Kans. 6, 48 Pac. 579; *Montana Mining Co. v. St. Louis Mining Co.*, 19 Mont. 313, 23 id. 311, 48 Pac. 305; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088. As to the effect upon a suit against joint contractors, of one of them being without the jurisdiction, see *Wilson, Sons & Co., v. Balcarres Brook S. S. Co.*, [1893] 1 Q. B. 422; *Chase v. Henry*, 166 Mass. 577, 44 N. E. 988.

however, whether anything less than express words can raise a liability which shall be at once a joint and a several liability.

Where the obligation is joint and several, an ancient and familiar rule of law forbids it to be treated as several as to some of the obligors, and joint as to the rest. The obligee has the right of choice between the two methods of proceeding; but he must resort to one or the other exclusively, and cannot combine both; that is, he must proceed either severally against each, or jointly against all. (c)¹

* The question whether the RIGHT under a contract is joint *13 or otherwise, enters more intimately into the nature of the contract, and therefore is of more importance; and it is at the same time of greater difficulty.

As a contract with several persons, for the payment to them of a sum of money, is a joint contract with all, and all the payees have therein a joint interest, so that no one can sue alone for his proportion; so, the designating of the share of each will not create such a severance of interest as to sustain a several action; but all must join in an action for the whole. (d) But if the contract contains distinct grants, or promises of distinct sums to distinct payees, they would then have several interests, and certainly may, perhaps must, bring separate actions. (e)

Where there are three or more obligees or promisees, the contract, if treated as joint by any, must be treated as joint by all.

(c) *Streatfield v. Halliday*, 3 T. R. 782; *Cabell v. Vaughan*, 1 Wms. Saund. 291, f. n. 4; *Bangor Bank v. Treat*, 6 Greenl. 207. In the case of a joint and several debt, judgment (without satisfaction) recovered against one of the debtors is no bar to an action against another. Per *Popham*, C. J., *Brown v. Wootton*, Cro. J. 74, cited by *Parke*, B., in *King v. Hoare*, 13 M. & W. 504. But a judgment, though unsatisfied, recovered against one of two joint debtors, is a bar to an action against the other, or to an action against both. 3 Kent's Com. 30; *Ward v. Johnson*, 13 Mass. 148; *Kingsley v. Davis*, 104 Mass. 178; *Cowley v. Patch*, 120 Mass. 137; *Candee v. Smith*, 93 N. Y. 349; *King v. Hoare*, 13 M. & W. 494; *Kendall v. Hamilton*, 4 App. Cas. 504. But *Collins v. Lemasters*, 1 Bail. 348; *Treasurers v. Bates*, 2 Bail. 362; *Sheehy v. Mandeville*, 6 Cranch, 253, *Harbeck v. Pupin*, 123 N. Y. 115 (statutory), are *contra*. In *King v. Hoare*, 13 M. & W. 494, the opinion of *Marshall*, C. J., in *Sheehy v. Mandeville* was cited as contrary to their conclusion, but *Parke*, B., observed: "We need not say we have the greatest respect for every decision of that eminent judge; but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar. *Ward v. Johnson*, 13 Tyng. 148." See *Robertson v. Smith*, 18 Johns. 484; *Marshall v. Smith*, 15 Me. 17.

(d) *Lane v. Drinkwater*, 5 Tyr. 40, 1 C., M. & R. 599; *Byrne v. Fitzhugh*, 5 Tyr. 54, 1 C., M. & R. 613.

(e) See *Servante v. James*, 10 B. & C. 410; *Ford v. Bronaugh*, 11 B. Mon. 14.

¹ See *In re Davison*, 13 Q. B. D. 50; *Chicago & A. Ry. Co. v. New York, &c. R. Co.*, 24 Fed. 516, 517.

In no case can two sue together, leaving the other to seek his remedy upon *the same contract*, by himself. (*f*)

If a contract which is expressly and in its very terms joint and several, be made with divers persons, but for the payment * of a sum or the accruing of some other benefit to one of them only, all must join in a suit upon that contract; (*g*) because but one thing is to be done, and all have a legal interest in the performance of that thing, although but one party has a beneficial interest. So if there be in one instrument a covenant with A, and another separate and distinct covenant with B, and both are for the payment of a sum of money to A, A cannot sue alone for this sum, but B must join, because otherwise the payer might be subjected to suits by both parties. (*h*) In general, all contracts, whether express or implied and resulting from the operation or construction of law, are joint, where the interest in them of the parties for whose benefit they are created, is joint, and separate where that interest is separate. But the interest which is thus important as a criterion is an interest in *the contract*, and not in any sum of money, or other benefit, to be received from it. It is a strictly legal and technical interest created *by* the contract, and does not depend upon the condition or state of the parties aside from the contract. (*i*)¹

A covenant which is single in its nature, or which is for one and the same cause, and so, in strict propriety, may be called one covenant and not a cluster of covenants, can never be *joint and several* in respect to the covenantees. In other words, this class of covenants does not exist with respect to the parties plaintiff in an action for covenant broken; it never lies in the option of

(*f*) *Contra*, Bro. Abr. Covenant, 49. A man covenanted with twenty, and with each of them, to make certain sea-banks; and by his not doing it the land of two was overflowed to their injury. *Held* by the court, that these two could have their action of covenant without the others. "*Quere*," adds Brooke, "for it seems that each should bring an action by himself." The criticism of Brooke is undoubtedly well founded. It may be questioned, moreover, whether this case is authority even to give such a covenant the *legitimate* attributes of a *several* covenant. The case was cited in Slingsby's case (according to the report of the latter in 2 Leon. 47). There, A, B, and C, being

parties respectively to an indenture tripartite, wherein A covenanted with B and C, *et quolibet eorum*, that the land which he had conveyed to B was discharged of all incumbrances, B brought a several action of covenant; and the court held, notwithstanding the case from Brooke, that C ought to have been joined.

(*g*) *Anderson v. Martindale*, 1 East, 497.

(*h*) *Id.*

(*i*) *Anderson v. Martindale*, 1 East, 497; *English v. Blundell*, 8 C. & P. 332; Lord Denman, *Hopkinson v. Lee*, 6 Q. B. 971, 972; *Copen v. Barrows*, 1 Gray, 376; *Wills v. Cutler*, 61 N. H. 405; *Hughes v. Oregon Ry. & Nav. Co.*, 11 Or. 437.

¹ As where one enters into a business contract under seal, and afterwards takes a partner in his business, the latter cannot sue upon the contract. *Duff v. Gardner*, 7 Lans. (N. Y.) 165. — K.

the covenantees to say whether they shall sue for the breach, jointly or severally. (x) They must sue jointly if they can. (j)

(j) *Slingsby's case*, 5 Rep. 19 a; *Spencer v. Durant*, Comb. 115; *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Petrie v. Bury*, 3 B. & C. 353; *Scott v. Godwin*, 1 B. & P. 67, 71; *Gibbs, C. J.*, *James v. Emery*, 5 Price, 533; *Foley v. Addenbrooke*, 4 Q. B. 197; *Pollock, C. B.*, *Parke, B.*, and *Rolfe, B.*, *Keightley v. Watson*, 3 Exch. 721, 723, 726. — Possibly, an exception to this rule is to be found in the case where the words of the covenant are joint and several as to the covenantees, while their interest is several. In such a case the law, perhaps, allows the covenantees, who, upon any principle of construction, clearly may sue separately, the liberty to sue jointly. See *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Withers v. Bircham*, 3 B. & C. 256; *Slingsby's case*, 5 Rep. 19 a; *Rolls v. Yates*, Yelv. (Metcalf's ed.), 177, n. The rule and exception might be expressed thus: It is not possible, by any mere words of joinder and severance, to give the covenantees the election to sue separately or together.

The covenant, with respect to the covenants, may belong to either one of the three classes of joint, several, and joint and several, just as the parties have chosen to say in the covenant that it shall. The language of severalty or joinder, and not the interest, is then the test of the quality of the covenant *quoad* the covenants. *Enys v. Donnithorne*, 2 Burr. 1190. As regards the joinder of the covenantees there is nothing *a priori* to present the existence of the same three classes to choose amongst; namely, the class where they must sue jointly, that where they must sue separately, and that where it is at their option to sue either jointly or severally. But the proposition stated above, if true, obviously removes the third alternative. The covenantees either must join or must sever. Thus the inquiry is narrowed to this: By what means is it to be determined in a given case whether they must or must not sue jointly? And this seems the only point upon which there is a real conflict of au-

thorities. A series of cases, received without question by the text-writers, went upon the principle that the interest which the covenantees take by the covenant, *quite irrespective of words of severalty or joinder*, is in all cases the decisive test. *James v. Emery*, 5 Price, 529, 8 Taunt. 245; *Withers v. Bircham*, 3 B. & C. 254; *Servante v. James*, 10 B. & C. 410; *Lane v. Drinkwater*, 5 Tyr. 40, s. c. 1 C., M. & R. 599. But Mr. Preston denies the correctness of the rule as stated. "On the subject of joint and several covenants, that eminent lawyer, Sir *Vicary Gibbs*, assumed that covenants must necessarily be joint or several according to the interest. The language was, 'Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint; and where the interest is joint, the action must be joint, although the covenant in language purport to be joint and several.' *James v. Emery*, 5 Price, 533. Yet the correct rule appears to be that, by express words clearly indicative of the intention, a covenant may be joint, or joint and several, to or with the covenantors or covenantees, notwithstanding the interests are several. *Salk.* 393; 2 *Roll. Abr.* 419; [possibly should be 149; see 6 Q. B. 971, n.] So they may be several, although the interests are joint. But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect. *Slingsby's case*, 5 Rep. 19; 3 *Chanc.* 126; 5 *T. R.* 522; *Southcote v. Hoare*, 3 Taunt. 89; 1 *Wood*, 537; 2 *Burr.* 1190." *Shep. Touch.* by *Preston*, 166. In *Sorsbie v. Park*, 12 M. & W. 146, *Lord Abinger* said: "I think the rule is plain and certain, and requires no authority; it is correctly stated by Mr. Pres-

(x) A covenant with tenants in common in their joint demise runs with the entire reversion, and such a demise, though nominally joint, amounts to a separate demise by each of them. *Thompson v. Hakewell*, 19 C. B. N. s. 713, 35 L. J. Ch. 18, 15 *English Ruling Cas.* 436, and notes. But when the reversion has passed to several as tenants in common, after a

demise by one only, each can sue separately for a breach of covenant running with the land. *Roberts v. Holland* [1893], 1 Q. B. 665, 62 L. J. Q. B. 621. One of several joint tenants who have made a joint demise may terminate the tenancy as to all by a notice to quit. *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135, 15 *English Ruling Cas.* 662, and notes.

- * 15 The circumstances of each case, and the situation * and relation of the parties, and the nature of the * considera- * 16 tion, are all to be looked into, to ascertain who is really interested, * and who has sustained the damage arising from * 17
- * 18 a breach of * the contract, and whether such damage was joint or several. (k)

ton in the passage in Shep. Touch. 166, which Mr. Temple cited. Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versa*. But there is no rule to say that words, which are expressly a joint covenant by [to] several persons, shall be construed as a several covenant, unless there is something to lead to that construction." In this view Parke, B., concurred (p. 158). "The rule is, that a covenant will be construed to be joint or several according to the interests of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint." In *Foley v. Addenbrooke*, 4 Q. B. 197 (which was decided a little before *Sorsbie v. Park*, but was not referred to in that case), the doubt suggested by Preston was not agitated. See *Mills v. Ladbroke*, 7 Man. & G., 218 [1844], *Hopkinson v. Lee*, 6 Q. B. 964 [1845], in which no reference was made to *Anderson v. Martindale*.—In *Bradburne v. Botfield*, 14 M. & W. 559, 572 [1845], the matter was thus left by Baron Parke: "There is no occasion to refer to the cases relating to the rule of construction, as to covenants being joint or several, according to the interest of the parties, which is perfectly well established. In the case of *Sorsbie v. Parke* (12 M. & W. 146), Lord Abinger and myself, on referring to the established rule, as laid down by Lord Chief Justice Gibbs, in the case of *James v. Emery* (2 Moore, 195), approved of Mr. Preston's qualification and explanation of it in his edition of the Touchstone, 166, namely, that if the language of the covenant was capable of being so construed, it was to be taken to be joint or several, according to the interest of the parties to it. Mr. Preston adds, that the general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by any intention, however express, and I

consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one. I mention this, because the Court of Queen's Bench, in the case of *Hopkinson v. Lee* (14 Law J. (N. S.) Q. B. 104), have supposed that Lord Abinger and myself had sanctioned some doctrine at variance with the case of *Anderson v. Martindale*, and Slingsby's case, which it was far from my intention, and I have no doubt from Lord Abinger's, to do; it being fully established. I conceive, by those cases, that one and the same covenant cannot be made both joint and several with the covenantees." See also *Keightley v. Watson*, 3 Exch. 716. Thus the Court of Exchequer maintained the general principle that it is competent for the parties to make the contract, by express words, what they please, as well with respect to the joinder of parties as with respect to any other legal quality of the contract. The rule, carried to its extent, would permit the making of a covenant joint, or several, or joint and several, as to the covenantors; and joint, or several, or joint and several, as to the covenantees. But the Court adds that the rule is to be taken with this qualification, namely, that one of the six cases above enumerated is excluded by the doctrine (settled, perhaps, on authority rather than principle), that no covenant can be joint and several as to the covenantees." In this respect all contracts, whether under seal or not, are governed by the same principles.

(k) In *Windham's case*, 5 Rep. 7, it is stated that joint words in a grant are sometimes taken severally. 1. In respect of the several interests of the grantors; as if two tenants in common, or several tenants, join in a grant of a rent-charge, yet in law this grant shall be several, although the words are joint. 2. In respect of the several interests of the grantees, &c. 19 H. 6, 63, 64. A warranty made to two of certain lands shall enure as several warranties, in respect that they are severally

* The nature, and especially the entireness (*l*) of the con- * 19
sideration, is of great importance in determining whether the
promise be joint or several; for if it moves from many persons
jointly, the promise of repayment is joint; (*m*) but if from many
persons, but from each severally, there it is several. (*n*) Where
the payment is in the first place of one sum *in solido*, and this is
afterwards to be divided among the payees, there, generally
the * interest of the payees is joint; (*o*) but where the first * 20
payment is in several sums among the several payees, there
generally their interest is several. (*p*) So if a sum *in solido* is
advanced to one by many persons, the promise of repayment is a
promise to all jointly; (*q*) but if several sums are advanced sepa-
rately by each, there the promise is to each severally. (*r*) And if
the several persons raise the sum by separate and distinct con-
tribution, but, when raised, it is put together and advanced as one
sum, there the promise of repayment is to all jointly. (*s*)

Both a joint obligation or right, and a several obligation or right
may coexist; for there may arise from the same contract, one
joint duty to all, and also several duties to each of the parties. (*t*)

In analogy with the rule in the case of contracts, it is well es-
tablished, that there can be no joint action for an injury, unless
that injury be a joint injury to the plaintiffs. Therefore husband
and wife cannot sue jointly for assault and battery of them or for
slander of them. (*u*) Whether the right created by a contract is
joint or several must be left in any particular instance to mere
authority, as appears by the decisions collected in the note. (*v*) (*x*)

seized, the one of part of the lands, and the
other of the residue in severalty. 6 E. 2 ;
Covenant, Br. 49. [But this case does not
seem to be law. See note (*m*) *supra*.] A
joint covenant taken severally in respect of
the several interests of the covenantees.
Vide 16 Eliz. Dyer, 337, 338 [*infra*, note
(*c*)], between Sir Anthony Cook and Wat-
ton, a good case. 3. In respect that the
grant cannot take effect but at several
times. 4. In respect of the incapacity and
impossibility of the grantees to take joint-
ly. 5. In respect of the cause of the grant,
or *ratione subjectæ materiæ*. 6. *Ne res destruat-
ur et ut evitetur absurdum*.

(*l*) Chanter v. Leese, 5 M. & W. 698,
701; 1 Roll. Abr. 31, pl. 9.

(*m*) Ivans v. Draper, 1 Roll. Abr. 31,
pl. 9; Winterstoke Hundred's case, Dyer,
370, a. But see Jones v. Robinson, 1
Exch. 454, *infra*, note (*c*).

(*n*) Bell v. Chaplain, Hardres, 321.

(*x*) Several beneficiaries may unite in a
suit, and obtain a joint judgment, for

(*o*) Lane v. Drinkwater, 5 Tyr. 40 ;
Byrne v. Fitzhugh, id. 54.

(*p*) Thomas and ———, Styles, 461.

(*q*) May v. May, 1 C. & P. 44. Money
advanced on the *joint credit* of two parties
may be recovered by them in a joint action
against the person for whose benefit it was
paid. Osborne v. Harper, 5 East, 225.

(*r*) Brand v. Boulcott, 3 B. & P. 235.

(*s*) May v. May, 1 C. & P. 44.

(*t*) Story v. Richardson, 6 Bing. N. C.
123; Peckham v. North Parish in Haver-
hill, 16 Pick. 274.

(*u*) 9 Ed. 4, 51; Cole v. Turner, 6
Mod. 149. The husband should sue alone
for the injury to him, and the husband
and wife should sue jointly for the injury
to her. Gazinsky v. Colburn, 11 Cush. 10.

(*v*) The following cases, being the most
important as to the joinder of plaintiffs, fall
within one of four classes: Where a joint
action was held properly brought; where

damages for the conversion of a trust fund
held by their guardian, though their re-

SECTION II.

* 21

OF SOME INCIDENTS OF JOINDER.

Parties are not said to be joint in law, merely because they are connected together in some obligation or some interest

it was held that a several action should have been joint; where a several action was held properly brought; where it was held that a joint action should have been several:—

1. *Where a joint action was held properly brought.*

WAKEFIELD v. BROWN, 9 Q. B. 209. Covenant. Bingley, being owner of a term of sixty-one years, granted an annuity to Samuel W., and for securing payment, assigned the term (wanting one day) to Robert W. By indenture, reciting these facts, Robert W., at the request of Samuel W. and of Bingley, demised, and Bingley demised and confirmed the promises to Sophia B., at a rent payable to Samuel W., while the premises remained subject to the annuity, and afterwards to Bingley. Sophia B. covenanted to and with Samuel W. and Robert W., and their respective executors, &c., and also with and to Bingley, his executors, &c., to pay the rent, while the premises were subject to the annuity, to Robert [sic] W., and afterwards to Bingley, and also to make certain repairs. The action was upon the covenant to repair. *Held*, on demurrer, that Samuel W. being dead, Robert W. and Bingley could sue jointly. — *ROSE v. POULTON*, 2 B. & Ad. 822. Covenant. Demurrer. The covenant declared upon was in terms, with the plaintiffs and G., *jointly and severally*. G. was also one of the covenantors, but was dead at the time

of the bringing of the action. The court held, that whether or not one of the covenantees could, if he had chosen, have sued separately, the action, as brought, was well maintainable. — *PEASE v. HIRST*, 10 B. & C. 122. A, wishing to obtain credit with his bankers, in 1817, prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order £300. Upon two of the partners retiring from the banking-house, a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. *Held*, that the action was well brought in the name of the surviving members of the old firm. — *KITCHIN v. BUCKLEY*, T. Raym. 80; 1 Lev. 109; s. c. 1 Sid. 157; *nom.* *Kitchin v. Compton*. Covenant for repairs against lessee for years. One Randall demised the tenement to the defendant, and afterwards granted a moiety of the reversion to Kitchin, and afterwards the other moiety to Knight. Kitchin and Knight brought this action jointly. After verdict for the plaintiffs, it was moved in arrest of judgment, that the plaintiffs, being tenants in common, ought not to join. But the court held that the action was properly brought, and said: "This is a personal action merely, in which tenants in common may join." — *VAUX v. DRAPER*, Styles, 156, 203; 1 Roll. Abr. 31, pl. 9. Assump-

spective interests in the fund are not equal. *Ketchum v. Parker*, 65 Conn. 544, 33 Atl. 499. So in a bill to recover the use of a church edifice, the presiding elder who holds quarterly conferences there, the pastor, and members of the congregation may unite as plaintiffs. *Fuchs v. Meisel*, 102 Mich. 357, 60 N. W. 773, 32, L. R. A. 92. See further *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 13 L. R. A. 481; *Thomas v. Carter*, 63 Vt. 609, 22 Atl. 720, 14 L. R. A. 82; *Dockwray v. Dickenson* (Skinner, 640), 1 English Ruling Cas. 156 and notes; *Carmien v. Cornell*, 148 Ind. 83,

47 N. E. 216; *Conery v. Sweeney*, 81 Fed. 14, 26 C. C. A. 309; *Story Eq. Pl.* (10th ed.) § 271, n. (a). When different sums are provided for to different persons by a policy of life insurance, the beneficiaries cannot properly be joined as plaintiffs. *Keary v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 359, 136 U. S. 644, 10 S. Ct. 1071, 34 L. Ed. 555; *Belding v. Gaines*, 37 Fed. 817. Different persons similarly defrauded have frequently been held entitled to join as plaintiffs in a suit to have written instruments cancelled, or to set aside a compromise. *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Trovel v. Thomas*, 155 Ind. 519, 58 N. E. 725.

* which is common to them both. They must be so connected as to be in some measure identified. They have *22

sit. The several cattle of the two plaintiffs having been distrained, defendant, in consideration of £10 paid to him by the plaintiffs, promised to procure the cattle to be re-delivered to them. *Held*, on motion in arrest of judgment, that the joint action was good. *Rolle*, C. J., said: "The consideration given is entire, and cannot be divided, and there is no inconvenience in joining the action in this case; but if one had brought the action alone, it might have been questionable." *Jerman*, J., dissented, and thought several promises should be intended.

American Cases. — *SMITH v. TALLCOTT*, 21 Wend. 202. In an agreement under seal for the sale of lands, husband, wife, and trustee of the wife, were parties of the first part. The trustee did not execute the deed, — though by an indorsement on the back (under seal) he bound himself to do what should be necessary on his part to carry the contract into effect. *Held*, that an action against the parties of the second part was properly brought in the joint names of husband, wife, and trustee. — *PEARSON v. PARKER*, 3 N. H. 366. Plaintiffs, being sureties for defendant, discharged the debt, in part, with money raised upon the joint note of the plaintiffs, and in part with their joint note given directly for the residue. *Held*, that their action against the principal debtor was well brought jointly. — *WRIGHT v. POST*, 3 Conn. 142. Twenty persons, desirous to support a public right of fishery, entered into an agreement to defend such right through a trial at law, each promising to pay his proportion of the expense to such of them as should be sued for occupying the fishery. Three of them were sued jointly, and, after an unsuccessful defence, each paid from his private funds one-third part of the execution. *Held*, that these three could maintain a joint action against a fourth, to recover his twentieth part of the expense incurred; the joint liability of the plaintiffs, coupled with defendant's promise, and not the payment of the money, being the cause of action. — *HAUGHTON v. BAYLEY*, 9 Ired. L. 337. The two plaintiffs, each out of his own stock, delivered goods to defendant, to be peddled, and took a bond, payable to themselves jointly, for the faithful accounting therefor. *Held*, that they could maintain a joint action upon the bond, notwithstanding their several interests. See also *Doe d. Campbell v. Hamilton*, 13 Q. B. 977; *Beer v. Beer*, 9 E. L. & E.

468; *Magnay v. Edwards*, 20 id. 264; *Arden v. Tucker*, 4 B. & Ad. 815; *Powis v. Smith*, 5 B. & Ald. 850; *Wallace v. McLaren*, 1 Man. & R. 516; *Townsend v. Neale*, 2 Camp. 190; *Osborne v. Harper*, 5 East, 225; *Midgley v. Lovelace*, Carth. 289; *Yate v. Roules*, 1 Bulst. 25; *Clement v. Henley*, 2 Roll. Abr. 22 (F), pl. 2; *Parker v. Gregg*, 3 Foster (N. H.), 416; *Saunders v. Johnson*, Skin. 401; *Dumanoise v. Townsend*, 80 Mich. 302.

2. In the following cases it was held that a several action should have been joint.

LUCAS v. BEALE, 20 Law. Jour. (N. S.) C. P. 134, 4 E. L. & E. 358. Assumpsit. The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, "on behalf of the members of the orchestra," to continue their services provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest. *Held*, that the contract was joint, and that he could not recover. — *LOCKHART v. BARNARD*, 14 M. & W. 674. Assumpsit. A hand-bill, relating to a stolen parcel, offered a reward to "whoever should give such information as should lead to the early apprehension of the guilty parties." The information was communicated first by plaintiff to C. in conversation, afterwards to a constable by plaintiff and C. jointly. *Held*, that C. ought to have joined in the action for the reward. — *HOPKINSON v. LEE*, 6 Q. B. 964. [For an abstract of this case, and for the comments made upon it by the Court of Exchequer, see note (j) *supra*.] — *BYRNE v. FITZHUGH*, 5 Tyr. 54; s. c. 1 C. M. & R. 613. Before *Patteson*, J., and *Gurney*, B. The agreement of defendant was that, in consideration of plaintiff and B. using their endeavors to charter ships and procure passengers on board of them, and not engaging with any other emigrant broker, they, the defendants, undertook to pay plaintiff and B. a commission of £5 per cent on the amount of the net passage-money made by the ships, one-half to be paid to plaintiff, and the other half to B.; *Lane v. Drink-*

* 23 not several and * respective shares, which being united

water, being cited, *held*, that plaintiff, suing without B., should be non-suited. — *HATSALL v. GRIFFITH*, 4 Tyr. 487. A broker was employed to sell a ship belonging to three part-owners, two of whom communicated with him. To them he paid their shares of the proceeds of the sale; but, after admitting the third part-owner's share to be in his hands, refused to pay it to him without the consent of the other two. An action of assumpsit having been brought by the third part-owner of the share, *held*, that he was not entitled to recover. — *PETRIE v. BURY*, 3 B. & C. 353. Covenant. Demurrer. The covenant declared upon was with the plaintiff and two others, for the use of a third party. The declaration averred that the two other covenantees, had never sealed the deed. *Held*, notwithstanding, that as all *might* sue, all *must* sue, and that the declaration was bad. *SOUTHCOTE v. HOARE*, 3 Taunt. 87. Covenant upon an indenture of three parts. *Held*, on demurrer, that a covenant with A and B, and with every of them, is joint, though A is party of the first part, and B party of the second part, to the deed. — *GUIDON v. ROBSON*, 2 Camp. 302. Action by the drawer and payee of a bill of exchange against the acceptor. The bill sued upon was drawn payable to Guidon & Hughes, under which firm the plaintiff traded. There was no one associated with him as partner; but he had a clerk named Hughes, and Lord *Ellenborough* held that such clerk should have been joined. — *SLINGSBY'S CASE*, 5 Rep. 18 b; s. c. 2 Leon. 160; s. c. 2 Leon. 47; s. c. Jenk. Cent. 262. R. B. by deed covenanted with four persons and their assigns, *et ad et cum quolibet eorum*, that he was lawfully and solely seized of a rectory. Two of the covenantees brought covenant against R. B. and *held* ill, because it was a joint covenant, and the others ought to have joined. The court said: "When it appears by the declaration that every of the covenantees hath, or is to have, a several interest or estate, there, when the covenant is made with the covenantees, *et cum quolibet eorum*, these words, *cum quolibet eorum*, make the covenant several in respect of their several interests. As if a man by indenture demises to A black acre, to B white acre, to C green acre, and covenants with them, and *quolibet eorum*, that he is lawful owner of all the said acres, &c., in that case in respect of the said several interests, by the said

words *et cum quolibet eorum*, the covenant is made several; but if he demises to them the acres jointly, then these words, *cum quolibet eorum*, are void, for a man by his covenant (unless in respect of several interests), cannot make it first joint and then make it several by the same or the like words, *cum quolibet eorum*; for, although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them, to make it joint or several at the election of several persons for one and the same cause, for the court would be in doubt for which of them to give judgment, which the law would not suffer, as it is held in 3 H. 6, 44 b." See also *Bradburne v. Botfield*, 14 M. & W. 559; *Sorsbie v. Park*, 12 M. & W. 146; *Lane v. Drinkwater*, 5 Tyr. 40, 1 C., M. & R. 599; *English v. Blundell*, 8 C. & P. 332; *Decharms v. Horwood*, 10 Bing. 526; *Hill v. Tucker*, 1 Taunt. 7; *Anderson v. Martindale*, 1 East, 497; *Spencer v. Durant*, Comb. 115; *Thimblethorp v. Hardesty*, 7 Mod. 116; *Chanter v. Leese*, 4 M. & W. 295; *Wetherell v. Langston*, 1 Exch. 634; *Foley v. Addenbrooke*, 4 Q. B. 197; *Teed v. Ellworthy*, 14 East, 210; *Scott v. Godwin*, 1 B. & P. 67.

American Cases. — *SWEIGART v. BERK*, 8 S. & R. 308. Seven of ten joint obligees brought an action (living the other obligees) against the obligor. *Held*, that it could not be maintained. *Seem*, an action could not have been maintained by *one*, although brought in respect of separate interests. — *DOB v. HALSEY*, 16 Johns. 34. Assumpsit by D. & D., partners, against H. M., being shown to be a member of the firm, *held*, that he ought to have been joined as plaintiff. — *SIMS v. HARRIS*, 8 B. Mon. 55. Debt on a penal bond. The bond was executed by the defendant in favor of the plaintiff and several others, as joint obligees. The plaintiff brought the action alone to recover the penalty. *Held*, that the action was not well brought. *Aliter*, if the action had been covenant on the bond; for in that case, so far as each of the obligees in the bond has a separate interest in the performance of its stipulations, the cause of action is several and not joint. See *Pearce v. Hitchcock*, 2 Comst. 388. — *TAPSCOTT v. WILLIAMS*, 10 Ohio, 442. Where lands descended to coparceners, with warranty, and they were evicted before severance, it was *held* that one of

make a whole; but these together constitute one whole, which,

them could not sue alone on the warranty for his share of the damages.

3. *In the following cases a several action was held to be properly brought.*

KEIGHTLEY v. WATSON, 3 Exch. 716. [For an abstract of this case see note (j) *supra*.]—JONES v. ROBINSON, 1 Exch. 454. The declaration stated that the plaintiff and A B carried on business in copartnership; and in consideration that they would sell defendant their business, and become trustees for him in respect of all debts, &c., due to plaintiff and A B in respect thereof, defendant promised plaintiff to pay him all the money he had advanced in respect of the copartnership, and for which it was accountable to plaintiff, and also promised plaintiff and A B that he would discharge all the debts due from the plaintiff and A B as such copartners, and all liabilities to which they are subject. The declaration then averred that plaintiff and A B did sell the business to defendant and become trustees for him in respect of all debts, &c., due to plaintiff and A B in respect thereof, and that, at the time of the promise, plaintiff had advanced a certain sum, for the non-payment of which the action was brought. On motion in arrest of judgment, the defendant contended that the consideration moved from the plaintiff and A B jointly, and therefore (as the consideration is the essential part of a contract, without which the promise is nothing), A B should have been joined as co-plaintiff; but the court *held* that the separate interest of the plaintiff in the partnership fund was the consideration upon which the promise sued upon in this case was founded; and, therefore, the rule for which the defendant contended did not apply.—PALMER v. SPARSHOTT, 4 Man. & G. 137. By an agreement, not under seal, between defendant of the one part, and plaintiff and F. of the other part—reciting that plaintiff and F. had assigned certain property to defendant for £150 apiece, and that it had been agreed that defendant should retain £20 out of each £150—the defendant, in consideration of the two several sums of £50 and £50 so retained, agreed with plaintiff and F., their executors, &c., to indemnify plaintiff and F., and each of them, their heirs, executors, etc., and their, and each and every of their, estates and effects, from the costs of a certain action. *Held*, that plaintiff might maintain assumpsit upon this agreement without joining F.—POOLE

v. HILL, 6 M. & W. 835. Covenant. By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c. *Held*, that this covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested.—PLACE v. DELEGAL, 4 Bing. N. C. 426. Assumpsit. One Evans, as attorney for plaintiffs, executors of Miers, having sold an estate, to a share of the proceeds of which W. was entitled as legatee, and defendant claiming W.'s share of such proceeds, under an agreement with W. plaintiffs paid the amount to defendant, on receiving from him a guaranty in these terms: "Mr. John Evans, and also Messrs. Place & Meabry [the plaintiffs], as the executors of the will of the late Mr. John Miers: In consideration of your having paid, &c., I hereby undertake to indemnify and save you and each of you harmless, &c. C. Delegal." *Held*, that plaintiffs might sue on this guaranty without joining Evans.—THACKER v. SHEPHERD, 2 Chitt. 652. The plaintiff and one R., being insurance brokers and partners, effected a policy of insurance on the defendant's ship. The premium was not paid to the underwriter till after R. had become bankrupt, when it was paid by the plaintiff alone out of his private property. The plaintiff brought this action alone to recover the amount of the premium thus paid. *Held*, that the action was well brought.—GLOSSOP v. COLMAN, 1 Stark. 25. Assumpsit. Plaintiff had held out his son as his partner, and had made out bills and signed receipts in their joint names; but *held* by the court of K. B. that he was not precluded from maintaining his action by showing that his son was not in fact his partner.—DAVENPORT v. RACKSTROW, 1 C. & P. 89. *Hullock*, B., s. p.—KELL v. NAINBY, 10 B. & C. 20 s. p. "A party with whom the contract is actually made may sue without joining others with whom it is apparently made." *Parke, J.*—GARRET v. TAYLOR, 1 Esp. Nisi Prius, 117. "Three persons had employed the defendant to sell some timber for them, in which they were jointly concerned. Two of them he had

* 24 whether it be an interest * or an obligation, belongs to

paid their exact proportion, and they had given him a receipt in full of all demands. The third now brought his action for the remainder, being his share; and it was objected, that as this was a joint employment by three, one alone could not bring his action. But it was ruled by Lord Mansfield, that where *there had been a severance* as above stated, that one alone might sue. 4 G. 3 MS." — KIRKMAN v. NEWSTEAD, 1 Esp. Nisi Prius, 117. "Action for the use and occupation of a house. It appeared that the house was the property of six tenants in common, to all of whom, except the plaintiff, the defendant had paid his rent; and this action was for his share of the rent. It was objected that one tenant in common alone could not bring this action, but that all ought to join; but Lord Mansfield overruled the objection, and the plaintiff recovered. Sitt. Westm. M. 1776, MS." [The above two cases from Espinasse's Nisi Prius are of doubtful authority. See note to Hatsall v. Griffith, 4 Tyr. 488, and Walford on Parties, 466.] — WOTTON v. COOKE, Dyer, 337 b. Covenant. Three purchased lands jointly in fee and covenanted *each with the others and their heirs, et eorum utriusque*, to convey to the heirs of those who happened to die first, their respective third parts. Two of the three having died, the heir of one of them brought this action against the survivor, alleging that he had not conveyed to him according to his covenant. It was moved, in arrest of judgment, that the covenant was joint, and not several, for the word "*utrique*" in Latin is *conjunctim*, and not *separatim*; *sed non allocatur*, and judgment was given for the plaintiff.

American Cases. — HALL v. LEIGH, 8 Cranch, 50. Plaintiff and P. consigned to defendant a quantity of cotton, of which they were joint owners. They gave defendant separate and different instructions for the disposition of their respective moieties, each distinctly confining his instructions to his own moiety. Held, reversing judgment of circuit court, that plaintiff could maintain an action for the violation of his instructions, without joining P. (c) — SWETT v. PATRICK, 2 Fairf. 179. Defendant conveyed land with warranty to A, B, and C. Held, on demurrer, that a several action on the warranty was well brought by A. —

SHARP v. CONKLING, 16 Vt. 354. Covenant. By indenture between the plaintiff and others, of the first part, and the defendant of the other part, the defendant covenanted with the parties of the first part that he would turn from its natural channel a certain stream of water which flowed over the land of the covenantees; and whereas, the water, when diverted, would pass over the land of the plaintiff, that he would so convey it as not to injure said land. The plaintiff brought the action without joining the other covenantees, and alleged breaches of both covenants. Held, that he might recover on the second covenant, but not on the first. Redfield, J., said the court were willing to abide by the rule that, where the interest in the subject-matter secured by the covenant is several, although the terms of the covenant will more naturally bear a joint interpretation, yet, if they do not exclude the inference of being intended to be several, they shall have a several construction put upon them. See also Catlin v. Barnard, 1 Aik. 9; Harrold v. Whitaker, 10 Jur. 1004; Mills v. Ladbroke, 7 Man. & G. 218; Simpson v. Clayton, 4 Bing. N. C. 758; Withers v. Bircham, 3 B. & C. 254; Johnson v. Wilson, Willes, 248; Lloyd v. Archbowl, 2 Taunt. 324; Story v. Richardson, 6 Bing. N. C. 123; Owston v. Ogle, 13 East, 538; Lahy v. Holland, 8 Gill, 445; Payne v. Jelleff, 67 Wis. 246.

4. In the following cases it was held that a joint action should have been several.

SEATON v. BOOTH, 4 A. & E. 528, Assumpsit. A, B, & C, being interested in certain lands, but having no common legal interest in any portion of them, agreed together, according to their respective interests, to put them up for sale, and the lands were so put up, under the direction of their agents, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated, among other things, that if the purchaser should be let into the premises before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of four per cent on the amount of purchase-money, as and for rent. Defendant bought four of the lots, and was let into possession, and held for several years without paying the purchase-money; whereupon the vendors

(c) See Shipman v. Straitsville Central Mining Co., 158 U. S. 356, 15 S. Ct. 886; 39 L. Ed. 1015.

all. Hence arises an implied authority to act for each other, which is in some cases carried * very far. (x) Thus, * 25 if several plaintiffs sue for a joint demand, and the defendant pleads in bar an accord and satisfaction with * one of the * 26 plaintiffs, but without any allegation that the other plaintiffs had authorized the accord and satisfaction, the plea is never-

brought their joint action against him, to recover rent. Their declaration contained two counts: one upon the contract between the plaintiffs and defendant for the sale of the property; the other for use and occupation. *Held*, that the action could not be sustained on either count; not on the first, because no joint contract with all the plaintiffs was proved; not on the second, because no joint ownership in the plaintiffs, and occupation under them, was proved. — *WILKINSON v. HALL*, 1 Bing. N. C. 713. Action of debt against lessee for double value, under stat. 4 Geo. II. c. 28, for holding over. *Held*, that tenants in common could not maintain such action jointly where there had been no joint demise. "If there be no joint demise, there must be several actions for rent, for a joint action is not maintainable except upon a joint demise." *Tindal, C. J.* — *SERVANTE v. JAMES*, 10 B. & C. 410. Covenant. The defendant who was master of a vessel, covenanted with the plaintiff and others, part-owners, and their *several and respective* executors, administrators, and assigns, to pay certain moneys to them and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names. The action was brought by all the covenantees jointly. *Held*, that the covenant was several, and so the action not well brought, but each covenantee should have brought a separate action. — *GRAHAM v. ROBERTSON*, 2 T. R. 282. Plaintiffs, together with A & B, being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded, with costs, which was paid solely by the plaintiffs, A and B having in the mean time become bankrupts. An action could not be brought by the plaintiffs alone for a moiety of the restitution money and costs, because it was either a partnership

transaction, when A and B ought to be joined; or not, when separate actions should be brought by each of the persons paying. See also *Smith v. Hunt*, 2 Chitt. 142; *Brandon v. Hubbard*, 2 Br. & B. 11; *Tippet v. Hawkey*, 3 Mod. 263; *Makepeace v. Coutes*, 8 Mass. 451, overruled in *Capen v. Barrows*, 1 Gray, 376; *Brand v. Boulcott* 3 B. & P. 235; *Kelby v. Steel*, 5 Esp. 194.

American Cases. — *Boggs v. CURTIN*, 10 S. & R. 211. Two firms, C. & B. and J. & D., having become sureties for A., gave their joint and several note for the debt of A. *Held*, that the two firms, on payment by them of the note, could not maintain a joint action against A., it not appearing that the payment was made out of a *joint fund* of the two firms. "The action of assumpsit must be joint or several, accordingly as the promise on which it is founded is joint or several. Where the promise is *express*, there can be little difficulty in determining to which class it belongs, as its nature necessarily appears on the face of the contract itself; and if it be joint, all to whom it is made must, or at least may, sue on it jointly . . . But an *implied* promise, being altogether ideal, and raised out of the *consideration* only by intendment of law, follows the nature of the consideration; and as that is joint or several, so will the promise be." *Gibson, J.* — *CARTHRAE v. BROWN*, 3 Leigh, 98. C. covenanted with B. & J. that he would pay B. and J. \$300, namely, to each of them one moiety thereof. *Held*, a several covenant, so that B., as the survivor of the two, could not maintain an action to recover the whole sum. — *ULMER v. CUNNINGHAM*, 2 Greenl. 117. Assumpsit for money had and received. Goods, belonging to some and not to all of sundry *joint debtors*, were taken in execution and wasted. *Held*, that all the debtors could not maintain a joint action against the sheriff, and that those only ought to have sued whose property was actually wasted. See also *Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361.

(x) As to agency between persons jointly liable, see the note to *Maddox v.*

Duncan (143 Mo. 678), in 65 Am. St. Rep. 678, 683.

theless good. (*w*) For a release of a debt, or of a claim to damages, by one of many who hold this debt or claim jointly, is a full discharge of it, and this whether they hold this debt or claim in their own right, or as executors or administrators. (*x*) (*xx*) This has been extended to the case where the release is given by one of joint plaintiffs, who, although a party to the record, is not a party in interest, but whose name the actual parties in interest * 27 were obliged to use with their own in bringing the * action. (*y*)

Nevertheless, if in such a case the party taking the release and pleading it in bar is aware that the party giving it had no interest in the claim released, the court would disregard the release; (*z*) and upon such facts as these the court have ordered the release to be given up and cancelled. (*a*)

If two or more are jointly bound or jointly and severally bound, and the obligee releases to one of them, all are discharged. (*b*) Formerly a very strict and technical rule was applied to these cases; thus where an action was brought against one of three who were bound jointly and severally, a plea in bar that the seal of one of the others was torn off was held good. And where three were bound jointly and severally, and the seals of two were eaten off by rats, the court inclined to think the obligation void against all. (*c*) But if the seals had remained on until issue were joined, their removal afterwards would not have avoided the bond. (*d*)

(*w*) *Wallace v. Kensall*, 7 M. & W. 264. See also *Osborn v. Martha's Vineyard R. R. Co.*, 140 Mass. 549.

(*x*) *Bac. Abr. Release*, D. E.; *Jacob v. Harwood*, 2 Ves. Sen. 265; *Murray v. Blatchford*, 1 Wend. 583; *Napier v. McLeod*, 9 Wend. 120; *Decker v. Livingston*, 15 Johns. 479; *Pierson v. Hooker*, 3 Johns. 68; *Austin v. Hall*, 13 Johns. 286; *Bulkley v. Dayton*, 14 Johns. 387; *Bruen v. Marquand*, 17 Johns. 58; *Helsey v. Fairbanks*, 4 Mason, 206; *Tuckerman v. Newhall*, 17 Mass. 581; *Wiggin v. Tudor*, 23 Pick. 444.

(*y*) *Wilkinson v. Lindo*, 7 M. & W. 81; *Gibson v. Winter*, 5 B. & Ad. 96.

(*xx*) It is generally held that the entry of a judgment or decree against one of two joint principals releases the other. *Lawrence v. Beecher*, 116 Ind. 312, 19 N. E. 143; *Travellers' Ins. Co. v. Mayo*, 170 Ill. 498, 500, 48 N. E. 917. But in England it has recently been held, following *Drake v. Mitchell*, 3 East, 251, and overruling *Cambeft v. Chapman*, 19 Q. B. D. 229, that an unsatisfied judgment against one joint contractor, on his personal check for

(*z*) *Gram v. Cadwell*, 5 Cowen, 489; *Legh v. Legh*, 1 B. & P. 447.

(*a*) *Barker v. Richardson*, 1 Y. & J. 362.

(*b*) *Co. Lit.* 232 a; *Bac. Abr. Release*, G.; *Vin. Abr. Release*, G. a; *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Lacy v. Kynaston*, 1 Ld. Raym. 690; s. c. 12 Mod. 551; *Clayton v. Kynaston*, Salk. 574; *Milliken v. Brown*, 1 Rawle, 391; *Johnson v. Collins*, 20 Ala. 435.

(*c*) *Bayly v. Garford*, March, 125; *Seaton v. Henson*, 2 Show. 29.

(*d*) *Nichols v. Haywood*, *Dyer*, 59 pl. 12, 13; *Michaell v. Stockworth*, *Owen*, 8.

the joint debt, does not bar an action against the other joint contractor on the original contract, which, in this case, was a joint guaranty. *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108.

Full payment and satisfaction of a judgment for the whole debt, by one jointly and severally liable with others therefor, discharges them all. *Jameson v. Barber*, 56 Wis. 630, 14 N. W. 859.

Where a technical release, that is, a release under seal, is given to one of two joint debtors, and the other being sued pleads the joint indebtedness and the release, it is no answer to say that the release was made at the defendant's request, and in consideration that he thereupon promised to remain liable for the debt, and unaffected by the release; (e) for this would be a parol exception to a sealed instrument; or rather a parol renewal in part, of a sealed instrument which was wholly discharged. This being the reason, it should follow that only a release under seal should have the effect of excluding this answer; and the weight of authority is certainly and very greatly in favor of this limitation. (f) (x) It has, however, been held in this country, that a release which is not under seal, to * one of many joint * 28 debtors, of his share or proportion of the debt, operates in law as a full discharge of all. (g) But though the word release be used, even under seal, yet if the parties, the instrument being considered as a whole and in connection with all the circumstances of the case and the relations of the parties, cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release; (h) for a general covenant not to sue is not itself a release of the covenantee, but is so construed by the law, to avoid circuity of action; and a covenant not to sue one of many, who are jointly indebted, does not discharge one who is a joint debtor with the covenantee, nor in any way affect his obligation. (i)

(e) *Brooks v. Stuart*, 9 A. & E. 854; *Parker v. Lawrence*, Hob. 70.

(f) *Shaw v. Pratt*, 22 Pick. 305; *Walker v. McCulloch*, 4 Greenl. 421; *Lunt v. Stevens*, 24 Me. 534; *Harrison v. Close*, 2 Johns. 448; *Rowley v. Stoddard*, 7 Johns. 210; *McAllester v. Sprague*, 34 Me. 296; *Pond v. Williams*, 1 Gray, 630.

(g) *Milliken v. Brown*, 1 Rawle, 391.

(h) *Solly v. Forbes*, 2 Br. & B. 46; *McAllester v. Sprague*, 34 Me. 296; *Burke v. Noble*, 48 Penn. St. 168.

(i) *Lane v. Owings*, 3 Bibb, 247; *Shed v. Pierce*, 17 Mass. 628; *Couch v. Mills*, 21 Wend. 424; *Rowley v. Stoddard*, 7 Johns. 209; *McLellan v. Cumberland Bank*, 24 Me. 566; *Bank of Catskill v. Messenger*, 9 Cowen, 37; *Durell v. Wendell*, 8 N. H. 369; *Bank of Chenango v.*

(x) An unconditional release, especially when under seal, of one joint debtor or obligor, releases all, unless the instrument or conduct of the parties, at the time of its execution, shows a contrary intention. *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534; 1 Am. St. Rep. 475; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461; *Merritt v. Bucknam*, 90 Me. 146, 37 Atl. 884; *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; see *Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338; *Clark v. Mallory*, 185

Ill. 227, 56 N. E. 1099; *Davies v. Jones*, 61 Kan. 602, 60 Pac. 314; *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154; *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771. In a release, general words of release do not necessarily create an estoppel, as the recital may qualify such general words, contrary to the usual rule as to the recital in a deed of conveyance. *Lampon v. Corke*, 3 B. & Ald. 606, 14 English Ruling Cas. 755 and notes.

It may be added, though not strictly within the law of contracts, that the effect of a release of damages to one of two wrongdoers is the same as a release of debt; it is in its operation a satisfaction of the whole claim arising out of the tort, and discharges all the parties. (*j*) (*x*) And in actions against two or more defendants for a joint tort, it has been said that damages should be assessed against all jointly for the largest amount which either ought to pay. (*k*) The true rule, however, must be, that the plaintiff is entitled to compensation for all the injury he has received, and for this there should be judgment against all who joined in doing the wrong. Several damages should not be assessed; but if they are, the plaintiff may elect which sum he will, and remitting the others, enter judgment for this sum against all. (*l*)

* 29 * No release by the party injured, or claimant, has the effect of discharging all, although given but to one, unless it be a voluntary release; (*y*) for if one of two who owe jointly either a debt or compensation for a wrong, be discharged by operation of law, without the concurrence or consent of the party to whom the debt or compensation is due, he does not hereby lose his right to enforce this claim against those not discharged. (*m*) But it is said, that if the discharge by operation of law is at the

Osgood, 4 Wend. 607; *Lancaster v. Harrison*, 6 Bing. 731; s. c. 4 Mo. & P. 561, *Dean v. Newhall*, 8 T. R. 168.

(*j*) *Brown v. Marsh*, 7 Vt. 320.

(*k*) *Bull. N. P.* 15; *Lowfield v. Bancroft*, 2 Str. 910; *Onslow v. Orchard*, 1 Str. 422; *Brown v. Allen*, 4 Esq. 158;

Austen v. Willward, Cro. E. 860; *Smithson v. Garth*, 3 Lev. 324.

(*l*) *Johns v. Dodsworth*, Cro. C. 192; *Walsh v. Bishop*, Cro. C. 243; *Heydon's Case*, 11 Rep. 5; *Halsey v. Woodruff*, 9 Pick. 555; *Rodney v. Strobe*, Carth. 19.

(*m*) *Ward v. Johnson*, 13 Mass. 152.

(*x*) See *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170; *Seither v. Philadelphia Traction Co.*, 125 Penn. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905 and note; *Usher v. Van Vranken*, 63 N. Y. S. 104, 48 App. Div. 413; *Wyss v. Grunert*, 108 Wis. 38, 83 N. W. 1095; *Patterson v. Standley*, 91 Ill. App. 671; *Ross v. Shanley*, 86 id. 144, 185 Ill. 390, 56 N. E. 1105; *Schramm v. Brooklyn Heights R. Co.*, 54 N. Y. S. 945, 35 App. Div. 334. Unless authorized by statute, a cause of action in tort cannot properly be joined in the same declaration or complaint with a count in contract. See *New Haven & N. Co. v. Campbell*, 128 Mass. 104; *Commercial Union Assur. Co. v. Shoemaker* (Neb.), 88 N. W. 156.

(*y*) The discharge of one joint obligor does not discharge the others without proof that that discharge did not have

their consent; and, in a suit to foreclose a mortgage, the plaintiff is not shown to have been discharged from liability on his guaranty of the original debt merely by proof of the erasure of the name of one of his joint obligors. *Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770.

In equity a joint obligation which may be reasonably presumed to have been intended by the parties to be joint and several, and which, through fraud, ignorance, or mistake, does not express their real intent, may be reformed so as to conform thereto; but such presumption is never extended to the case of a mere surety, whose duty is measured solely by the legal force of his bond. *United States v. Price*, 9 How. (U. S.) 83, 1 Wall. Jr. 173; *Pickersgill v. Lahens*, 15 Wall. (U. S.) 140. See *Deposit Bank v. Peak* (Ky.), 62 S. W. 268.

instance of the plaintiff, or be caused by him, it then operates as a discharge of the other debtors. (*n*) (*x*)

The legal operation of a release to one of two or more joint debtors may be restrained by an express provision in the instrument, that it shall not operate as to the other. For if a release containing such a proviso be pleaded by the other in bar to an action against both, a replication that the action is brought against both, only to recover of the other, is good. (*o*)

If an action be brought against many, and to this an accord and satisfaction by one be pleaded in bar, it must be complete, covering the whole ground, and fully executed. It is not enough if it be in effect only a settlement with one of the defendants for his share of the damages; nor would it be enough if it were only this in fact, although in form an accord and satisfaction of the whole claim. (*p*)

Joint trustees are not necessarily liable for each other, or bound by each other's acts. Each is liable for the acts of others, only so far as he concurred in them, or connived at them, actively or negligently. (*y*) Each is, in general, responsible only for money which he has himself received; and if he signs a receipt with the others, because the receipt would have no force without his signature, he may, at least in equity (unless he is himself in default), show that he did not receive the money, and thus remove or

(*n*) *Robertston v. Smith*, 18 Johns. v. *Wakefield*, 13 Q. B. 536. See *post*, 459. p. * 285.

(*o*) *Twopenny v. Young*, 3 B. & C. 211; s. c. 5 Dow. & R. 261; *Lancaster v. Harrison*, 4 Mo. & P. 561; s. c. 6 Bing. 726; *Solly v. Forbes*, 2 Br. & B. 38; *North v. Anderson v. Turnpike Co.*, 16 Johns. 87; *Clark v. Dinsmore*, 5 N. H. 136; *Rayne v. Orton*, Cro. E. 305; *Lynn v. Bruce*, 2 H. Bl. 317.

(*x*) A joint right of action is barred by the expiring of limitation against one of the parties jointly liable, or against one of the parties entitled to a joint action. *Davis v. Coblens*, 174 U. S. 719, 725, 19 S. Ct. 832, 43 L. Ed. 1147; *Dickey v. Armstrong*, 1 A. K. Marsh. (Ky.), 39; see *Leeds Lumber Co. v. Haworth*, 98 Iowa, 463, 60 Am. St. Rep. 199, note; *Chase v. Henry*, 166 Mass. 577, 582, 44 N. E. 988. And when the debt is once barred, it cannot be revived by one joint debtor, so as to make the others liable, without their knowledge and assent. *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918; *Conn. Trust Co. v. Wead*, 69 N. Y. S. 518, 67 id. 416; *Maddox v. Duncan*, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678; *State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466; 32 Am. L. Rev. 846; *Leeds Lumber Co. v. Haworth*, 98 Iowa, 463, 67 N. W. 383, 60 Am. St. Rep. 199 and note. Before the statute has run out, unauthorized part payment or acknowledgment of the debt by one of several debtors does not, it seems, bind the others. *In re Wolmershausen*, 62 L. T. 541; *Bennett v. McCause*, 65 Mo. 194; *Woonsocket Sav. Inst'n v. Ballou*, 16 R. I. 351, 16 Atl. 144; *Bergman v. Bly*, 66 Fed. 40, 27 U. S. App. 650, 13 C. C. A. 319.

(*y*) The liability of trustees for a breach of trust is joint and several. *Wilson v. Moore*, 1 Myl. & K. 126, 337; *Blyth v. Fladgate*, 63 L. T. 546, 553; *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763, L. R. 8 Eq. 7; *Heath v. Erie Ry. Co.*, 8 Blatch. 347, 411; *Boyd v. Gill*, 21 id. 543; *Stockton v. Anderson*, 40 N. J. Eq. 486. As to executors, see *infra*, p. * 131 and n. (*z*).

limit his liability; but if this be not shown, the joint receipt

* 30 is evidence against all. (q) A trustee may thus * explain

his receipt, because he is obliged to join with the others in giving one; but a co-executor not being under this necessity, it is said that he is bound by the receipt he signs. (r) And, in general, any co-executor or co-trustee who does jointly with the others any act which it is not necessary for him to do, is bound thereby to any party who shall suffer therefrom. (s)

If two or more persons are bound jointly to pay a sum of money, and one of them dies, at common law his death not only severs the joinder, but terminates the liability which belonged to him, so that it cannot be enforced against his representatives; (t) but if they were bound jointly and severally, the death of one has not this effect. (u) (x) If bound jointly, the whole debt becomes the debt of the survivors alone, and if they pay the whole, they can have at law no contribution against the representatives of the deceased, because this would be an indirect revival of a liability which death has wholly terminated. (v) (y) But where the debt was made joint by fraud or error, equity will relieve by granting contribution; as it will if the debt were for money lent to both and received by both, so that both actually participate in the benefit. (w) If the last survivor dies, leaving the debt unpaid,

(q) *Fellows v. Mitchell*, 1 P. Wms. 83, and *Cox's note*; *Westly v. Clarke*, 1 Eden, 360; *Griffin v. Macaulay*, 7 Gratt. 476. See *Rider Life Raft Co. v. Roach*, 97 N. Y. 378.

(r) *Sadler v. Hobbs*, 2 Br. Ch. 114; *Chambers v. Minchin*, 7 Ves. 198.

(s) *Brice v. Stokes*, 11 Ves. 319; *Sadler v. Hobbs*, 2 Br. Ch. 95, and note to Am. ed.

(t) *Bac. Abr. Obligations*, D. 4; *Os-*

borne v. Crosbern, 1 Sid. 238; *Calder v. Rutherford*, 3 Br. & B. 302; *Foster v. Hooper*, 2 Mass. 572; *Yorks v. Peck*, 14 Barb. 644.

(u) *Towers v. Moore*, 2 Vern. 99; *May v. Woodward*, Freem. 248.

(v) See note (e), p. * 32 *post*.

(w) *Waters v. Riley*, 2 Har. & G. 313; *Simpson v. Vaughan*, 2 Atk. 33; *Yorks v. Peck*, 14 Barb. 644.

(x) If one joint contractor dies after part performance on his own part, his estate continues liable on the contract, and is entitled to its share of any profits resulting therefrom. *King v. Leighton*, 100 N. Y. 386, 393; *Jepson v. Killian*, 151 Mass. 593, 24 N. E. 856, 21 Am. St. Rep. 508. So, according to the rule adopted in Massachusetts, the death of one member of a partnership (which is not known to the common law as an entity) does not terminate the firm's contract with an employé, if the business goes on without interruption, and the parties act on the theory that the contract continues; but, in England and some of the States, the firm has been treated as ceasing to exist upon the death

of a member. See *Hughes v. Gross*, 166 Mass. 61, 65, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620; *Tasker v. Shepard*, 6 H. & N. 575; *Griggs v. Swift*, 82 Ga. 392; *Greenburg v. Early*, 30 Abb. N. C. 300, 303. A surety's death does not terminate the suretyship, but the contract of a joint debtor or obligor is severed and is determined by his death. *Moore v. Rogers*, 19 Ill. 348; *Chamberlain v. Dunlop*, 126 N. Y. 45, 22 Am. St. Rep. 807, and note.

(y) Conversely, when one or more of several obligees or partners having a joint interest dies, the survivors only sue, and the executor or administrator must not be joined. *Knights of Honor v. Portingall*, 167 Ill. 291, 47 N. E. 203.

his representatives alone are chargeable, and have no contribution against the representatives of the other deceased obligor.

Such were the rules of the common law ; but in most of the United States these rules are changed by statute. The representatives of the deceased continue to be bound by his obligation. If the debtors were jointly bound, the creditor could bring but one action when all were alive, and that against all ; and then obtaining judgment and taking out execution against all, he might levy it on all or either as he chose, leaving them to adjust their proportion by contribution. After the death of a * joint * 31 debtor, the creditor cannot join the survivors and the representatives of the deceased in one action, even if the statute gives the creditor, where one of many joint debtors dies, the same remedy by action as if the contract were joint and several ; inasmuch as an executor cannot be joined with the survivors in an action upon a contract which was originally joint and several, because one would be charged *de bonis testatoris*, and the other *de bonis propriis*, which cannot be ; (x) but the creditor may elect which to sue. (y) He may sue either or both in distinct actions, and may levy his executions upon either or both. But he can get, in the whole, only the amount of his debt ; and the survivors and the representatives of the deceased, or the representatives of all the debtors, if all are deceased, have against each other a claim for contribution, if either pay more than a due proportion. (z)

If one or more of several joint *obligees* die, the right of action is solely in the survivors, and if all die, the action must be brought by the representatives of the last survivor. (a) But if the right under the contract be several, the representatives of the deceased party may sue, although the other obligees are living. (b)

SECTION III.

OF CONTRIBUTION.

Where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them pay the whole, or more than his or their share, and thereby relieve the

(x) *Kemp v. Andrews*, Carth. 171 ; (a) *Rolls v. Yate*, Yelv. 177 ; *Anderson Hall v. Huffam*, 2 Lev. 228. v. *Martindale*, 1 East, 497 ; *Stowell's*

(y) *May v. Woodward*, Freem. 248 ; *Admr. v. Drake*, 3 Zab. 310. *Enys v. Donnithorne*, 2 Bur. 1190.

(z) *Peaslee v. Breed*, 10 N. H. 489 ;
Batchelder v. Fiske, 17 Mass. 464.

(b) *Shaw v. Sherwood*, Cro. E. 729.

others so far from their liability, those paying may recover from those not paying, the aliquot proportion which they ought * 32 to pay. (c) Some things have been said about this * right to contribution, in the preceding section; we add that the persons not paying, but being relieved from a positive liability by the payment of others who were bound with them, are held by the law as under an implied promise *to contribute* each his share to make up the whole sum paid. (d) And this rule applies equally to those who are bound as original co-contractors, and to those who are bound to pay the debt of another or answer for his default, as co-sureties. (e) (x)

(c) Harbert's Case, 13 Rep. 13 a, 15 b; Layer v. Nelson, 1 Vern. 456; Toussaint v. Martinant, 2 T. R. 104; Kemp v. Finden, 12 M. & W. 421; Browne v. Lee, 6 B. & C. 689; Sadler v. Nixon, 5 B. & Ad. 936; Holmes v. Williamson, 6 M. & Sel. 159; Blackett v. Weir, 5 B. & C. 387; Lanchester v. Tricker, 1 Bing. 201; Boulter v. Peplow, 9 C. B. 193; Wood v. Leland, 1 Met. 387; Aspinwall v. Sachhi, 57 N. Y. 331. In Offley and Johnson's case, 2 Leon. 166 [1584], the Court of King's Bench held that one surety had no right at common law to recover contribution from a co-surety. "The first case of the kind in which the plaintiff succeeded was before Gould, J., at Dorchester." Buller, J., 2 T. R. 105. — The action for money paid to recover contribution is founded upon the old writ *de contributione facienda*, Tindal, C. J., Edger v. Knapp, 5 Man. & G. 758, citing Fitzherbert's Natura Brevium, 378, in the edition of 1794, p. 162. From the passage in Fitzherbert, as the English version is amended by the learned reporter of Edger v. Knapp, 5 Man. & G. 758, 759, it seems that a *parcener* distrained upon is entitled to contribution without any express agreement on the part of her coparceners, while to entitle a *joint feoffee* to contribution, under similar circumstances, the other feoffees must have agreed to contribute. In analogy to the case of feoffees, one partner, in order to entitle himself to recover contribution of his copartner, is bound to show a contract independent of the relation of partner: Tindal, C. J., 5 Man. & G. 759. It is not sufficient for him to show that the payment made on account of his copartners was made *by compulsion of law*. Sadler v. Nixon, 5 B. & Ad. 936. — In Hunter v. Hunt, 1 C. B. 300, plaintiff and

defendant respectively were under-lessees, at distinct rents, of separate portions of premises, the whole of which were held under one original lease, at an entire rent. Plaintiff, having paid the whole under a threat of distress, brought an action against defendant to recover the proportion of rent due from him, as for money paid to his use. Held, that the action was not maintainable. See Springer v. Springer, 43 Penn. St. R. 518.

(d) Contribution was at first enforced only in equity, and Lord Eldon regretted (not without reason, in the opinion of Baron Parke, 6 M. & W. 168), that courts of law ever assumed jurisdiction of the subject. The duty of contribution *originates* in the equitable consideration that those who have assumed a common burden ought to bear it equally; from this equitable obligation the law implies a contract, since all who have become jointly liable may reasonably be considered as mutually contracting among themselves with reference to the duty in conscience. Lord Eldon, Craythorne v. Swinburne, 14 Ves. 160, 169 (adopting the view taken by *Romilly arguendo*); Campbell v. Mesier, 4 Johns. Ch. 334; Lausdale v. Cox, 7 Monr. 401; Fletcher v. Grover, 11 N. H. 368; Johnson v. Johnson, 11 Mass. 359; Chaffee v. Jones, 19 Pick. 264; Horbach v. Elder, 18 Penn. 33; Powers v. Nash, 37 Me. 322; Holmes v. Weed, 19 Barb. 128; Yates v. Donaldson, 5 Md. 389. Assumpsit for money paid is the usual action for enforcing contribution, and its propriety, before taken for granted, was confirmed in Kemp v. Finden, 12 M. & W. 421.

(e) A surety is not necessarily discharged by the creditor's neglect to present claim. Sibley v. McAllister, 8 N. H. 339. See also Chipman v. Morrill, 20 Cal. 130.

(x) The right to contribution arises, not from any agreement between the parties,

but from an implied promise raised by the law in order to do equity because of

*The payment, to establish a claim for contribution, must * 33 be compulsory. Hence, if one of many who must pay a certain debt might show if sued that he was bound to pay only a certain proportion and could defend himself against a further claim, his payment of more than his share gives him no claim for contribution. (f) But this does not mean that there must be a suit, but only a fixed and positive obligation. (g) The law requires no

Bachelor *v.* Fiske, 17 Mass. 464, was perhaps the earliest case where the executor of a deceased co-debtor was held liable at law for contribution. The court there met the technical objections that were raised, with the maxim, *Ubi jus ibi remedium*. And see McKenna *v.* George, 2 Rich. Eq. 15; Riddle *v.* Bowman, 7 Foster (N. H.) 236.

In the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost against the representatives of him who dies first; where all the obligors are principals, equity will enforce contribution though the remedy at law is gone, but in case of a surety it will not interfere to charge him beyond his legal

liability in the absence of fraud, accident, or mistake; and although a surety who has paid the debt may compel his living co-surety to contribute, he has no such right either at law or in equity, against the estate of a deceased co-surety, because the liability of the creditor was terminated by his death and cannot be indirectly revived. Waters *v.* Riley, 2 Har. & G. 305. But see the able dissenting opinion of *Archer, J.*

(f) Lucas *v.* Jefferson Ins. Co., 6 Cow. 635. See also Mutual Safety Ins. Co. *v.* Hone, 2 Comst. 235; Webster's Appeal, 86 Pa. 409.

(g) Pitt *v.* Purssord, 8 M. & W. 538; Maydew *v.* Forrester, 5 Taunt. 615; Davies *v.* Humphreys, 6 M. & W. 153;

their mutual relation. Warner *v.* Morrison, 3 Allen (Mass.), 566; Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. 157; Jacobs-meyer *v.* Jacobsmeyer, 88 Mo. App. 102; Culliford *v.* Walser, 158 N. Y. 65, 70 Am. St. Rep. 437, 450. As between co-sureties, one is not entitled to contribution until he is damnified by actual payment, and it is settled that he has paid more than his share; and the statute of limitations begins to run only from the date of such payment. *Ex parte* Snowdon, 17 Ch. D. 44; Gardner *v.* Brooke, [1897] 2 I. R. 6; Washington *v.* Norwood (Ala.), 30 So. 405; Reed *v.* Sieckenius (Tex. Cir. App.), 65 S. W. 487; Egbert *v.* Hanson, 70 N. Y. S. 383; Cornett *v.* Holcomb (Ky.), 62 S. W. 477. The right to contribution is not impaired because the statute of limitations has already run as between the principal creditor and the co-surety. Wolmershausen *v.* Gullick, [1893] 2 Ch. 514. See Robinson *v.* Harkin, [1896] 2 Ch. 415; Martin *v.* Frantz, 127 Penn. St. 389; McCormick *v.* Sener, 200 Penn. St. 11, 49 Atl. 311; Fullerton *v.* Bailey, 17 Utah, 85, 53 Pac. 1020. When a guarantor sues his co-guarantor's estate for contribution, one who possesses a part of the decedent's estate through purchase from a distributee is not a proper party. Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025.

Successive indorsers, when shown by parol evidence to be co-sureties, are subject

to contribution. Weeks *v.* Parsons, *supra*. But successive accommodation indorsers are not so liable in the absence of a special agreement to be jointly bound. Egbert *v.* Hanson, *supra*.

One tenant in common has no lien on his co-tenant's interest for his share of the rents and profits, but when one of them makes expenditures for the common benefit, contribution may be made a condition of sharing in the improvements. Dunavant *v.* Fields, 68 Ark. 534, 60 S. W. 420; Huber *v.* Hess, 191 Ill. 305, 61 N. E. 61; Gass *v.* Waterhouse (Tenn. Ch. App.), 61 S. W. 450; Wilson *v.* Sanger, 68 N. Y. S. 124, 57 App. Div. 323.

Co-insurers are not usually entitled to contribution as to insurance that is double, but not contemporaneous. Deming *v.* Merchants' Cotton-Press Co., 90 Tenn. 306, 17 S. W. 89; London Assurance *v.* Pater-son, 106 Ga. 538, 551, 32 S. E. 650. As to contribution, an invalid policy is "other insurance" under a provision that the insurer shall be liable only for his *pro rata* share in case of other insurance, whether valid or invalid. Bateman *v.* Lumbermen's Ins. Co., 189 Penn. St. 465, 42 Atl. 184; Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655. See Traders' Ins. Co. *v.* Pacaud, 150 Ill. 245, 37 N. E. 460; McFetridge *v.* American F. Ins. Co., 90 Wis. 138, 62 N. W. 938; Coats *v.* West Coast F. & M. Ins. Co., 4 Wash. St. 375, 30 Pac. 404.

one to wait for a suit, if he has no defence; and not always, even if he has a defence. (h)¹ And if he resists a suit in which he has no sufficient defence, he cannot, generally, recover from the party for whom he pays, the costs of this suit. (i) And where a

Lord *Kenyon*, *Child v. Morley*, 8 T. R. 614; *Frith v. Sprague*, 14 Mass. 455; *Russell v. Failor*, 1 O. St. 327; *Hichborn v. Fletcher*, 66 Me. 209; *Mason v. Pierron*, 69 Wis. 585.

(h) It has been held that a surety paying when he had a good defence, which defence, however, was not available to the principal, if he had been sued by the creditor, may recover of the principal. *Shaw v. Loud*, 12 Mass. 461.

(i) Whether contribution can be recovered for the costs of a suit sustained in resisting payment, is left in doubt by the authorities. Lord *Tenterden* ruled against contribution for costs in *Roach v. Thompson*, Mo. & M. 489; *Gillet v. Rippon*, id. 406; *Knight v. Hughes*, id. 247; in the latter case intimating that there might be a distinction between a case between two sureties (the case before him) and a case of surety against principal. But in *Kemp v. Finden*, 12 M. & W. 421, where the plaintiff and defendant had executed as sureties a warrant of attorney, given as collateral security for a sum of money advanced on mortgage to the principals, and on default being made by the principals, judgment was entered upon the warrant of attorney, and execution issued against the plaintiff, it was held that he was entitled to recover from the defendant as his co-surety a moiety of the costs of such execution. *Parke, B.*, said: "They were costs incurred in a proceeding to recover a debt for which, on default of the principals, both the sureties were jointly liable; and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion." — A surety to a note was

subjected to costs in consequence of its non-payment by the principal; there was an agreement in writing to save him harmless: held, that he was entitled to recover the costs so paid by him in an action against the principal. *Bonney v. Seely*, 2 Wend. 481. In *Cleveland v. Covington*, 3 Strob. L. 184, it was held that as a general rule a principal was liable for costs incurred by the surety, and was therefore incompetent as a witness in an action against him. Where a judgment, recovered against an insolvent principal, and his two sureties, was paid by one of them, held, that he could recover of his co-surety one half of the costs. *Davis v. Emerson*, 17 Me. 64. And in *Fletcher v. Jackson*, 23 Vt. 593, the right of a co-surety to recover costs and expenses is said to depend altogether upon the question whether the defence was made under such circumstances as to be regarded as hopeful and prudent; if so, the expenses of defence may always be recovered. So in *Security Ins. Co. v. St. Paul, &c. Ins. Co.*, 50 Conn. 233; *Gross v. Davis*, 37 Tenn. 226. And see *Van Winkle v. Johnson*, 11 Or. 469. — But not if the surety be notified that there is no defence. *Beckley v. Munson*, 22 Conn. 299. — In *Boardman v. Page*, 11 N. H. 431, where an action was commenced by the holder of a note against all the co-signers, and judgment was recovered against one only, it was held that upon payment of damages and costs of the judgment, the party against whom the judgment was recovered was not entitled to contribution from the other co-signers in respect to the costs, — the same not being a burden common to all the co-

¹ Ordinarily if a surety fails to avail himself of a good defence against the creditor he cannot recover contribution from a co-surety. *Russell v. Failor*, 1 Ohio St. 327; *Aldrich v. Aldrich*, 56 Vt. 324, 327. But he can recover if the co-surety was liable to the creditor for the full amount. *Houck v. Graham*, 106 Ind. 195.

So if the surety was ignorant of the facts constituting his defence, and paid in good faith, he may have contribution. *Hichborn v. Fletcher*, 66 Me. 209.

If, however, such payment is made with full knowledge of the facts, the surety will not be entitled to contribution because he was ignorant of the legal effect of those facts. *Bancroft v. Abbott*, 3 Allen, 524.

It has been held that a surety who has paid a claim to which he had no defence, could not recover contribution from a co-surety, if the latter had a good defence to an action by the creditor. *Cochran v. Walker*, 82 Ky. 220. But this seems erroneous, and is against the weight of authority. *Camp v. Bostwick*, 20 Ohio St. 337; *Stark v. Carroll*, 66 Tex. 393; *Aldrich v. Aldrich*, 56 Vt. 324; *Liddell v. Wiswell*, 59 Vt. 365. And see p. * 36 *infra*. — W.

contract is broken, the surety may * pay without suit and * 34 hold the principal, and a co-surety may pay and hold the co-sureties to contribution. (j) And the right to contribution arises although the co-surety paid the debt after giving a bond for it without the knowledge of the co-sureties. (k)

If a plaintiff in an action *ex contractu* recovers judgment and takes out an execution, a defendant upon satisfying the execution makes out a claim for contribution against other parties, by showing either that such parties were co-defendants in the action, or that they were jointly liable in fact for the debt which was made a cause of action against him alone. (l) But *in * 35 the latter case the joint liability must not be a liability as copartners. (m)

At law a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; (n) but in equity it is otherwise. (o)

signers of the note. — Probably, notwithstanding the *nisi prius* decisions of Lord *Tenterden*, that where the party from whom contribution is sought was at the time of the former action directly liable for the debt to the creditor, so that if the latter had chosen he might have been sued by him, contribution may be recovered for the costs of the judgment, though not perhaps for costs incurred in resisting payment of the judgment. Yet in the late case of *Henry v. Goldney*, 15 M. & W. 494, 496, an action *ex contractu* being brought against A, and he pleading in abatement the pendency of another action for the same cause against B, it was contended that the plea ought to be sustained, to prevent A from being twice vexed for the same cause; but *Alderson*, B., observed: "How is A vexed by an action being brought against B? B cannot recover against A his proportion of the costs." And see *Dearsly v. Middleweek*, 18 Ch. D. 236.

(j) It has been held in Kentucky that the principal must be insolvent to render a co-surety liable to contribute to another who has paid the debt. *Pearson v. Duckham*, 3 Litt. 386; *Daniel v. Ballard*, 2 Dana, 296; *Morrison v. Poyntz*, 7 Dana, 307. But this is opposed to the prevailing doctrine. *Cowell v. Edwards*, 2 B. & P. 268; *Odin v. Greenleaf*, 3 N. H. 270; *Buckner's Adm. v. Stuart*, 34 Ala. 529; *Rankin v. Collins*, 50 Ind. 158; *Croy v. Clark*, 74 Ind. 597.

(k) *Dunn v. Slee*, Holt, 399; where it was also held by *Parke, J.*, that time

given to one surety is no bar to an action afterwards by that surety against a co-surety.

(l) In *Murray v. Bogert*, 14 Johns. 318, it was held that where A who claims contribution of B. & C. on the ground of having paid a judgment, shows neither that B. & C. were parties to the judgment, nor that the debt was a joint one, not arising out of a partnership transaction, he must be nonsuited. The reporter's abstract seems incorrect, in representing that the mere absence of proof that the defendants were parties to the judgment was fatal to the claim of contribution. Such a doctrine would be directly in the face of *Holmes v. Williamson*, 6 M. & Sel. 158; *Burnell v. Minot*, 4 Moore, 340; *Boardman v. Paige*, 11 N. H. 431.

(m) *Sadler v. Nixon*, 5 B. & Ad. 936; *Edger v. Knapp*, 5 Man. & G. 758; *Murray v. Bogert*, 14 Johns. 318; *Lawrence v. Clark*, 9 Dana, 257; *Pearson v. Skelton*, 1 M. & W. 504, where the former action was *ex delicto*. But where the joint contractors were, together with many others, partners in a joint-stock company, of which they were the contract committee men, contribution was enforced between them on account of the joint liability incurred by them as such committee. *Boulter v. Peplow*, 9 C. B. 493.

(n) *Browne v. Lee*, 6 B. & C. 689; *Cowell v. Edwards*, 2 B. & P. 268. — *Shaw*, C. J., *Chaffee v. Jones*, 19 Pick. 265; *Currier v. Fellows*, 7 Foster (N. H.), 366.

(o) *Peter v. Rich*, 1 Chanc. 34; *Cowell v. Edwards*, 2 B. & P. 268; *Young v.*

If one co-surety takes security from the principal for his proportion of the burden, or for the whole, the other co-surety shall share in the benefit of it. (*p*)

The contract of contribution is a several contract. (*q*) And hence a surety may release one of his co-sureties without barring his right of action against the rest; for a release of one surety discharges the others only from such a proportion of the debt as they would be entitled to have recourse to the discharged party for, upon their payment of the whole debt. (*r*) But if two co-sureties pay the debt out of a joint fund, their right of action against the principal, and as it would seem against other co-sureties, is joint. (*s*)

The contract on which the assumpsit is founded dates *from the time when the relation of co-surety or co-obligor is entered into*;

although the cause of action does not arise till the payment. * Hence the discharge of one of the joint debtors (by whatever cause) from his direct liability to the creditor, does not relieve him in law, any more than in equity, from his obligation to indemnify such of the remaining joint debtors as have borne more than their original proportion of the debt. (*t*)

The undertaking which is to serve as the foundation of a claim of contribution must be joint, not separate and successive. (*tt*) Thus, the second indorser of a promissory note is not liable to the

Lyons, 8 Gill, 162, 166; Preston v. Preston, 4 Gratt. 88, and cases *infra*. — And in Vermont the rule of equity has been held to be the rule of law also. Mills v. Hyde, 19 Vt. 59. So also, Henderson v. McDuffee, 5 N. H. 38; Boardman v. Paige, 11 N. H. 431; Jeffries v. Ferguson, 87 Mo. 244. Co-sureties who are not within the jurisdiction, as well as insolvent co-sureties, are to be excluded in the calculation of the proportion to be contributed by those against whom payment can be enforced. Security Ins. Co. v. St. Paul, &c. Ins. Co., 50 Conn. 233; Whitman v. Porter, 107 Mass. 522; Boardman v. Paige, 11 N. H. 431; McKenna v. George, 2 Rich. Eq. 15; Liddell v. Wiswell, 59 Vt. 365.

(*p*) Steel v. Dixon, 17 Ch. D. 825; *In re* Arcedeckne, 24 Ch. D. 709; Berridge v. Berridge, 44 Ch. D. 168; Cannon v. Connaway, 5 Del. Ch. 559; Titcomb v. McAllister, 81 Me. 399; Wolcott v. Hagerman, 50 N. J. L. 289; Parham v. Green, 64 N. C. 436; Shaeffer v. Clendenin, 100 Pa. 565; Miller v. Sawyer, 30 Vt. 412.

(*q*) Kelby v. Steel, 5 Esp. 194; Gra-

ham v. Robertson, 2 T. R. 282; Brand v. Boulcott, 3 B. & P. 235; Birkley v. Presgrave, 1 East, 220; Parker v. Ellis, 2 Sandf. 223.

(*r*) Crowder v. Shelby, 6 J. J. Marsh. 61; Fletcher v. Grover, 11 N. H. 368; Fletcher v. Jackson, 23 Vt. 581.

(*s*) Osborne v. Harper, 5 East, 225; Boggs v. Curtin, 10 S. & R. 211; Pearson v. Parker, 3 N. H. 366; Jewett v. Cornforth, 3 Greenl. 107; Fletcher v. Jackson, 23 Vt. 593. *Contra*, Gould v. Gould, 8 Cowen, 168. But Kelby v. Steel, 5 Esp. 194, on the authority of which this case seems to have been decided, is quite distinguishable from Osborne v. Harper.

(*t*) Where the liability of one joint maker of a promissory note was continued by partial payments within six years, but the remedy of the holder against the other was barred by limitation, the debtor who continued liable could still recover contribution from the other after paying the debt. Peaslee v. Breed, 10 N. H. 489; Boardman v. Paige, 11 N. H. 431; Howe v. Ward, 4 Greenl. 195.

(*tt*) Prescott v. Perkins, 16 N. H. 305.

first, though neither be indorser for value;¹ unless there is an agreement between the indorsers that, as between themselves there shall be co-sureties; (v) and this is true even if they are indorsers of accommodation paper. (w) And a guarantor cannot be compelled to contribute in aid of a surety. (x)

Directors of an association who have authority to contract debts on the credit of members of the corporation, those debts being reasonable and necessary for carrying on the business, may have a bill in equity against the members for contribution towards the payment of these debts; but not for costs and expenses of suits instituted against them by creditors of the association; unless a due regard to the interests of the association required a defence against those suits. (xx)

The right of contribution exists against all who are sureties for the *same debt*, although their primary liability depends upon different instruments. Where two bonds, for example, are given for the performance of the same duty, and A and B sign as sureties in one, and C and D in the other, A, if he pay the debt, may in equity recover one fourth of the whole from each of the rest. (y)

(v) *Weston v. Chamberlain*, 7 Cush. 404; *Hogue v. Davis*, 8 Gratt. 4. See also *Westfall v. Parsons*, 16 Barb. 645; *Pitkin v. Flanagan*, 23 Vt. 160.

(w) *McNelly v. Patchin*, 23 Mo. 40; *Dunn v. Wade*, id. 207.

(x) *Longley v. Griggs*, 10 Pick. 121. In *Harris v. Warner*, 13 Wend. 400, it was held that the defendant, who was the last of four sureties for H. in a joint promissory note, was not bound to make contribution to the plaintiff, who was the first surety and had paid the debt, the defendant having qualified his undertaking by adding to his signature the words "surety for the above names." In *Keith*

v. Goodwin, 31 Vt. 268, it was held that the guarantor of a note on which sureties had already signed, stood in relation to those who had signed before him as surety *for them jointly*, not jointly *with* them.

(xx) *Tyrrell v. Washburn*, 6 Allen, 466.

(y) *Deering v. Winchelsea*, 2 B. & P. 270; *Mayhew v. Crickett*, 2 Swanst. 184; *Craythorne v. Swinburne*, 14 Ves. 160; *Monson v. Drakely*, 40 Conn. 552; *Young v. Shunk*, 30 Minn. 503. *Seemle*, the same principle may be applied at law; *Bronson, C. J. Norton v. Coons*, 3 Denio, 130, 132; *Chaffee v. Jones*, 19 Pick. 260, 264; *Enicks v. Powell*, 2 Strob. Eq. 196.

¹ "Where a note is indorsed by several successive indorsers for the accommodation of the maker, their rights and obligations in respect to each other are determined by the form of the contract in the absence of any agreement between them." *Woodward v. Severance*, 7 Allen, 340; *McCarty v. Roots*, 21 How. 432; *Moody v. Findley*, 43 Ala. 167; *Kirschner v. Conklin*, 40 Conn. 77; *Armstrong v. Harshman*, 61 Ind. 52; *Scott v. Doneghy*, 17 B. Mon. 321; *Coolidge v. Wiggins*, 62 Me. 568; *Shaw v. Knox*, 98 Mass. 214; *Hillegas v. Stephenson*, 75 Mo. 118; *Whitehouse v. Hanson*, 42 N. H. 9; *Barnet v. Young*, 29 Ohio St. 7; *Briggs v. Boyd*, 37 Vt. 534; *Hogue v. Davis*, 8 Gratt. 4. By agreement between themselves, however, accommodation indorsers may bear towards each other the relation of co-sureties. *Phillips v. Preston*, 5 How. 278; *Rhodes v. Sherrod*, 9 Ala. 63; *Edelen v. White*, 6 Bush, 408; *Clapp v. Rice*, 13 Gray, 403; *Dunn v. Wade*, 23 Mo. 207; *Paul v. Rider*, 58 N. H. 119; *Easterly v. Barber*, 66 N. Y. 433; *Kelley v. Few*, 18 Ohio, 441; *Ross v. Espy*, 66 Pa. 481. A contrary decision was reached in *Johnson v. Ramsey*, 43 N. J. L. 279.

In like manner the maker of a note may have contribution from an indorser if they were in fact by parol agreement co-sureties. *Drummond v. Yager*, 10 Ill. App. 380; *Dawson v. Pettway*, 4 Dev. & B. 396. — W.

A party acquires a right to contribution as soon as he pays more than his share, but not until then; (z) and conse-

* 37 quently * the statute of limitations does not begin to run until then. (a)

The law does not, generally at least, raise any such implied promise, or right to contribution, among wrong-doers, or where the transaction was unlawful. If money be recovered in an action grounded upon a tort it gives no ground for contribution. Still, however, contribution is sometimes enforced where he who is to be benefited by it did not know his act to be illegal, or where it was of doubtful character.¹

The implied promise and the right to contribution resting upon it, may be controlled by circumstances or evidence showing a different understanding between the parties;² thus, a surety cannot exact contribution of one who became co-surety at his request. (e)³

* 38 * The commercial law of France, and of continental Europe generally, admits the right to contribution, and regulates it much as the law of England and this country. (f)

(z) *Ex parte* Snowdon, 17 Ch. D. 44; Emery, 37 N. H. 567; Baxter v. Moore, Davies v. Humphreys, 6 M. & W. 153; 5 Leigh, 219. And see Thomas v. Cook, Lord Eldon, *Ex parte* Gifford, 6 Ves. 808; 8 B. & C. 728; Harris v. Warner, 13 Lytle v. Pope, 11 B. Mon. 297. Wend. 400; Robison v. Lyle, 10 Barb.

(a) Davies v. Humphreys, 6 M. & W. 153; Ponder v. Carter, 12 Ired. L. 242; 512; Keith v. Goodwin, 31 Vt. 268. *Contra* are Bagott v. Mullen, 32 Ind. 332; Presslar v. Stalworth, 37 Ala. 402; Wood v. Leland, 1 Met. 387; Singleton v. McKee v. Campbell, 27 Mich. 497; Burnett v. Millsaps, 59 Miss. 333. See also Solomon v. Reese, 34 Cal. 28; Apgar v. Hiler, 24 Townsend, 45 Mo. 379. N. J. L. 812; Norton v. Coons, 6 N. Y. 33.

(e) Turner v. Davies, 2 Esp. 478; Byers v. McClanahan, 6 G. & J. 256; Daniel v. Ballard, 2 Dana, 296; Taylor v. Savage, 12 Mass. 98, 103; Cutter v. Obligations, by Evans, 291.

¹ There is ordinarily no contribution or right of indemnity between wrong-doers. Merryweather v. Nixan, 8 T. R. 186; Colburn v. Patmore, 1 C. M. & R. 73; Chicago v. Robbins, 2 Black, 418; Selz v. Unna, 6 Wall. 327; Herr v. Barber, 2 Mackey (D. C.), 545; Nichols v. Nowling, 82 Ind. 488; Minnis v. Johnson, 1 Duv. 171; Percy v. Clary, 32 Md. 245; Churchill v. Holt, 131 Mass. 67; Coventry v. Barton, 17 Johns. 142; Miller v. Fenton, 11 Paige, 18; Cumpston v. Lambert, 18 Ohio, 81; Atkins v. Johnson, 43 Vt. 78. See also Sherner v. Spear, 92 N. C. 148. The rule is based on the principle that where parties are *in pari delicto*, the court will assist neither, and where this reason does not exist, the rule should not be applied. It is held, therefore, that where the party paying the full debt or damages was innocent in fact of any conscious wrong-doing, as where the act done by him was not in itself tortious, but only became so because of facts unknown to him, he may have contribution, or indemnity. Pearson v. Skelton, 1 M. & W. 504; Betts v. Gibbins, 2 A. & E. 57; Dugdale v. Lovering, L. R. 10 C. P. 196; Moore v. Appleton, 26 Ala. 633; Bailey v. Bussing, 28 Conn. 455; Farwell v. Becker, 129 Ill. 261; Percy v. Clary, 32 Md. 245; Jacobs v. Pollard, 10 Cush. 287; Gray v. Boston Gas Light Co., 114 Mass. 149; Simpson v. Mercer, 144 Mass. 413; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121; Acheson v. Miller, 2 Ohio St. 203; Armstrong Co. v. Clarion Co., 66 Pa. 218. — W.

² Houck v. Graham, 106 Ind. 195; Gourdin v. Trenholm, 25 S. C. 362. — W.

³ Sureties may by agreement terminate the right to contribution. Robertson v. Deatherage, 82 Ill. 511. — W.

The civil law wholly rejects it. (g) But by a decree of the Emperor Hadrian, a co-surety being sued might require the plaintiff to proceed against all liable jointly with him. He could not therefore be compelled to pay the whole unless through his own neglect. (h) (x)

(g) Dig. 46, 1, 39.

(h) Inst. 3, 21, 4. If the surety, on paying the debt, took the precaution to obtain a subrogation, he might exercise

the actions of the creditor against his co-sureties; 1 Pothier on Obligations, by Evans, 291; Cod. 8, 41, 11; Dig. 46, 1, 39.

(x) In relation to the rule considered *supra*, pp. 16, 17, that the nature of a joint contract often determines whether a breach thereof gives a separate right of

action, see especially *Baugham v. Louisville, &c. R. Co.*, 94 Ky. 150, 21 S. W. 757; *Southern Ry. Co. v. Marshall* (Ky.), 64 S. W. 418.

* 39

* CHAPTER III.

AGENTS.

SECT. I. — *Of Agency in General.*

THERE are two principles in relation to the important law of agency on one of which it is founded, while the other measures the responsibility of the principal for the acts of an agent. The first is, that the agent is but the instrument of the principal, who acts by him; and a principal assumes the relations, acquires the rights, and incurs the obligations which are the proper results of his acts, equally, whether he does these mediately, or directly; whether he uses an unconscious and material instrument, or a living and intelligent instrument: whether he signs his name by a pen which he takes from the table, or by a man whom he requests to sign his name for him. In either case, the thing done is the act of the principal; and, to a considerable extent, the law *identifies* the agent with the principal, although for some purposes, and in some respects, the agent incurs his own share of responsibility, or acquires his own rights, by the act which he performs as the act of another. The second principle is, that, as between the principal and a third party who has supposed

himself to deal with a principal by means of one purporting
 * 40 to be his agent, the principal is responsible * for and is bound by the acts of his agent on either of two grounds, which may co-exist, and may not. One of these is, that he has actually created this agency; the other is, that he has, by words or acts, fully authorized the third party to believe the person to be his agent. If he has justified the belief of the third party, that this person had from him sufficient authority to do, as his agent, that precise thing, it is no answer, on his part, to say that the agent had no authority, or one which did not reach so far, and that it was a mistake on the part of the third party. It may have been his mistake, but the question then is, whether the principal led this third party into the mistake. And in deciding this question, all the circumstances of the transaction, and espe-

cially the customary usages in relation to such transactions, come into consideration.

This principle applies to, and may indeed, be said to create, the distinction between a general agent and a particular agent. (a) A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. (x) A particular agent is one authorized to do one or two special things. But it is not always easy to find a precise rule which determines with certainty between these two kinds of agency. A manufacturing corporation may authorize A to purchase all their cotton, and he is then their general agent for this special purpose, or to purchase all the cotton they may *have occasion to *41 buy in New Orleans, and then he may be called their general agent for this special purpose in that place. Or to purchase the cargoes that shall come from such a plantation, or shall arrive in such a ship or ships, or five hundred bales of cotton, and then he should rather be regarded as their particular agent for this particular transaction.

But there is a material distinction between *authority*, and *instructions* uncommunicated, and not intended to be communi-

(a) See *Jacques v. Todd*, 3 Wend. 83 ; *Anderson v. Coonley*, 21 Wend. 279 ; *Savage v. Rix*, 9 N. H. 263 ; *Whitehead v. Tuckett*, 15 East, 400. *Agency* seems to imply either a contract between principal and agent, or the legal means by which the principal is made, without his direct participation, a *party* to a contract with a third person. If in the latter aspect the domestic contract between principal and agent be for the time excluded from the mind, the rule of law would be that the principal is in *all* cases bound for acts of the agent done *within the scope of his authority*, and *never* except for those. A par-

ticular agent's authority is measured by the express directions he has received ; in the case of a general agent the law permits usage to enlarge the liability of the principal, although there is no common scope of authority predicable of every general agent. "General agent" does not describe his powers, or determine the extent of his principal's liability, but it must be ascertained for what particular business he is a general agent. This done, the agency is brought within a class, and the qualities attach to it which the law, in the light of mercantile custom, affixes to the class at large.

(x) "General agent" has also a somewhat technical meaning in particular kinds of business, such as insurance, his power and authority being in large measure determined by the usages and course of dealing of his own and other companies, which are illustrated by the following decisions : *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883 ; *Wood v. American F. Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 29 N. Y. S. 250 ; *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 168 Penn. St. 1, 31 Atl. 875 ; *Continental Ins. Co. v. Ruckman*, 127 Ill. 121, 11 Am. St. Rep. 364 ; *Boren v. Manhattan L. Ins. Co.*, 99 Ga. 238, 25 S. E. 314 ; *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516, 51 N. W. 29 ; *Phoenix Ins. Co. v.*

Munger, 49 Kans. 178, 30 Pac. 120 ; *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323 ; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. 744 ; *Harding v. Norwich Union F. Ins. Soc.*, 10 So. Dak. 64, 71 N. W. 755.

When the general agent of a manufacturer has authority to sell and warrant the manufactured goods, such as machinery, he has also authority, after a sale, to waive such terms as a limit of time for testing and approving. *Peterson v. Walter A. Wood Machine Co.*, 97 Iowa, 148, 66 N. W. 96, 59 Am. St. Rep. 399 ; *Blaess v. Nichols & Shepard Co. (Iowa)*, 88 N. W. 829.

cated to the third party dealing with the agent. Such instructions qualify the liability of the principal neither in the case of a general agency nor of a particular agency. (aa)

The importance of the distinction between a general agent and a special or particular agent, lies in the rule, that if a particular agent exceed his authority, the principal is not bound; (b) *42 but if a general agent exceed his authority the *principal is bound, (c)¹ provided the agent acted within the ordinary and usual scope of the business he was authorized to transact and the party dealing with the agent did not know that he exceeded his authority. (d)²

Any specific authority must be strictly pursued; as, for example, one known to be an agent to settle claims, and with specific authority to this effect, cannot be supposed to have authority to commute them. (c)³ Nor can the agency be enlarged

(aa) The sound rule of law is set forth by *Parker, C. J.*, in *Hatch v. Taylor*, 10 N. H. 538: "It is, we think, apparent enough, that all which may be said to a special agent, about the mode in which his agency is to be executed, even if said at the time that the authority is conferred or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. . . . We deduce the general principle, that where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer." pp. 548, 549. See also *Trickett v. Tomlinson*, 13 C. B. (N. S.) 663; *Edmunds v. Bushell*, L. R. 1 (Q. B.) 97; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *Nat. Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Fatman v. Leet*, 41 Ind. 133; *Cruzan v. Smith*, 41 Ind. 288; *Banks v. Everest*, 35 Kan. 687; *Byrne v. Massasoit Packing Co.*, 137 Mass. 313; *Sails v. Miller*, 98 Mo. 478; *Howell v. Graff*, 25 Neb. 130; *Daylight Burner Co. v. Odlin*, 51 N. H. 56.

(b) *Fleming v. Hector*, 2 M. & W. 178; *Todd v. Emly*, 7 M. & W. 427; 8 id. 505; *East India Co. v. Hensley*, 1 Esp. 111; *Woodin v. Burford*, 2 Cr. & M. 391; *Jordan v. Norton*, 4 M. & W. 155; *Sykes v. Giles*, 5 M. & W. 645; *Waters v. Brogden*, 1 Y. & J. 457; *Daniel v. Adams*, Amb. 495. And see *Reaney v. Culbertson*, 21 Penn. St. 507.

(c) *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248, 273; *Nickson v. Brohan*, 10 Mod. 109; *Monk v. Clayton*, Molloy, B. 2, ch. 10, § 27.

(d) *Forman v. Walker*, 4 La. An. 409; *Campbell v. Hicks*, 4 H. & N. (Exch.) 851.

(c) *Kingston v. Kincaid*, 1 Wash. C. C. 454. That the authority given to the agent must in all cases be *strictly* pursued, see *Robertson v. Ketchum*, 11 Barb. 652, and *Cooley v. Willard*, 34 Ill. 69; *Chicago, &c. Land Co. v. Peck*, 112 Ill. 408; *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344. The exception, extending the principal's liability in favor of third parties, is only made where such third parties are ignorant that restrictions have been imposed upon the agent. See *Hayes v. Colby*, 65 N. H. 192; *Edwards v. Dooley*, 120 N. Y. 540. In *Attwood v. Mannings*, 7 B. & C. 283, *Bayley, J.*, said: "This was an action upon an acceptance importing to be by procuration, and,

¹ Thus where a general agent gave, without authority, a lease under seal in his principal's name, and received rent thereunder, its surrender to him is a good defence to the principal's action for further rent. *Amory v. Kannoisky*, 117 Mass. 351. See *Thurber v. Anderson*, 88 Ill. 167. — K.

² This is true although the agent was expressly forbidden to do the act in question. *Bell v. Offutt*, 10 Bush, 632; *Minter v. Pacific R. Co.*, 41 Mo. 503. — K.

³ Authority to sell gives no power to barter, *Hayes v. Colby*, 65 N. H. 192; nor, necessarily, to receive payment. *Kane v. Barstow*, 42 Kan. 465. Authority to receive

so as to hold any principal but the one employing the agent; thus the agent of a partnership is not the agent of the members severally. (ee) The * rule is, as to the public, that the * 43 authority of a general agent may be regarded by them as measured by the usual extent of his general employment. (f) The obvious reason for this is, that the public may not be deceived to its injury by previous acts which the agent was fully authorized to do. By such authority the principal does, as it were, proclaim and publicly declare him to be his agent, and must abide the responsibility of so doing. It would not be right for the principal to say to one who dealt with his general agent: "You knew that he was my general agent, for I authorized you and everybody else to believe this, but in this particular instance I had revoked or limited the authority, and the revocation or limitation shall affect

therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority." The authority in that case was in two powers of attorney, and the agent was held to have exceeded his authority. This case is confirmed by *Withington v. Herring*, 5 Bing. 442. Goods were shipped on board of plaintiff's ship, and by the bills of lading, which were indorsed to the defendants, were to be delivered on payment of freight. The bills were indorsed by the defendants to their factors, to whom the goods were delivered, and the freight charged. Assumpsit was brought against the defendants on the bankruptcy of the factors, but was not sustained on the ground that authority to receive the goods was given only on immediate payment of the freight. *Tobin v. Crawford*, 5 M. & W. 235. And see *Hogg v. Snaith*, 1 Taunt. 347; *Accey v. Fernie*, 7 M. & W. 157; *Esdaille v. La Nauze*, 1 Y. & Coll. 394; *Maanss v. Henderson*, 1 East, 335; *Murray v. East India Co.*, 5 B. & Ald. 204; *Gardner v. Baillie*, 6 T. R. 591; with which compare *Howard v. Baillie*, 2 H. Bl. 618; *Stainback v. Bank of Virginia*, 11 Gratt. 269; *Same v. Read*,

id. 281. The ruling of *Heath, J.*, in *Hicks v. Hankins*, 4 Esp. 114, seems to admit of question. For instance, where the authority of a general agent has been circumscribed, see *Odiorne v. Maxcy*, 13 Mass. 178; *White v. Westport Cotton Man. Co.*, 1 Pick. 215; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Wyman v. Hallowell & Augusta Bank*, 14 Mass. 58; *Kerns v. Piper*, 4 Watts, 222; *Terry v. Fargo*, 10 Johns. 114; *Reynolds v. Rowley*, 4 La. An. 409. Except the master of a vessel and an acceptor for honor, no agent can borrow money on his principal's account without special authority. *Hawtayne v. Bourne*, 7 M. & W. 595. See *post*, pp. * 81 & * 82.

(ee) *Johnston v. Brown*, 18 La. An. 330.

(f) *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400. But if injury results to one man from the omission or neglect of an agent of another, the principal is liable. And when the defendants sent their agent to employ the plaintiff, who was a physician, to visit a boy who had been injured while in their service, directing the agent to tell the plaintiff that they would pay him for his first visit, and the agent neglected so to do and employed the plaintiff generally to attend the boy so long as he might need medical aid, and the plaintiff attended upon the boy on the credit of defendants, the defendants were held liable to the plaintiff for his services in attending the boy. *Barber v. Briton & Hall*, 26 Vt. 112.

payments gives no power to receive notes in payment. *Scully v. Dodge*, 40 Kan. 395. Nor does authority to draw bills of exchange on time or sight include the drawing of post-dated bills. *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344. Nor does authority to buy include buying on credit. *Wheeler v. McGuire*, 86 Ala. 398. For other illustrations see cases cited in note (e) *supra*, and Section iii. *infra*. — W.

you although you did not know it." But a principal may well say to one who dealt with an agent for a particular purpose, "it was your business first to ascertain that he was my agent, and then to ascertain for yourself the character and extent of his agency." (*f*)

We think the distinction between a general agency and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far, and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may indeed be said, that every agency is, under one aspect, special, and under another, general. No agent has authority

to be in all respects and for all purposes an "alter ego" of
 * 44 his principal, binding him by whatever the * agent may do in reference to any subject whatever; and therefore the agency must be special so far as it is limited by place, or time, or the extent or character of the work to be done. On the other hand every agency must be so far general, that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. This distinction (*g*) and the rules founded upon it are really subordinate to the cardinal principle that a principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority.

Where the agency is implied from general employment, it may survive this employment, and will be still implied in favor of those who knew this general employment, but have not had notice of the cessation of the employment, and cannot be supposed to have knowledge thereof. (*h*) Hence the common and very proper practice of giving notice by public advertisement when such an agency is revoked.

In order to judge correctly of the extent of an agent's authority, the distinction must be noticed between those acts which are within his *authority*, and those which are only within an *appearance of authority*, for which the principal is not responsible; for a principal is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. An agent's authority is that which is given by the declared terms

(*f*) *Barry v. Anderson*, 22 Ind. 36; quite insufficient to solve a great variety of cases. It is unprofitable to dwell upon *Davenport v. Peoria Ins. Co.*, 17 Ia. 276; and cases notes (*e*) and 3, *supra*. that distinction."

(*g*) In *Mechanics Bank v. N. Y. & C. R. Co.*, 3 Kernan, 632, *Comstock, J.*, said of this matter: "The distinction itself is highly unsatisfactory, and will be found
 (*h*) ——— *v. Harrison*, 12 Mod. 346; *Monk v. Clayton*, Molloy, B. 2, ch. 10, § 27, cited *per curiam*, 10 Mod. 110; *Emmett v. Norton*, 8 C. & P. 506.

of his appointment, notwithstanding secret instructions; or that with which he is clothed by the character in which he is held out to the world, although not within the words of his commission. Whatever is done under an authority * thus * 45 manifested, is actually within the authority, and the principal is bound for that reason; for he is bound equally by the authority which he actually gives, and by that which, by his own acts, he appears to give. But it is obvious that an agent may clothe his act with all the *indicia* of authority, and yet the act itself may not be within either the real or apparent authority. The appearance of the authority is one thing; and for that the principal is responsible only so far as he has caused that appearance. The appearance of the act is another; and for that it seems the agent alone is responsible. It is a fundamental proposition, that one man can be bound only by the *authorized* acts of another. He cannot be charged because another holds a commission from him, and falsely asserts that his acts are within it. (*i*) This distinction has been well illustrated by recent adjudications. Thus a master of a ship is the general agent of the owners to perform all things relating to the usual employment of his ship and, among other things, to sign bills of lading for goods *put on board*, and acknowledge the nature, quality, and condition of the goods. (*x*) But if he signs a bill of lading for goods which have never been shipped, he exceeds his authority; and although the act, judged by its appearance and the representation of the agent, is strictly within the authority, yet the principal is not bound. (*k*) So, if the master signs a bill of lading for a greater quantity of goods than those on board, the same principle applies. (*l*) And

(*i*) Per *Comstock, J.*, in *Mechanics Bank v. N. Y., & C. R. Co.*, 3 Kernan, 599.

(*k*) *Grant v. Norway*, 10 C. B. 665. See *post*, p. * 46, note 1.

(*l*) *Hubbersty v. Ward*, 8 Exch. 330.

(*x*) The captain of a ship is merely an agent, as to the cargo, to receive the goods for carriage; he is not an agent to accept them or their delivery under the contract by which the shippers purchased them. *Vigers Bros. v. Sanderson Bros.*, [1901] 1 K. B. 608, 612. He cannot materially alter a charter-party: *Balcarres Brook S. S. Co. v. Grace*, 75 Fed. 1017; *The Edward Blake*, 92 Fed. 202; or make any contract for ship or cargo that are not strictly necessary. *The Clan McLeod*, 38 Fed. 447; *The Albany*, 44 Fed. 431, 437; *Randall v. Brodhead*, 70 N. Y. S. 43. He is the judge as to all such matters as the weight to be carried, and the stowage of the cargo. *The Titania*, 19 Fed. 101;

The Boskenna, 22 Fed. 662; *The Keystone*, 31 Fed. 412; *Manchisa v. Card*, 39 Fed. 492; *The Giles Loring*, 48 Fed. 463; *The Minnie E. Kelton*, 109 Fed. 164; *The Centurion*, 68 Fed. 382; *The Thames*, 61 Fed. 1014. See *Knott v. Botany Mills*, 179 U. S. 69; 21 S. Ct. 30, 45 L. Ed. 90.

In case of real necessity, he becomes agent for the insurer as well as for the charterer and owners. *Harrison v. Fort-lage*, 161 U. S. 57, 65, 16 S. Ct. 488, 40 L. Ed. 616; *The Gratitude* (3 C. Rob. 240), 24 English Ruling Cas. 277, 318. He is personally liable when his negligence causes loss to ship or cargo. *Union Ins. Co. v. Dexter*, 52 Fed. 152.

where the servant of a wharfinger fraudulently signed a receipt, purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, no such wheat having in fact been delivered, and thereby wilfully induced one C to pay the price thereof to the pretended vendor; it was held that the wharfinger was not liable, the servant having authority only to give receipts for goods which had in fact been delivered at the wharf. (*m*) Again, where a railroad corporation appointed an agent to issue certificates for stock, upon a transfer on the company's books by a previous owner, and a surrender of that owner's certificate;

* 46 and the agent fraudulently issued *certificates for his own benefit, without a compliance with either of the above conditions, his acts were held to be beyond the scope of his authority, and his principals not bound. (*n*) And where an agent authorized in writing to purchase goods to a certain amount, had exceeded the amount, but assured a seller that he had not, and the seller sold the goods on this assurance, it was held by a majority of the court (*Wilde, J.*, dissenting), that the principal was not held. (*o*) We have some doubts of the last decision; and, certainly, care must be taken not to extend this principle too far. Thus, an agent may be authorized to give notes for his principal in order to raise money to be used in the business of the latter. A third person may inspect the power, advance the money in good faith, and the agent appropriate it to his own use; and this the agent may have intended at the time. In such a case, the principal would be responsible, not because the act of the agent *appeared* to be within the authority, but because the power actually included the transaction. A power given to an agent to borrow money, upon notes or otherwise, implies that the money may be paid to him, and so the whole transaction is strictly and literally authorized. The misappropriation of the proceeds by the agent is a mere breach of trust, relating to money in his hands, and upon the principles of trust, his intention to misappropriate would not affect an innocent party. But suppose the power to give the note is on its face conditional. It then has no existence until the condition has been actually fulfilled. And if one advances money to the agent on his declaration that the conditions have been fulfilled, and it turns out that the conditions had not occurred on which the exercise of the power depended, then he was trusting to the representation of

(*m*) *Coleman v. Riches*, 16 C. B. 104.

(*n*) *Mechanics Bank v. N. Y., &c. R. Co.*, 3 Kernan, 599.

(*o*) *Mussey v. Beecher*, 3 Cush. 511.

the *agent*, and must look to *him* alone. As the principal never authorized the transaction at all, he is bound neither by the contract nor by the representation. (*p*)¹

It has been held that "a general and special agent to transact *all manner of business," though created by a *47 power of attorney under seal, does not necessarily include therein authority to sell. Such a power is regarded as a vague

(*p*) Per *Comstock*, J., in *Mechanics* See *North River Bank v. Aymar*, 3 Hill, Bank v. N. Y., &c. R. Co., 3 Kernan, 599. 262.

¹ In one class of cases, the rule as stated in the text is held, in some jurisdictions at least, to be subject to a qualification. This is well expressed by the New York Court of Appeals, in giving judgment in a recent case, as follows: "It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." *Bank of Batavia v. New York, &c. R. R. Co.*, 106 N. Y. 195, 197.

In this case it was held that a carrier was liable upon a bill of lading issued by its agent and transferred for value by the shipper to the plaintiff, though the goods described in the bill of lading had never been in fact received, and though the agent had authority only to issue bills of lading upon receipt of goods.

Cases of this nature afford perhaps the most frequent illustration of the rule under consideration. In accordance with the case just cited it has been held that the carrier is liable on such a bill of lading in *Wichita Savings Bank v. Atchison, &c. R. R. Co.*, 20 Kan. 519; *Sioux City, &c. R. R. Co. v. First Nat. Bank*, 10 Neb. 556; *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; *Brooke v. New York, &c. R. R. Co.*, 108 Pa. 529. On the other hand it has been held that the carrier is not liable even to a holder for value of such a bill of lading, in *Grant v. Norway*, 10 C. B. 665; *The Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. 7; *The Loon*, 7 Blatch. 244; *Robinson v. Memphis, &c. R. R. Co.*, 9 Fed. Rep. 129; *Hunt v. Mississippi Central R. R. Co.*, 29 La. An. 446; *Baltimore, &c. R. R. Co. v. Wilkens*, 44 Md. 11; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington, &c. R. R. Co.*, 93 N. C. 42; *Erb v. Great Western Ry. Co.*, 5 Can. Sup. Ct. 179. See also *Nichols v. DeWolf*, 1 R. I. 277.

But the rule is applicable to many other cases. It can only be on this principle that a bank is held liable to the holder for value of a check certified by its cashier to be good, though in fact the drawer had no funds and the cashier no authority to certify checks under such circumstances. *Merchants' Bank v. State Bank*, 10 Wall. 604; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; *Hill v. Nation Trust Co.*, 108 Pa. St. 1.

So a corporation has been held liable for certificates of stock improperly issued by officers authorized to issue certificates regularly. *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Allen v. South Boston Railroad*, 150 Mass. 200. (*x*)

In *Mussey v. Beecher*, stated in the text, it seems that a different decision would have been reached in States where what may be called the New York rule is consistently applied. See *Palmer v. Cheney*, 35 Ia. 281. Likewise in *Lowell v. Winchester Bank*, 8 Allen, 109, where a town officer duly authorized to borrow a certain sum of money, after having done so, fraudulently borrowed the sum again, representing that he had not done so before, and it was held that the town was not liable.

In *Montaignac v. Shitta*, 15 App. Cas. 357, it was held that where an agent had authority to borrow on exceptional terms under circumstances of emergency, the lender was not bound to inquire whether in the particular case the emergency had arisen. See also *Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122, *Martin v. Niagara, &c. Co.* 122 N. Y. 165, 174. — W.

(*x*) See *Hill v. Jewett Pub. Co.*, 154 Mass. 172.

and indefinite instrument, under which a prudent man would not accept a title to property. (*q*)

For the power of the agent to submit questions in which his principal is interested, to arbitration, see the section on Arbitration in the second volume.

SECTION II.

IN WHAT MANNER AUTHORITY MAY BE GIVEN TO AN AGENT.

The facts being undisputed, the question whether the alleged agent had sufficient authority, is a question of law. (*qq*) An agent, generally, may be appointed by parol, and so authorized to do anything which does not require him to execute a deed for his principal. (*r*) The rule of the common law, that an agent cannot affix a seal for his principal, unless his authority to do this is under seal, is still generally recognized as in force. (*rr*) He may be authorized by parol to make and sign contracts in writing, and it seems to be now settled that he may be authorized without writing, to make even those contracts which are not binding upon his principal unless in writing signed by him. (*s*) And even a parol ratification is equivalent to an original authority. (*t*)

An authority is presumed or raised by implication of law, on the ground that the principal has justified the belief that he has given such authority, in cases where he has employed a person in his regular employment; (*u*)¹ as where one sends goods

(*q*) *Hodge v. Coombs*, 1 Black, 192.

(*qq*) *Gulick v. Grover*, 4 Vroom, 463.

(*r*) 2 Kent, Com. 612. *Manhattan Ins. Co. v. La Pert*, 52 Tex. 504. The receipt of an authorized agent is the receipt of the principal. *Mackersy v. Ramsays*, 9 Cl. & F. 818, 850. — A tender made to an authorized agent is as if made to his principal. *Moffat v. Parsons*, 5 Taunt. 307.

(*rr*) *Rowe v. Ware*, 30 Ga. 278; *Echols v. Cheney*, 28 Cal. 157; *Elliott v. Stocks*, 67 Ala. 336; *Watson v. Sherman*, 84 Ill. 263; *Adams v. Powers*, 52 Miss. 828; *Shuetze v. Bailey*, 40 Mo. 69; *Harshaw v. McKesson*, 65 N. C. 688. And in *Banorjee v. Hovey*, 5 Mass. 11, it was held (*Sewall*, J., dissenting), that a sealed instrument executed in the name of the principal by an agent, not authorized

under seal, could not be admitted in evidence in an action of *assumpsit* against the principal. But see *contra*, *Cooper v. Rankin*, 5 Binn. 613, and page * 52 *infra*, notes (*m*), (*o*).

(*s*) *Shaw v. Nudd*, 8 Pick. 9; *Ewing v. Tees*, 1 Binn. 450; *Clinan v. Cooke*, 1 Sch. & L. 22; *Coles v. Trecothick*, 9 Ves. 234, 250. — But by an express provision of the Statute of Frauds, an agent, to grant or assign a term for more than three years, or an estate of freehold, must be authorized thereto in writing. 29 Car. II. c. 3, § 3.

(*t*) *Maclean v. Dunn*, 4 Bing. 722.

(*u*) *Dows v. Greene*, 16 Barb. 72; *Lyell v. Sanbourn*, 2 Mich. 109; *Thompson v. Bell*, 10 Exch. 10.

¹ But not if the former employment was without the principal's knowledge, *Cobb v. Hall*, 49 Ia. 366; nor if a mere temporary employment, nearly a year before, *Green*

* to an auctioneer or to a common repository room for * 48 sale, the bailee has an implied authority to sell. (v) And such presumptions frequently arise in the case of a wife; (w) or of a domestic servant; (x) or of a son who has been permitted for a considerable time to transact a particular business for the father, (y) as to sign bills, etc.; or where one has been repeatedly employed to sign policies of insurance for another. (z) So the acceptance of the agency by the agent may be inferred from his acting under it; and this has been held even where he writes to his principal refusing the agency. (zz)

It must be remembered, however, that an agent employed for a *special* purpose, derives from this no *general* authority from his principal. (a)¹ Where the belief of the authority of an agent arises only from previous action on his part as an agent, the persons so treating with him must, on their own responsibility,

(v) Lord *Ellenborough*, *Pickering v. Busk*, 15 East, 38.

(w) *Prestwick v. Marshall*, 7 Bing. 565; *Huckman v. Fernie*, 3 M. & W. 505; *Att'y-Gen. v. Riddle*, 2 Cr. & J. 493; *Plimmer v. Sells*, 3 Nev. & M. 422. — After separation, the wife is still her husband's agent for the procurement of such things as are reasonable and necessary for herself. *Emmett v. Norton*, 8 C. & P. 506. So where the person cohabited with is only a mistress, and known to be in fact only a mistress, if she is allowed to pass ostensibly as wife. *Ryan v. Sams*, 12 Q. B. 460.

(x) A master is not responsible for a contract entered into by a servant to whom he had always given cash for making purchases. *Rusby v. Scarlett*, 5 Esp. 75. So with *any* particular agent who obtains on credit goods which the principal gave him money to purchase. Lord *Abinger*, C. B., *Fleming v. Hector*, 2 M. & W. 181.

(y) *Watkins v. Vince*, 2 Stark. 368; *Weaver v. Ogletree*, 39 Ga. 586; *Thurber v. Anderson*, 88 Ill. 167; *Matteson v. Blackmer*, 46 Mich. 393.

(z) *Brockelbank v. Snugrue*, 5 C. & P. 21; *Haughton v. Ewbank*, 4 Camp. 88, where it was held sufficient proof of an

agent's authority to subscribe a policy of insurance for an insurer, that the insurer was in the habit of paying losses upon policies so subscribed by him, without producing the power of attorney under which the agent testified that he acted. — An authority to draw is not an authority to indorse; *Robinson v. Yarrow*, 7 Taunt. 455; yet the fact that a confidential clerk had been accustomed to draw, taken in connection with the fact that his master had in one instance authorized him to indorse, and on two other occasions had received money obtained by his indorsement, is evidence from which a jury may infer a general authority to indorse. *Prescott v. Flynn*, 9 Bing. 19. As to what will amount to proof of an implied authority to a clerk in a mercantile house to sign shipping papers in the names of his principals, see *Dows v. Greene*, 32 Barb. 490.

(zz) *George v. Sandel*, 18 La. An. 535.

(a) *Reynell v. Lewis*, 15 M. & W. 517; *Dawson v. Morrison*, 16 L. J. C. P. 240; *Cox v. Midland Railway Co.*, 3 Exch. 268; *Rusby v. Scarlett*, 5 Esp. 75; *Burnes v. Pennel*, 2 H. L. Cas. 519; *Kaye v. Brett*, 5 Exch. 269; *Thatcher v. Bank of New York*, 5 Sandf. 121.

v. Hinkley, 52 Ia. 633; nor to sell from the fact that a purchasing clerk was employed fifteen months before to make a single sale. *Cupples v. Whelan*, 61 Mo. 583. See *Wilcox v. Chicago, & C. R. Co.*, 24 Minn. 269; *Whelan v. Reilly*, 61 Mo. 565; *Abrahams v. Weiller*, 87 Ill. 179. — K.

¹ Thus a horse-car conductor cannot agree to give a free passage, *Wakefield v. So. Boston R. Co.*, 117 Mass. 544; nor an engineer contract for a railroad, *Gardner v. Boston, & C. R. Co.*, 70 Me. 181; nor a passenger agent make freight contracts, *Taylor v. Chicago, & C. R. Co.*, 74 Ill. 86. See *Reed v. Ashburnham R. Co.*, 120 Mass. 43. — K.

ascertain the nature and extent of his previous employment. (b) This may be such as to estop the principal from * denying his authority in the particular transaction; but if not, then they have no remedy, unless against the agent himself who misled them. (c)

SECTION III.

SUBSEQUENT CONFIRMATION.

As agency may be presumed from repeated acts of the agent, adopted and confirmed by the principal previously to the contract in which the question is raised, (d) so agency may be confirmed and established by a subsequent ratification; the common law having adopted the civil-law maxim, "*omnis ratihabitio retro trahitur et mandato æquiparatur.*" (e) The rule may be stated thus: where any one contracts *as agent*,—but not unless he contracts as agent, (f)—without naming a principal, his acts inure to the benefit of the party, although at the time uncertain or unknown, for whom it shall turn out that he intended to act, provided the party thus entitled to be principal ratify the * 50 contract. (g) (x) And, on the other * hand, if the principal

(b) *Schimmelpennich v. Bayard*, 1 Pet. 264; *Parsons v. Armor*, 3 id. 413; *Blane v. Prouditt*, 3 Call. 207; *Kilgour v. Finlyson*, 1 H. Bl. 155.

(c) *Pourie v. Fraser*, 2 Bay. 269.

(d) *Townsend v. Inglis*, Holt, 278; *Haughton v. Ewbank*, 4 Camp. 88; *Barber v. Ginnell*, 3 Esp. 60. There the apparent acceptor of a bill of exchange, setting up as a defence that his signature had been forged, it was held a good answer that the defendant had paid other bills of the drawer under similar circumstances. And see *Brigham v. Peters*, 1 Gray, 147.

(e) 18 Vin. Abr. *Ratihabitio*; *Lucena v. Craufurd*, 1 Taunt. 325; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 158; *Fleckner v. United States Bank*, 8 Wheat. 63; *Bell v. Cunningham*, 3 Pet. 81; *Hooe v. Oxley*, 1 Wash. (Va.) 19; *Moss v. Rosie Lead Mining Co.*, 5 Hill (N. Y.), 137; *Rogers v. Kneeland*, 10 Wend. 218; *Marsh v. Keating*, 1 Bing. N. C. 198; *Bigelow v. Dennison*, 23 Vt. 565. — If any stranger

in the name of the mortgagor or his heir (without his consent or privity), tender the money, and the mortgagee accepteth it [which, however, he is not bound to do], this is a good satisfaction, and the mortgagor or his heir, agreeing thereunto, may re-enter into the land. Co. Lit. 206 b.

(f) *Collins v. Suau*, 7 Rob. 623.

(g) *Wilson v. Tummam*, 6 Man. & G. 242. "*Ratum quis habere non potest quod ipsius nomine non est gestum.*" See also *Saunderson v. Griffiths*, 5 B. & C. 909; and *Routh v. Thompson*, 13 East, 274; *Foster v. Bates*, 12 M. & W. 226; *Hull v. Pickersgill*, 1 Br. & B. 282; *Williams v. North China Ins. Co.*, 1 C. P. D. 757; *Francis v. Kerker*, 85 Ill. 190. This doctrine has frequent application in cases of marine insurance. See *Hagedorn v. Oliverson*, 2 M. & Sel. 485; *Finney v. Fairhaven Ins. Co.*, 5 Met. 192. — A notice to quit, given by an unauthorized agent, cannot be made good by an adoption of it by the principal after the proper time for

(x) A real principal is bound by his ratification, whether it be for his detriment

or advantage, and whether founded on a tort or on a contract, with the same effect

accept, receive, and hold the proceeds or beneficial results of such a contract, he will be estopped from *denying an * 51

giving it, the agent having acted in his own name in giving the notice, nor it seems, if he acted in the name of the principal. *Doe v. Goldwin*, 2 Q. B. 143; *Right v. Cuthell*, 5 East, 491. — In *Bird v. Brown*, 4 Exch. 786, where a very important distinction was taken by the Court of Exchequer, *Pollock*, C. B., delivering the judgment, said: "The doctrine '*omnis ratihabitio retrotrahitur et mandato æquiparatur*,' is one intelligible in principle, and easy in its application when applied to cases of contract." If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; and if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue, that he would have had against A. B. In cases of tort there is more difficulty. If A. B., professing to act by my authority, does that which *prima facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the

doctrine of ratification even in cases of tort — the party ratifying becomes as it were a trespasser by estoppel — he cannot complain that he is deemed to have authorized that which he admits himself to have authorized. The authorities, however, go much further, and show that in some cases where an act, which if unauthorized would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, there a subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under circumstances, when the ratifying party might have himself lawfully done the act which he ratifies. Lord *Audley's* case, (Cro. E. 561; Moore, 457, pl. 630; Poph. 108, pl. 2; cited with approbation by Lord *Coke* in *Margaret Podger's* case, 9 Rep. 106 a), appears to us to govern the present. There the entry to be good must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine; by the ratification it became the act of the party in whose name it was made, but that was not until after the five years — he could not be deemed to have made an entry till he ratified the previous entry — and he did not ratify until it was too late to do so. In the present case the stoppage could only be made during the *transitus*; during that period, the defendants, without au-

and all the consequences that would follow if the same act were done by his previous authority. *Wilson v. Tumman*, 6 Man. & G. 236, 242; *Brook v. Hook*, L. R. 6 Ex. 89, 96; *Clews v. Jamieson*, 182 U. S. 461; 21 S. Ct. 845, 45 L. Ed. 1183. An undisclosed principal cannot sue upon the agent's sealed contract. *Equitable Life Ass. Society v. Smith*, 25 Ill. App. 471. A person for whose benefit an unsealed contract is made, though he is not named therein, may usually sue thereon as an undisclosed principal or beneficiary. *Woodland v. Newhall*, 31 Fed. 434; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807; *State v. Laclede Gaslight Co.*, 102 Mo. 472, 15 S. W. 383; *Linneman v. Moross*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528, and note. But when a contract

is made and the parties to it are ascertained, one who has made the contract on his own behalf, and without the authority of any one else, cannot be always treated as an agent, so as to enable a third person, by ratification, to make himself liable to sue or to be sued on that contract. *Keighley, Maxsted & Co. v. Durant*, [1901] A. C. 240. See *Livingstone v. Ross*, id. 327. If the supposed principal does not exist, or is under legal disability to contract, there is said to be no rule of law which makes the agent himself the contracting party. *Hollman v. Pullin*, 1 C. & E. 254. Recovery of judgment against one who in making a purchase was another's agent, though not known so to be, is not an election precluding a subsequent suit against the principal. *Rommel v. Townsend*, 83 Hun, 353.

original authority, or a ratification. *(h)*¹ And if a party does not disavow the acts of his agent as soon as he can after they come to his knowledge, he makes these acts his own.² *(c)* Nor

thority from Illins, made the stoppage. After the *transitus* was ended, but not before, Illins ratified what the defendants had done; from that time the stoppage was the act of Illins. But it was then too late for him to stop; the goods had already become the property of the plaintiffs, free from all right of stoppage. We are therefore of opinion that there must be judgment for the plaintiffs." — See also *Chapman v. Lee*, 47 Ala. 143; *Day v. McAllister*, 15 Gray, 433; *Armitage v. Widoe*, 36 Mich. 124; *Workman v. Wright*, 33 Ohio St. 405. It seems now remarkable that it was at one time strenuously contended that the doctrine of ratification reached less broadly in *contract* than in *tort*; and that although a principal, unknown at the time, could afterwards adopt the act of the agent in the latter case, he could not in the former. See *Hagedorn v. Oliverson*, 2 M. & Sel. 485, and per *Parke, J.*, in *Hull v. Pickersgill*, 1 Br. & B. 287.

(h) *Holt, C. J.*, in *Bolton v. Hillersden*, 1 Ld. Raym. 224, 225; *Thorold v. Smith*, 11 Mod. 72; *Byrne v. Doughty*, 13 Ga. 46; *Johnson v. Smith*, 21 Conn. 627; *Perkins v. Boothby*, 71 Me. 91. The principal,

when he has once affirmed a contract made by the agent without authority, and even fraudulently, cannot afterwards disaffirm it; bringing *assumpsit* against the third party is an affirmation. *Smith v. Hodson*, 4 T. R. 211, 217. Yet if the party, alleged to be principal, after denying that the agent had authority from him to purchase goods, receive them from the agent in payment of a debt due from the latter, the original seller (whatever other remedy he may have) cannot hold such supposed principal liable as having ratified the purchase made by the agent. *Hastings v. Bangor House*, 18 Me. 436. — The ratification of an act of an agent, in order to bind the principal, must be with a full knowledge of all the material facts. *Freeman v. Rosher*, 13 Q. B. 780; *Owings v. Hull*, 9 Pet. 607; *Penn & Co. v. Dandridge*, 8 G. & J. 248, 323; *Hays v. Stone*, 7 Hill (N. Y.), 128; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. — Conduct which would be sufficient to charge an *individual* as principal, may not amount to ratification in the case of a State. *Delafield v. Illinois*, 26 Wend. 192; *Warden v. Eichbaum*, 3 Grant, 42; *Drennen v. Walker*, 21 Ark. 539.

¹ And in general conduct may show a ratification. *Chamberlain v. Collinson*, 45 Ia. 429; *Gibson v. Norway Bank*, 69 Me. 579; *Blakely v. Graham*, 111 Mass. 8; *Monitor Ins. Co. v. Buffum*, 115 Mass. 343; *Bearce v. Bowker*, 115 Mass. 129; *Harrod v. McDaniels*, 126 Mass. 413; *Duncan v. Hartman*, 143 Pa. 595. — W.

² This principle is generally admitted, though not always expressed in the same way. Frequently it is said that it is necessary for a principal to disavow the unauthorized acts of an agent or one purporting to act as such, "immediately," "promptly," or "as soon as he can" after receiving notice. *Ward v. Williams*, 26 Ill. 447; *Kehlor v. Kemble*, 26 La. An. 713; *Foster v. Rockwell*, 104 Mass. 167; *Crane v. Bedwell*, 25 Miss. 507; *Kelsey v. National Bank*, 69 Pa. 426; *Hart v. Dixon* 5, Lea, 336.

But more generally it is said that such a disavowal need only be made within a reasonable time after the principal has acquired full knowledge of the facts. *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Mobile, &c. Ry. Co. v. Jay*, 65 Ala. 113; *Breed v. Central City Bank*, 6 Col. 235; *Bray v. Gunn*, 53 Ga. 144; *Alexander v. Jones*, 64 Ia. 207; *Clay v. Spratt*, 7 Bush, 334; *Lafitte v. Godechaux*, 35 La. An. 1161; *Johnstone v. Wingate*, 29 Me. 404; *Maddux v. Bevan*, 39 Md. 485; *Heyn v. O'Hagen*, 60 Mich. 157; *Peck v. Ritchey*, 66 Mo. 114; *Wright v. Boynton*, 37 N. H. 9; *Hamlin v. Sears*, 82 N. Y. 327; *Saveland v. Green*, 40 Wis. 431.

The duty resting on a principal to disavow the acts of one purporting to act as his agent without authority, seems generally regarded as the same in extent as his duty to disavow such acts of his agent as are beyond the scope of the agent's authority. See cases *supra*. But in *Ward v. Williams*, 26 Ill. 447, 451, *Caton, C. J.*, said: "Where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done

(c) So assent of the stockholders of a corporation to have its directors act as its selling agents may be implied from long acquiescence. *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 100, 44 N. E. 112.

will the delay of a third party to assert his rights against the principal for the acts of the agent, discharge the former from his liability, if the relative position of principal and agent have not in the mean time been altered. But the failure of the principal to notify the agent of his dissent, does not, as between them, ratify the act; (*k*) for the agent knew his own want of authority. An adoption of the agency in part adopts it in the whole, because a principal is not permitted to accept and confirm so much of a contract made by one *purporting to *52 be his agent, as he shall think beneficial to himself, and reject the remainder. (*l*)(*x*)

(*k*) *Lewin v. Dille*, 17 Mo. 64.

(*l*) *Wilson v. Poulter*, 2 Stra. 859; *Smith v. Hodson*, 4 T. R. 211; *Hovil v. Pack*, 7 East, 164; *Brewer v. Sparrow*, 7 B. & C. 310; *Wright v. Crookes*, 1 Scott, N. R. 685; *Hovey v. Blanchard*, 13 N. H. 145; *Farmers' Loan Co. v. Walworth*, 1 Comst. 447; *N. E. Marine Ins. Co. v. De Wolfe*, 8 Pick. 56; *Culver v. Ashley*, 19 id. 300; *Bigelow v. Denison*, 23 Vt. 565; *Hodnet v. Tatum*, 9 Geo. 70; *Elam v. Carruth*, 2 La. An.

375; *Mercier v. Copelan*, 73 Ga. 656; *Henderson v. Cummings*, 44 Ill. 325; *Krider v. Western College*, 31 Ia. 547; *Eberts v. Selover*, 44 Mich. 519; *Crans v. Hunter*, 28 N. Y. 389; *Hyatt v. Clark*, 118 N. Y. 563; *Rudasill v. Falls*, 92 N. C. 222; *Tasker v. Kenton Ins. Co.*, 59 N. H. 438; *Mundorff v. Wickersham*, 63 Pa. 87; *Seago v. Martin*, 6 Heisk. 380; *McClure v. Briggs*, 58 Vt. 82; *Ruffner v. Hewett*, 7 W. Va. 585.

in his name by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification." See also *DeLand v. Dixon Nat. Bank*, 111 Ill. 333. Probably the more guarded expression of *Colt, J.*, in *Foster v. Rockwell*, 104 Mass. 167, 172, is more accurate. "Implied ratification from mere silence more readily arises when the act is in misuse or excess of authority given."—W.

(*x*) The act to be ratified must be one which the principal has the power and the legal capacity to do. *Borderre v. Den*, 106 Cal. 594, 39 Pac. 946; *Ashbury, & Co. v. Riché*, L. R. 7 H. L. 653, 2 English Ruling Cas. 304, and notes. The ratification, if made advisedly, relates back to the beginning of the transaction, and cannot be revoked. *Russ v. Telfener*, 57 Fed. 973; *Sanders v. Peck*, 87 Fed. 61, 30 C. C. A. 530; *Brown v. Rouse*, 104 Cal. 672; *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559; *Singer Manuf. Co. v. Flynn*, 63 Minn. 475, 65 N. W. 923; *Mitchell v. Minnesota Fire Ass'n*, 48 Minn. 278, 51 N. W. 608. It cannot be partial. *Stanard M. Co. v. Flower*, 46 La. Ann. 315; *Esterly H. M. Co. v. Froley*, 34 Neb. 110; *Walker v. Haggerty*, 30 Neb. 120. If an unauthorized act is ratified, the principal is liable for the agent's negligence in doing the act. *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177; see *Monnahan v. Judd*, 165 Mass. 93, 42 N. E. 555. In England it is held that the principal's

ratification makes the agent's contract effective, though subsequent to the other party's repudiation of the contract. *Bolton v. Lambert*, 41 Ch. D. 295. But the contrary view is supported by the weight of American authority. *Gregg v. Wooliscroft*, 52 Ill. App. 214; *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091. The ratification need not be pleaded, but may be proved as part of the agreement. *Long v. Osborn*, 91 Iowa, 160, 59 N. W. Rep. 14.

Suit brought by the principal, founded upon his agent's unauthorized act, amounts to a ratification. *Rob v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52. The principal's silence may amount to a ratification. See *Lorie v. North Chicago City Ry. Co.*, 32 Fed. 270; *Long v. Thayer*, 150 U. S. 520, 14 S. Ct. 189, 37 L. Ed. 1167; *Wheeler v. McGuire* (86 Ala. 398), 2 L. R. A. 808, note; *Deane v. Gray Co. (Cal.)*, 42 Pac. 443. The retention of the proceeds of a sale is not necessarily a ratification. *Schutz v. Jordan*, 32 Fed. 55; *Wheeler v.*

A ratification is too late if it defeats the intervening rights of a third party. (*U*)¹

Where the party who undertakes to act as agent has affixed a seal to an instrument which did not need a seal, a *parol* ratification will make the instrument obligatory upon the principal as a simple contract. (*m*) And where one acting as agent has, without authority, entered into a contract in writing required by the Statute of Frauds to be in writing, the principal is bound by an oral ratification. (*n*)² But it has been held, that a *parol* ratification cannot make that the *deed* of the principal which originally did not bind him from the agent's want of an authority under seal. (*o*)³

It may be stated as a general rule, that no act operates a ratification, unless, with a full knowledge of the circumstances, it was intended so to operate, or unless it was such an act as justifies third parties who are interested in the question, in believing that it was a ratification. (*oo*) And the ignorance of the principal,

(*U*) Stoddard's case, 4 Court of Claims, 511. See 25 Am. L. Rev. 74.

(*m*) Hunter v. Parker, 7 M. & W. 322; Despatch Line v. Bellamy Manuf. Co., 12 N. H. 205; Worrall v. Munn, 1 Seld. 229; Randall v. Van Vechten, 19 Johns. 61; Bank of Metropolis v. Guttchlick, 14 Pet. 29; Mitchell v. St. Andrew's, & Co., 4 Fla. 200; Wood v. A. R. R. Co., 4 Seld. 160; Crozier v. Carr, 11 Tex. 376; Hammond v. Hannin, 21 Mich. 374; Adams v. Power, 52 Miss. 828; Briggs v. Partridge, 64 N. Y. 357; State v. Spartansburg, & Co. R. R. Co., 8 S. C. 129. But see Wheeler v. Nevins, 34 Me. 54; Pollard v. Gibbs, 55 Ga. 45.

(*n*) Maclean v. Dunn, 4 Bing. 722.

(*o*) Steiglitz v. Eggington, Holt, 141, per Gibbs, C. J.; Despatch Line v. Bellamy

Manuf. Co., 12 N. H. 205; Parke, B., Hunter v. Parker, 7 M. & W. 343; McCracken v. San Francisco, 16 Cal. 591; Pollard v. Gibbs, 55 Ga. 45; Heath v. Nutter, 50 Me. 378; Blood v. Goodrich, 9 Wend. 68; Grove v. Hodges, 55 Pa. 504.

(*oo*) Dickenson v. Conway, 12 Allen, 487; Coombs v. Scott, 12 Allen, 493; Johnson v. Craig, 21 Ark. 539; Bennecke v. Insurance Co., 105 U. S. 355; Miller v. Board of Education, 44 Cal. 166; Lester v. Kinne, 37 Conn. 9; Internat. Bank v. Ferris, 118 Ill. 465; Bohart v. Oberne, 36 Kas. 284; Bannon v. Warfield, 42 Md. 22; Hovey v. Dover, 59 N. H. 522; Craighead v. Peterson, 72 N. Y. 279; Zoebisch v. Reuch, 133 Pa. 532; Spooner v. Thompson, 48 Vt. 259; Curry v. Hale, 15 W. Va. 869.

¹ Where one without authority, but purporting to act as agent for A, entered into a contract with B, and the latter on discovering the agent's lack of authority attempted to withdraw from the contract, it was held in Bolton v. Lambert, 41 Ch. D. 295, that a subsequent ratification by A related back to the date of the contract, and by making it binding from that time, prevented B's attempted withdrawal from having any effect. On similar facts the Supreme Court of Wisconsin reached the conclusion that A could not ratify such a contract without B's consent. Atlee v. Bartholomew, 69 Wis. 43. — W.

² But if the law requires that the authority of the agent be under seal or in writing, *parol* ratification is ineffectual for any purpose. Salfield v. Sutter County, & Co., 94 Cal. 546; Ragan v. Chenault, 78 Ky. 545. — W.

³ It has been said that this rule will not be applied in partnership cases, but that a partner may ratify by *parol* a deed of his partner in regard to partnership business. Peine v. Weber, 47 Ill. 41; Skinner v. Dayton, 19 Johns. 513. And in Massachusetts the execution of a deed may in all cases be ratified by *parol*. Holbrook v. Chamberlin, 116 Mass. 155. See also Fouch v. Wilson, 59 Ind. 93. — W.

N. W. Sleigh Co., 39 id. 347. But, in general, the principal cannot retain a benefit and repudiate that from which it came. First Nat. Bank v. Badger Lumber Co., 54 Mo. App. 327; Zimpelman v. Keating, 72 Texas, 318.

although it arose from his own negligence, will invalidate the ratification. (op)¹ The evidence of ratification should be as clear as that required for an original authority. (oq)

The ratification of the tort of an agent does not, in general, relieve the agent from liability; although by such ratification in tort as well as in contract, a liability is incurred by the principal. (p)²

(op) *Coombs v. Scott*, 12 Allen, 493.

(oq) *Wisconsin Bank v. Morley*, 19 Wis. 62.

(p) The cases recognize no greater difficulty in becoming a trespasser by ratifying the trespass of the agent, than in becoming liable *ex contractu* by ratifying the agent's contract. In neither case can the principal be made liable, unless the agent, at the time of the tort or the contract, undertook to act *for him*; but if the agent, though without any precedent authority, did undertake to act *for the principal*, and he subsequently ratify, "in that case," in the language of *Tindal*, C. J., *Wilson v. Tumman*, 6 Man. & G. 242, "the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on tort or a contract, to the same extent as, by, and with all the consequences which follow from, the same act done by his previous authority." *Wilson v. Tumman* was an action of trespass against T., who had ratified the trespass of agents; but they in committing the trespass had not acted for T., but for *another person*; and on this account it was held that T. was not liable. In *Barker v. Braham*, 3 Wils. 376, *De Grey*, C. J., said explicitly, "one assenting to a trespass after it is done is a trespasser." In *Co. Lit.*, 180 b, it is stated, that "if A dis-seize one to the use of B, who knoweth not of it, and B assent to it, in this case, till the agreement, A was tenant of the land, and after the agreement, B is tenant of the land, but *both* of them be *dis-seizors*; for *omnis ratihabitio retrotrahitur*

et mandato equiparatur." And where a bailiff seized a beast for a heriot where none was due, and the lord agreed to the seizure and took the beast, the whole court agreed that the lord was liable in trespass, and the only question made was whether the plaintiff might elect to bring trover instead. *Bishop v. Montague*, Cro. E. 824. See also *Wilson v. Barker*, 4 B. & Ad. 614, 616, where 4 Inst. 317 is cited by *Parke*, J.; *Hull v. Pickersgill*, 1 Br. & B. 282, 286; *Pollock*, C. B., *Bird v. Brown*, 4 Exch. 786, cited *supra*, p. *49, note g. This matter of trespass by ratification was very thoroughly discussed, and the law respecting it settled substantially as it has ever since remained, so early as 38 Ed. 3, 18; *Lib. Ass.* 223, pl. 9 s. c.; and see the resolution of the court stated Bro. Abr., *Ejectione Custodie*, pl. 5, 8, *Trespass*, pl. 113, 256. — As to trespass with *battery*, or a trespass constituting a statutory offence, see *Bishop v. Montague*, Cro. E. 824; *Hawk. P. C.*, B. 2, Ch. 29, § 4; but with this last compare *Gould*, 42; *Moore*, 53, pl. 155; and *Co. Lit.* 180 b, note 4. [That torts generally may be ratified, see *Morehouse v. Northrop*, 33 Conn. 380; *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144; *Tucker v. Jerris*, 75 Me. 184; *Lane v. Black*, 21 W. Va. 617.] In *Buron v. Denman*, 2 Exch. 167, *Parke*, B., said: "I do not say that I dissent; but I express my concurrence with some doubt, because, on reflection, there appears to me a considerable distinction between the present and the ordinary case of ratification by subsequent authority between private individuals.

¹ But "where one purposely shuts his eyes to means of information within his own possession and control and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have," he will be bound. *Kelley v. Newburyport Horse R. R. Co.*, 141 Mass. 496, 499; and see *Phosphate Co. v. Green*, L. R. 7 C. P. 43, 57; *Hyatt v. Clark*, 118 N. Y. 563. — W.

² In *Dempsey v. Chambers*, 154 Mass. 330, the action was founded on the negligence of M., who while delivering on behalf of the defendant, though not employed by him, coal ordered of the latter, broke a plate-glass window. The defendant ratified the delivery, but the ratification was not directed specifically to the tort. It was held, however, that the tort was so connected with the act of delivery that it could not be separated, and the defendant was held liable. The case contains some remarks on the history of the law of ratification and a considerable citation of early authorities. — W.

* 53 * An agent who has the power to appoint a sub-agent, may ratify his act, and thereby make it binding on the agent's principal. (q)¹

* 54

* SECTION IV.

SIGNATURE BY AN AGENT.

The manner in which an agent should sign an instrument for his principal has given rise to some controversy. There has been a tendency to discriminate in this respect; to say, for instance, that if A signs "A for B," this is the signature of A, and he is the contracting party, although he makes the contract at the instance and for the benefit of B. But if he signs "B by A," then it is the contract of B made by him through his instrument A. In the first case A is the principal; in the second, B is the principal and A his agent. But the recent cases, and the best reasons, are, for determining in each instance and with whatever technical inaccuracy the signature is made, from the facts and the evidence, that a party is an agent or a principal, in accordance with the intention of the parties to the contract; if the words are sufficient to bear the construction. (r) But it is still requisite that the name of the principal appear as such in the signature of a deed. (s) It has been regarded as an established

If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass."

(q) *Newton v. Bronson*, 3 Kern. 587.

(r) See *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 337; *Long v. Colburn*, 11 Mass. 97; *Abbey v. Chase*, 6 Cush. 54; *Sheldon v. Kendall*, 7 Cush.

217; *Wilks v. Black*, 2 East, 142; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Miller*, 6 B. Mon. 612; *Whitehead v. Reddick*, 12 Ired. L. 95; *McCall v. Clayton*, 1 Busb. L. 422; *Sydnor v. Hurd*, 8 Tex. 98; *Giddens v. Byers' Heirs*, 12 id. 75; *Johnson v. Smith*, 21 Conn. 627; *Rogers v. March*, 33 Me. 106; *Southern Ins. Co. v. Gray*, 3 Flor. 262; *Hicks v. Hinde*, 9 Barb. 528; *Chipman v. Foster*, 119 Mass. 189; *Gadd v. Houghton*, 1 Ex. D. 357; *Cutler v. Ashland*, 121 Mass. 588; *Lacy v. Dubuque Lumber Co.*, 43 Ia. 510. But see *Moss v. Livingston*, 4 Comst. 208; *Lennard v. Robinson*, 5 El. & Bl. 125.

(s) *Bac. Abr. Leases*, I. 10; *Clarke v. Courtney*, 5 Pet. 319, 350; *Hancock v. Yunker*, 83 Ill. 208; *Briggs v. Partridge*, 64 N. Y. 357; *Providence v. Miller*, 11

¹ The ratification of an unauthorized sub-agent's acts binds the principal equally as if authorized, as in the collection of money, *Strickland v. Hudson*, 55 Miss. 235; but such ratification does not render the principal liable to pay for the sub-agent's services, *Homan v. Brooklyn Ins. Co.*, 7 Mo. App. 22. See also *Grace v. American Ins. Co.*, 16 Blatchford, 433; *Danaher v. Garlock*, 33 Mich. 295, as to sub-agent's. — K.

principle, that no person is held to be the agent of another in making a written contract, unless his agency is stated in the instrument itself, and he therein stipulates for his principal by name. (t) ¹ (xx) In *Stackpole v. Arnold*, (w) * Chief Justice *Parker* considers this rule as applicable to every written contract. But the rule is qualified, if not contradicted, by authorities of much weight, and we do not regard it as of great force except in cases of sealed instruments. (v) Indeed, Chief Justice *Parker*, in the later case of *New England Marine Ins. Co. v. De Wolf*, (w) seems to confine it to these cases. The rule stated by Mr. Smith (2 Leading Cases, note to *Thompson v. Davenport*), is this: parol evidence may always be admitted to charge an unnamed principal; but not to discharge the actual signer. Good reasons may be given for this rule; but it is not sustained by all the authorities. We give in our note the cases on this subject. (x) As between an undischarged principal and

R. I. 272. See *Beckham v. Drake*, 9 M. & W. 79; *McClure v. Herring*, 70 Mo. 18; *Kansas v. Hannibal, &c.* R. R. Co. 77 Mo. 180.

(t) *Long v. Colburn*, 11 Mass. 97; *Magill v. Hinsdale*, 6 Conn. 464; *Hancock v. Fairfield*, 30 Me. 299.

(u) 11 Mass. 27.

(v) *Evans v. Wells*, 22 Wend. 324; *Pinkney v. Hagadorn*, 1 Duer, 89; *Andrews v. Estes*, 2 Fairf. 267. The undisclosed principal, however, can never come in and take advantage of a written contract entered into by his agent in a case where the latter has distinctly described himself in the writing as principal. *Lucas v. De La Cour*, 1 M. & Sel. 249; 2 Greenl. Evid. § 281. In *Humble v. Hunter*, 12 Q. B. 310, which was an action of assumpsit on a charter-party executed, not by

the plaintiff, but by a third person who in the contract described himself as the "owner" of the ship, it was held, that evidence was not admissible to show that such person was the plaintiff's agent.

(w) 8 Pick. 56; *Northampton Bank v. Pepoon*, 11 Mass. 288, 292.

(x) In favor of this rule may be cited *Humble v. Hunter*, 12 Q. B. 310; *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 A. & E. 594. — In *Beckham v. Drake*, 9 M. & W. 79, where it was decided that a partner might be held liable upon a written contract, signed by his copartners, but in which his name did not appear, Lord Abinger, C. B., and *Parke, B.*, took occasion to consider the case upon the principles of Agency. They admitted that in the case of a bill of exchange or promissory note, none but

¹ Even in the case of sealed instruments it is not essential that the agency should be stated in the body of the instrument. *Northwestern Distilling Co. v. Brant*, 69 Ill. 658. See also *Shanks v. Lancaster*, 5 Gratt. 110. — W.

(xx) Parol authority to an agent to let real estate for three years is sufficient, as is the agent's signature to the lease in this form: "A. agent for B.," B's name appearing as principal in the lease. *Dunklee v. Webber*, 151 Mass. 408, 24 N. E. 1082. See *Conant v. Alvord*, 166 Mass. 311, 44 N. E. 250.

Upon a promissory note reading "we promise to pay," and signed with the name of a corporation and with the names of individuals described as "president," "secretary," or "trustees," such individuals are personally liable, and parol

evidence is not admissible to prove that they are not personally bound. *Coburn v. Omega Lodge*, 71 Iowa, 581, 32 N. W. 513; *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 161, 42 N. W. 635; *Mathews & Co. v. Dubuque Mattress Co.*, 87 Iowa, 246, 54 N. W. 225; *Tama Water Power Co. v. Ramsdell*, 90 Iowa, 747, 52 N. W. 209. A court of equity may, when necessary, correct an omission made by mistake in an agent's signature. *Capital Sav. Bank & Trust Co. v. Swan*, 100 Iowa, 718, 69 N. W. 1065.

- * 56 a third * party, a letter of the agent informing the principal of his action with the reply of the latter approving thereof, will be evidence of the agent's authority; even
- * 57 though the terms stated in the * letter be not precisely those of the transaction, if the latter be not unreasonable nor unusual and in substance the same. (y)

The case of an attorney for a corporation executing a deed of

the parties named in the instrument by their name or firm, can be made liable to an action upon it, but were of opinion that all other written contracts, not under seal, stand upon the same footing with regard to the parties who may be sued upon them, as contracts not written. The weight of American authority is as yet opposed to the admission of parol evidence to charge an unnamed party. Many of the cases in which this broad doctrine was laid down by our courts, were cases of mercantile paper, yet the decisions evidently were not rested upon the peculiar character of this class of instruments. Whether American courts will be inclined to follow the English judges, and draw a line of distinction which shall leave ordinary written contracts open to the admission of new parties remains to be seen. It is certain, however, that considerations deserving great attention may be urged against the admissibility of parol evidence to charge with liability upon a written contract a party not referred to be in it. See *Long v. Colburn*, 11 Mass. 97; *Lerned v. Johns*, 9 Allen, 419; *Stackpole v. Arnold*, 11 Mass. 27; *Bradlee v. Boston Glass Co.*, 16 Pick. 350; *Savage v. Rix*, 9 N. H. 263; *Minard v. Mead*, 7 Wend. 68; *Spencer v. Field*, 10 Wend. 87; *United States v. Parmele*, Paine, C. C. 252; *Fenly v. Stewart*, 5 Sandf. 101; *Chandler v. Coe*, 54 N. H. 561. In *Finney v. Bedford Commercial Ins. Co.* 8 Met. 348, it was held, that when a part-owner of a vessel or its outfits effects insurance thereon in his own name only, and nothing in the policy shows that the interest of any other person is secured thereby, an action on the policy cannot be maintained in the names of all the owners, upon parol evidence that such part-owner was their agent for procuring insurance and that his agency and their ownership were known to the underwriters, and that the underwriters agreed to insure for them all, and that it was the intention of all the parties, in making the policy, to cover the interest of all the owners. And with this recent case agrees the decision of the Supreme Court in *Graves v. Boston Mar.*

Ins. Co., 2 Cranch, 419, 439. But in *Huntington v. Knox*, 7 Cush. 371, *Shaw*, C. J., relying upon *Higgins v. Senior*, states the principle broadly thus: "Where a contract is made for the benefit of one not named, though in writing, the latter may sue on the contract jointly with other or alone, according to the interest. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts, first, that the act is done in the exercise, and, second, within the limits of the powers delegated; and these are necessarily inquirable into by evidence." And see *National Ins. Co. v. Allen*, 116 Mass. 398. In *Newcomb v. Clark*, 1 Denio, 226, it was held that an action upon an express contract (not being a negotiable instrument), must be brought in the name of the party with whom it was made; and that it is not competent to show by parol that the promisee was the agent of another person for the purpose of enabling such person to maintain an action. See also *Fenly v. Stewart*, 5 Sandf. 101. The true principle appears to be that laid down in *Fenly v. Stewart*, and may be stated thus: where a contract is reduced to writing, and an action is brought upon the writing itself, no other persons can be made parties than those named in the instrument, but when a right of action exists independent of the writing, which is merely offered as evidence tending among other things, to establish that right, then the party having the legal interest or liability, and for whom the contract was actually made, may sue or be sued, although not named in the writing. But *Hubbert v. Borden*, 6 Whart. 79; *Violett v. Powell*, 10 B. Mon. 347; *Brooks v. Minturn*, 1 Cal. 471; and *Cothay v. Fennell*, 10 B. & C. 671, are authorities to show that an unnamed principal may come in to take the benefit of a written contract with an agent, who acted in his own name. And see *Nicoll v. Burke*, 78 N. Y. 580.

(y) *Campbell v. Hicks*, 4 H. & N. (Exch.) 851.

their land, under his own name and seal, is considered in the chapter on Corporations. (yy)

The case sometimes occurs where a person holding some office, signs his name, adding to it the name of his office, for the purpose of representing himself as an official agent, and preventing his personal liability. But this mere addition seldom has this effect, being usually regarded only as a word of description. (z) So if he adds only the word "trustee," or even "agent," it has been said that he is held personally; but this is sometimes denied. (zz)¹ If the plaintiff knew that the agent acted only in the official capacity which he designates, and accepted the contract as such, the agent would not be held personally. (za) A general rule may be drawn from the cases to this effect; one signing as

(yy) See *post*, p. * 140 and note.

(z) *Mare v. Charles*, 5 E. & B. 978. *Held*, that he may sign the name of his principal first, and add his own as agent thus: "A, by B, agent," in *Smith v. Curd & White*, 2 Head, 582.

(zz) *Bickford v. First, &c. Bank*, 42 Ill. 238; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, 13 Stewart, 165.

(za) *Randal v. Snyder*, 1 Laws. 163.

¹ An instrument in the form of a note beginning, "We as trustees but not individually promise to pay," and signed "A. B. and C., trustees," secured by a mortgage given by A. B. and C. as trustees, does not bind them personally. *Shoe & Leather Bank v. Dix*, 123 Mass. 148. A mortgage assignment from a loan association, concluding, "In witness whereof the said association, by J. S. its president, duly authorized for this purpose, has hereunto set its seal, and the said J. S. president as aforesaid has hereunto set his hand," signed "J. S., president of" (giving the association name, and sealed, is in form executed by the association. *Murphy v. Welch*, 128 Mass. 489. See *Fleet v. Murton*, L. R. 7 Q. B. 126; *Hutchinson v. Tatham*, L. R. 8 C. P. 482. A note signed by "A., agent," *Bartlett v. Hawley*, 120 Mass. 92; by "A., receiver," *Towne v. Rice*, 122 Mass. 67; by "A., treasurer," *Mellen v. Moore*, 68 Me. 390; by "A., administratrix," *Harrison v. McClelland*, 57 Ga. 531; by "A. & B., school trustees," *Cahokia Trustees v. Rautenberg*, 88 Ill. 219; by A. & B., trustees of the, &c. Church," *Hayes v. Matthews*, 63 Ind. 412; or by "A., vestryman, Grace Church," *Tilden v. Barnard*, 43 Mich. 376, binds the signer personally. A person who describes himself in the body of a contract "as agent," and signs his name without more, is liable personally, *Paice v. Walker*, L. R. L. R. 5 Ex. 173; but not if he there describes himself as contracting "on account of." *Gadd v. Houghton*, 1 Ex. D. 357. In *Metcalf v. Williams*, 104 U. S. 93, 98, *Bradley, J.*, said: "The ordinary rule undoubtedly is that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' &c., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties."

And it is generally admitted that parol evidence is admissible, where from the instrument itself it is doubtful whether the obligation is that of the principal or of the agent, although the courts differ as to what constitutes such ambiguity. *Bean v. Pioneer Mining Co.* 66 Cal. 451; *Burgess v. Fairbanks*, 83 Cal. 215; *Scanlan v. Keith*, 102 Ill. 634; *Lacy v. Dubuque Lumber Co.*, 43 Ia. 510; *Rendell v. Harriman*, 75 Me. 497; *Haile v. Peirce*, 32 Md. 327; *Hardy v. Pilcher*, 57 Miss. 18; *Klosterman v. Loos*, 58 Mo. 290; *Kelly v. Thuey*, 102 Mo. 522, 528; *Kean v. Davis*, 21 N. J. L. 683; *Newman v. Greeff*, 101 N. Y. 663; *Walker v. Christian*, 21 Gratt. 291; *Devendorf v. West Va. &c. Co.*, 17 W. Va. 135. — W.

“agent,” without giving the name of his principal, is himself bound. But if he gives the name of his principal, he is himself bound only as agent. (*zb*)

See further as to the form of the signature, chapter sixth, on Attorneys.

SECTION V.

DURATION AND EXTENT OF AUTHORITY.

Where there is an authority expressly given or implied by law, it is important to determine its extent, scope, and duration. Where a principal has held one out as his general agent, or authorized parties so to regard him by continued acquiescence and confirmation, we have said that the principal cannot limit or qualify his own liability by instructions, or limitations, given by him to his agent, and not made known in any way to parties acting with such agent. (*a*) And where an agent is employed to transact some specific business, and only that, yet he binds his principal by such subordinate acts as are necessary to, or are usually and properly done in connection with the principal act, * 58 or to carry the same into effect. (*b*)¹ (*x*) And he has a * reason-

(*zb*) See *Williams v. Robbins*, 16 Gray, 77, and compare *Means v. Swomestedt*, 32 Ind. 87, with *Dutton v. Marsh*, L. R. 6 Q. B. 361.

(*a*) *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400; *Commercial Bank v. Kortright*, 22 Wend. 348; *Munn v. Commission Co.*, 15 Johns. 44; *Hatch v. Taylor*, 10 N. H. 538; *Lobdell v. Baker*, 1 Met. 193; *Nickson v. Brohan*, 10 Mod. 109; *Runquist v. Ditchell*, 3 Esp. 64; *Precious v. Abel*, 1 Esp. 350; *Howard v. Howard*, 11 How. Pr. 80; *Lloyd v. West Branch Bank*, 15 Penn. St. 172; *Chouteaux v. Leach*, 18 Penn. St. 224. — *E converso*, it would seem that a third party dealing with an agent cannot have the benefit against the principal of a private arrangement between the latter and the agent, of which such third party neither knew nor was entitled to know. See *Acey v. Fernie*, 7 M. & W. 151.

(*b*) *Tredwen v. Bourne*, 6 M. & W. 461; *Lord Ellenborough, Helyear v. Hawke*, 5 Esp. 75; *Withington v. Her-*

ring, 5 Bing. 442; *Goodson v. Brooke*, 4 Camp. 163, *Barnett v. Lambert*, 15 M. & W. 489; *Denman v. Bloomer*, 11 Ill. 177; *Franklin v. Ezell*, 1 Sneed, 497. So where the government is the principal and a statute the letter of authority. *United States v. Wyngall*, 5 Hill (N. Y.), 16. — If a party authorizes a broker to buy shares for him in a particular market, where the usage is, that when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425. See, on the limitation of general powers, *Blum v. Robertson*, 24 Cal. 127.

¹ Thus a mercantile firm is liable for the necessary horse-hire of an agent selling by sample, although the latter was furnished with money for that purpose and was

(*x*) The implied powers of an agent appointed by a trader differ from the implied powers of a partner in a similar business, especially in that the former, when ex-

able discretion as to the execution of his authority. Thus, an agent employed by government to collect debts may, in the exercise of this discretion, give the debtor reasonable indulgence as to the time of payment. (c) But no officer of the United States can enter into a submission to arbitration which shall bind them, unless authorized by an act of Congress. (d)¹ But an agent is not at liberty to exercise this discretion in the choice of a mode of performing the duty imposed upon him, if some one mode, and that only, is fixed either by usage or by the orders of his principal, if he is a general agent; or if he is a particular agent, by his principal's orders alone; for then he must adopt that very mode and no other. (e) An authority to sell does not carry with it authority to sell on credit, unless such be the usage of the trade; but if there be such usage, then the agent may sell on credit unless specially instructed and required to sell only for cash. (g)² And if he sells for credit, having no authority to do so, he becomes personally responsible to his principal for the

(c) *United States v. Hudson*, 3 McLean, 156.

(d) *United States v. Ames*, 1 Woodb. & M. 76, 89.

(e) *Daniel v. Adams*, Amb. 495. And the *incidental* means the agent resorts to in carrying out his authority must be those which *usually* attend an agency of that kind: if an extraordinary exigence occur he has no right to have recourse

to extraordinary means to meet it. *Haw-
tayne v. Bourne*, 7 M. & W. 595.

(g) *Holt*, C. J. Anon. 12 Mod. 514; *Lord Ellenborough*, Wiltshire v. Sims, 1 Camp. 258; *Van Allen v. Vanderpool*, 6 Johns. 69; *Robertson v. Livingston*, 5 Cowen, 473; *James v. McCredie*, 1 Bay, 294; *Delafield v. Illinois*, 26 Wend. 223; *Stoddard v. McIlwain*, 7 Rich. L. 525; *Burks v. Hubbard*, 69 Ala. 379; *School District v. Ætna Ins. Co.*, 62 Me. 330.

forbidden to pledge the firm's credit, *Bentley v. Doggett*, 51 Wis. 224; a person held out as manager of a hotel binds the hotel-keeper by his purchases of necessary supplies on credit, *Beecher v. Venn*, 35 Mich. 466; an oral contract of insurance made by a local agent binds the company, *Putnam v. Home Ins. Co.*, 123 Mass. 324; a principal is liable for misuse of a hired horse by an agent whose duty includes travelling in districts where it is necessary or usual to make use of horses to get from place to place, *Huntley v. Mathias*, 90 N. C. 101. — W.

¹ Nor can any agent authorized to settle a claim or dispute bind his principal by submitting it to arbitration. *Huber v. Zimmerman*, 21 Ala. 488; *Mich. Central R.R. Co. v. Gougar*, 55 Ill. 503. — W.

² There is such a usage as to *factors*. *Greely v. Bartlett*, 1 Greenl. 172, 179. — W.

pressly authorized to purchase, has only such incidentally implied powers as relate to purchasing, and no power to borrow. *Jacobs v. Morris*, [1902] 1 Ch. 816. See *American Mining Co. v. Converse*, 175 Mass. 449, 56 N. E. 594. So express authority to sell for cash gives the agent no power to sell on credit. *Norton v. Nevills*, 174 Mass. 243, 54 N. E. 537. The principal is bound by the exercise of his agent's apparent authority with reference to one who has no notice of any defect in such authority. *Piano Manuf. Co. v. Nordstrom* (Neb.), 88 N. W. 164; *Willcox*

v. Arnold, 162 Mass. 577; 39 N. E. 414. The agency itself must, however, be proved as a fact. *Manning v. Carberry*, 172 Mass. 432, 52 N. E. 521; *Scribner v. Flagg Manuf. Co.*, 175 Mass. 536, 56 N. E. 603. When the agent exceeds his authority by doing a wrongful act, the principal's approval of the wrong usually ratifies such act. *Brown v. Webster City* (Iowa), 88 N. W. 1070. But a repudiation by the principal cannot be treated as a ratification merely because he gives an unfounded reason therefor. *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073.

* 59 whole debt. (*h*) So is he also if * he blends the accounts of his principal with his own, or takes a note payable to himself. (*i*) If an agent to whom goods are intrusted for a particular purpose, sell the same to a person, or in a manner not within the scope of his authority, the principal may disaffirm the sale and recover the goods of the vendee, if he have not justified the vendee in believing that the agent had such authority. (*k*) Even a general agent, appointed and authorized to transact business in the most general terms, cannot bind his principal in any matter which does not fairly fall within the business. (*kk*) So an authority to buy a certain lot of land or other special thing does not authorize the agent to sell or exchange it, (*kl*) or buy more or less. (*km*)

(*h*) *Barksdale v. Brown*, 1 Nott & M. C. 517; *Walker v. Smith*, 4 Dallas, 389. And the principal may also maintain trover against the vendee. *Holt*, C. J., *Anon.* 12 Mod. 514; and see *Wiltshire v. Sims*, 1 Camp. 258. — An agent to sell has no power to barter, and if he undertake to do so, the principal may recover the goods, although the party receiving them was ignorant that the agent was not the owner. *Guerreiro v. Peile*, 3 B. & Ald. 616. — A simple authority to sell will not authorize a sale at auction. *Towle v. Leavitt*, 3 Foster (N. H.), 360. — And it seems an authority to sell at auction will not support a private sale, although more is thus obtained than the agent was limited to in case of an auction sale. *Daniel v. Adams*, Amb. 495. — At common law an agent cannot pledge the goods of his principal without special authority. *Patterson v. Tash*, 2 Stra. 1178; *Daubigny v. Duval*, 5 T. R. 604; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Rodriguez v. Hefernman*, 5 Johns. Ch. 417; *Bott v. McCoy*, 20 Ala. 578. This has been modified in England by various statutes (4 Geo. IV. c. 83; 6 Geo. III. c. 94; 5 & 6 Vict. c. 39). See *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441. And in several States of this Union statutory enactments have been made providing that any consignee, agent, or factor, having possession of merchandise with authority to sell the same, or having possession of any bill of lading, permit, certificate, or order for the delivery of merchandise with the like authority, shall be deemed the true owner thereof so as to give validity to the sale, disposition, or pledge of such merchandise as security for any advances, negotiable paper, or other obligation given on faith thereof. Kentucky, Laws, 1880, May 5, §§ 1 and 6, Maine,

R. S. (1883), ch. 31, § 1; Maryland, Rev. Code, 1878, p. 292; Massachusetts, Pub. Stat. ch. 71; Missouri, Laws of 1869, p. 91; Ohio, R. S. (1886), § 3216; Pennsylvania, Brightly's Purdon's Digest, p. 773; Rhode Island, Pub. Stat. p. 332. By the statutes of some of the States the pledgee cannot retain the merchandise if he had notice that the factor was not the true owner before he made the advances, for which the merchandise was pledged as security. But the statute of Massachusetts provides that the pledge shall hold good, "notwithstanding the person making such advances upon the faith of such deposit or pledge may have had notice that the person with whom he made such contract was only an agent," provided the pledgee make the advances in good faith believing that the agent had authority to enter into the contract. — If the merchandise was pledged to secure antecedent advances, the pledgee acquires no other right or interest in the pledge than was possessed or could have been enforced by the agent or factor at the time of making the pledge. See statutes cited above.

(*i*) *Symington v. McLin*, 1 Dev. & B. 291. See *post*, p. *95, n. (*w*).

(*k*) *Peters v. Ballistier*, 3 Pick. 495; *Nash v. Drew*, 5 Cush. 422.

(*kk*) *Weston v. Alley*, 49 Me. 94. But see *State v. Atherton*, 16 N. H. 203; *Stevenson v. Hoy*, 43 Penn. St. 191; *Hatch v. Coddington*, 95 U. S. 48.

(*kl*) *Tod v. Benedict*, 15 Ia. 591. See *Lumpkin v. Wilson*, 5 Heiskell, 555. See also *Herring v. Hottendorf*, 74 N. C. 588; *Silliman v. Fredericksburg, &c.* R. Co. 27 Gratt. 119; *Wanless v. McCandless*, 38 Ia. 20; *Baxter v. Lamont*, 60 Ill. 237; *Meade v. Brothers*, 28 Wis. 689.

(*km*) *Olyphant v. McNair*, 41 Barb. 446; *Rice v. Tavernier*, 8 Minn. 248.

If the power of an agent be given by a written instrument which instrument is known to the party contracting with him, such instrument must be followed strictly, and the power given by it cannot be varied or enlarged by evidence of usage; (*l*)¹ because the effect of usage is properly limited to the manner in which the power is to be exercised; and even in this respect it cannot control the language of the instrument, although it may aid in construing its words, or in supplying some that are needed. But an agent authorized to make a certain contract may bind his principal by one which while it differs in its precise terms is of the same legal effect; especially if it secures additional benefits to his principal. (*ll*)

An agent employed to answer particular questions, and withholding some facts material to the contract, about which * no questions are asked, does not thereby vitiate the con- * 60 tract; (*m*) it would be otherwise if such agent were employed to make the contract. (*n*) A mere power to sell land gives the agent no power to convey. (*nn*)

It has been held that a power to sell carries with it a power to warrant; (*o*) but we think it the better rule, that an agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty, in which case he may; (*p*)² thus

(*l*) *Delafield v. Illinois*, 26 Wend. 192.

(*ll*) *Simonds v. Clapp*, 16 N. H. 222.

(*m*) *Huckman v. Fernie*, 3 M. & W. 505.

(*n*) *Everett v. Desborough*, 5 Bing. 503; *Fitzherbert v. Mather*, 1 T. R. 12.

(*nn*) *Force v. Dutcher*, 3 Green, 401; *Lyon v. Pollock*, 99 U. S. 668.

(*o*) *Nelson v. Cowing*, 6 Hill (N. Y.), 336; *Woodford v. McClenahan*, 4 Gilman, 85; *Hunter v. Jameson*, 6 Ired. L. 252; *Franklin v. Ezell*, 1 Sneed, 497; *Schuchardt v. Allens*, 1 Wall. 359.

(*p*) *Gibson v. Colt*, 7 Johns. 390; *Hel-year v. Hawke*, 5 Esp. 72; *Croom v. Shaw*, 1 Flor. 211; *Smith v. Tracy*, 36 N. Y. 79. A sale by sample is a warranty that the

bulk shall correspond with the sample; and a general authority to sell goods at wholesale is an authority to sell by sample. *Andrews v. Kneeland*, 6 Cowen, 354. An agent to sell a horse may warrant his soundness. *Alexander v. Gibson*, 2 Camp. 555; *Bradford v. Bush*, 10 Ala. 386. See *Brady v. Todd*, 9 C. B. (N. S.) 592. In Alabama, an authority to sell a slave has been held to imply an authority to warrant. *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Gaines v. McKinley*, 1 Ala. 446. But an agent to deliver has no authority to warrant. *Woodin v. Burford*, 2 Cr. & M. 291, 4 Tyr. 264. In judicial sales there is no warranty express or implied. *The Monte Allegre*, 9 Wheat. 616.

¹ Where a principal sends a written order capable of two interpretations, and the agent *bona fide* acts upon one of them, the principal cannot be released from his contract on the ground that he intended it to bear the other. *Ireland v. Livingston*, L. R. 5 H. L. 395. — K.

² Whether a sale is one which is usually attended with warranty is a question of fact to be determined in the light of all surrounding circumstances. *Herring v. Skaggs*, 62 Ala. 180; s. c. 73 Ala. 446; *Pickert v. Marston*, 68 Wis. 465. But where it is a matter of general knowledge that a warranty is usual in certain classes of sales, the court will take judicial notice of this. Thus where the goods sold were not in the hands of the selling agent, and therefore not subject to inspection, the court held

an auctioneer has, in general, no implied authority to sell with warranty of the quality of what he sells. (*q*) But even where usage would permit a warranty, if the principal gives his agent express instructions not to warrant, and the agent does warrant, although it has been said that such warranty is not binding on the principal, on the general ground that no principal is bound by the acts of his agent if such acts transcend his authority, (*r*) yet the better opinion is that the principal is bound by such warranty, where the buyer was justified by the nature of the case in believing that this authority was given, and had no means of knowing the limitation of the authority of the agent. (*s*)

* 61 * The usage of the trade or business is of great importance in determining all these questions; but this important distinction seems to be taken between the cases of a *written* authority and that of an *oral* authority, namely, — where the authority is

(*q*) *Blood v. French*, 9 Gray, 197; the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." So per *Bayley, J.*, *Pickering v. Busk*, 15 East, 45. And see *Howard v. Sheward*, L. R. 2 C. P. 148.

(*r*) *Lord Kenyon*, *Fenn v. Harrison*, 3 T. R. 760; *Dodderidge, C. J.*, *Seignior and Wolmer's case*, Godb. 361.

(*s*) *Boothby v. Scales*, 27 Wis. 626. In *Fenn v. Harrison*, 3 T. R. 760, *Ashhurst, J.*, said: "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and

authority to warrant was implied. *Talmage v. Bierhouse*, 103 Ind. 270. And see *Ahern v. Goodspeed*, 72 N. Y. 108; *Wait v. Borne*, 123 N. Y. 592.

In sales of agricultural implements by travelling agents, it has been held that a warranty by the agent is usual, and therefore binds the principal, whether the agent had in fact authority to warrant or not. *Murray v. Brooks*, 4 Ia. 45; *McCormick & Co. v. Snell*, 23 Ill. App. 79; *McCormick v. Kelly*, 28 Minn. 135; *Flatt v. Osborne*, 33 Minn. 98; *Boothby v. Scales*, 27 Wis. 626.

For decisions on particular facts as to the liability of a principal for an unauthorized warranty, see also *Howard v. Sheward*, L. R. 2 C. P. 148; *Applegate v. Moffitt*, 60 Ind. 104; *Harrison v. Shanks*, 13 Bush. 620; *Randall v. Kehlor*, 60 Me. 37; *Anderson v. Bruner*, 112 Mass. 14; *Palmer v. Hatch*, 46 Mo. 585; *Morris v. Bowen*, 52 N. H. 416; *Cooley v. Perrine*, 41 N. J. L. 322; *Decker v. Fredericks*, 47 N. J. L. 469; *Baker v. Arnot*, 67 N. Y. 448; *Fay v. Richmond*, 43 Vt. 25; *Deming v. Chase*, 48 Vt. 382; *Pickert v. Marston*, 68 Wis. 465.

Where one adopts a sale made by another as his agent, he cannot repudiate a warranty which is an essential part of the contract. *Churchill v. Palmer*, 115 Mass. 310; *Eadie v. Ashbaugh*, 44 Ia. 519.

In *First Nat. Bank of Las Vegas v. Oberne*, 121 Ill. 25, an agent sold a note belonging to his principal to the plaintiff bank, giving an unauthorized guaranty to induce the sale. The proceeds of the note were put to the credit of the principal, and the agent subsequently drew the money on checks signed with his principal's name, which he had authority to sign. About half of the proceeds of the note appeared to have been used for the principal's benefit. It was held that to this extent the principal was liable on the guaranty. — W.

oral and is known to the party dealing with the agent, usage may enlarge and affect the authority, or the contract; but, as has been already stated, usage has not this power where the whole authority is in writing, and this is known to the party dealing with the agent. (t)

If a principal sells goods by an agent, and the agent makes a material misrepresentation which he believes to be true, and his principal knows to be false, this is the falsehood of the principal and avoids the sale. (u) (x)

* An agent's acts in making or transferring negotiable * 62 paper (especially if by indorsement) are much restrained. It seems that they can be authorized only by express and direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them. (v)¹ But, to this extent, the principal will be held. Thus,

(t) *Attwood v. Munnings*, 7 B. & C. 278; s. c. 1 Man. & R. 66; *Schimmelpennich v. Bayard*, 1 Pet. 264. See also *Wood, &c. Machine Co. v. Crow*, 70 Ia. 340; *Furneaux v. Easterly*, 36 Kan. 539.

(u) *Schneider v. Heath*, 3 Camp. 506. And this is true although the representations are of such a character that the principal is not bound by them; for, as was said by Lord *Abinger* in *Cornfoot v. Fowke*, 6 M. & W. 386: "It does not follow that because he is not bound by the representation of an agent without authority, he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. It is one thing to say that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and another to say that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority." *Cornfoot v. Fowke*, 6 M. & W. 358, was an assumpsit for the non-performance of an agreement to take a ready-furnished house. The plaintiff had employed C. to let the house in question, and the defendant being in treaty with C. for taking it, was informed by him that there was no objection to the house, but after entering into the agreement, discovered that the adjoining house was a brothel, and on that account declined to fulfil the contract. It appeared that the plaintiff knew of the existence of

the brothel before, but C., the agent, did not. The majority of the court held, contrary to the opinion of Lord *Abinger*, C.B., that these facts furnished no ground of defence to the action. This case has been very much questioned from the first, and was overruled in *Fuller v. Wilson*, 3 Q. B. 58. The judgment in the latter case was indeed reversed in the Exchequer Chamber, 3 Q. B. 68, but not on this point. [And *Cornfoot v. Fowke* is now supported in England only as deciding a point of pleading. *National Exchange Co. v. Drew*, 2 Macq. 103, 144; *Ludgater v. Love*, 44 L. T. 694; *Barwick v. English Joint Stock Banking Co.*, L. R. 2 Ex. 259, 262.] In this country, *Cornfoot v. Fowke* was denied to be law by the court in *Fitzsimmons Joslin*, 21 Vt. 129. And see *Crump v. U. S. Mining Co.*, 7 Gratt. 352. See also *infra*, p. *74, note 1.

(v) *Paige v. Stone*, 10 Met. 160; *Rossiter v. Rossiter*, 8 Wend. 494. An assurance by an agent that bills will be accepted by his principal, though acted upon by the party assured, is not as between the latter and the principal to be treated as equivalent to an acceptance of the bills, so as to vest in the principal legal rights from the time such assurance is given. *Hoare v. Dresser*, 7 H. L. Cas. 290; *Harrop v. Fisher*, 10 C. B. n. s. 196. But see *Layet v. Gano*, 17 Ohio, 466; *Forsyth v. Day*, 46 Me. 176.

¹ The treasurer of a savings bank has no authority to indorse its name on a promissory note; and a vote of the corporation to sell notes held by it does not confer such authority. *Bradlee v. Warren Savings Bank*, 127 Mass. 107. — K.

(x) See *Reg. v. Butt*, 51 L. T. 608; *Joliffe v. Baker*, 11 Q. B. D., 255, 269.

if a principal supply an agent with his acceptances in blank, as to date, amount, time, and place of payment, but payable to the order of that correspondent, though part of these acceptances may bear upon their face that they are the *second of exchange*, yet if the correspondent fraudulently negotiate those marked second, the acceptor will be liable to an innocent holder for value for the amount which they represent. (w) An express power to indorse does not imply a power to receive notice of dishonor. (x) It may be stated as a general rule that retaining money procured by an indorsement will be regarded as a ratification of the authority to indorse. (xx)

SECTION VI.

THE RIGHT OF ACTION UNDER A CONTRACT MADE BY AN AGENT.

In contracts by deed no party can have a right of action under them but the party whose name is to them; (y)¹ but in the case of a simple contract an undisclosed principal may show that the apparent party was his agent, and may put himself in the place of his agent, (z) but not so as to affect injuriously the rights of the other party. (a) (x) Thus a purchaser for an unknown principal,

(w) *Bank of Pittsburg v. Neal*, 22 How. Senior, 8 M. & W. 834; *Whitmore v. Gilmour*, 12 id. 808; *Gage v. Stimson*, 26 Minn. 64; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224; *Lovell v. Williams*, 125 Mass. 439; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Irvine v. Watson*, 5 Q. B. D. 102; *Milliken v. W. U. Tel. Co.*, 110 N. Y. 403. See *Oelricks v. Ford*, 20 Md. 489. [And where a seal is not essential to a contract, it has been held that an undisclosed principal who has received the benefit of the contract may be held liable upon it. *Moore v. Granby Mining Co.*, 80 Mo. 86; *Stowell v. Eldred*, 39 Wis. 614; *cf. Briggs v. Partridge*, 64 N. Y. 357, 364.]

(x) *Bank of Mobile v. King*, 9 Ala. 279.

(xx) *National Bank v. Fassett*, 42 Vt. 432.

(y) *Green v. Horne*, 1 Salk. 197; *Frontin v. Small*, 2 Ld. Raym. 1418; *Pickering's Claim*, L. R. 6 Ch. 525; *Briggs v. Partridge*, 64 N. Y. 357. [As to charter parties see *Christofferson v. Hansen*, L. R. 7 Q. B. 509; *Pederson v. Lotinga*, 28 L. T. 267.]

(z) *Skinner v. Stocks*, 4 B. & Ald. 437; *Cothay v. Fennell*, 10 B. & C. 671; *The Duke of Norfolk v. Worthy*, 1 Camp. 337; *Garrett v. Handley*, 4 B. & C. 664; *Davis v. Boardman*, 12 Mass. 80; *Rutland Railroad v. Cole*, 24 Vt. 33; *Higgins v. Sims*, 5 B. & Ad. 389; *Warner v.*

¹ Bills of exchange and promissory notes, also, being, like deeds, formal instruments, give no rights and create no liabilities except in favor of and against the parties thereto. *Cragin v. Lovell*, 109 U. S. 194; *Heaton v. Myers*, 4 Col. 59; *Pease v. Pease*, 35 Conn. 131; *Kenyon v. Williams*, 19 Ind. 44; *Brown v. Baker*, 7 Allen, 339; *Keck v. Sedalia Brewing Co.*, 22 Mo. App. 187; *Webster v. Wray*, 19 Neb. 558; *Nat. City Bank v. Westcott*, 118 N. Y. 468; *Texas Land Co. v. Carroll*, 63 Tex. 48; *Arnold v. Sprague*, 34 Vt. 402. This rule does not apply to non-negotiable notes. *National Ins. Co. v. Allen*, 116 Mass. 398. — W.

(a) That the question of double liability may differ from that as to the right to sue, on a written instrument signed by an agent see *Byington v. Simpson*, 134 Mass. 169,

whom he does not disclose, is himself liable for the price. (aa) Nor can the unknown principal adopt a contract as made by his agent, in part only and for so much as benefits him; he must adopt it as a whole if at all. (ab) How far this rule * is affected by the Statute of Frauds will be considered *63 hereafter. (b) By parity of reasoning, an undisclosed principal, subsequently discovered, may be made liable on such contract; (c)¹ but in general, subject to the qualification that the state of the account between the principal and agent is not altered to the detriment of the principal. (d) It might be sup-

McKay, 1 M. & W. 591; *Huntington v. Knox*, 7 Cush. 371; *Violett v. Powell*, 10 B. Mon. 349. And see *Harrison v. Roscoe*, 15 M. & W. 231; *Woodruff v. M'Gehee*, 30 Ga. 158.

(aa) *Pierce v. Johnson*, 34 Conn. 274.

(ab) *Elwell v. Chamberlin*, 31 N. Y. 611. See *ante*, p. *52.

(b) And see p. *54 note (r), *supra*. See also *Bank of United States v. Lyman*, 20 Vt. 666, 673, 674, where the doctrine of *Lord Abinger* and *Baron Parke* in *Beckham v. Drake*, 9 M. & W. 79, was recognized by *Prentiss, J.*

(c) *Thompson v. Davenport*, 9 B. & C. 78; *Cothay v. Fennell*, 10 B. & C. 671; *Thomas v. Edwards*, 2 M. & W. 216; *Beebe v. Robert*, 12 Wend. 413; *Upton v. Gray*, 2 Greenl. 373; *Nelson v. Powell*,

3 Doug. 410; *Hopkins v. Lacouture*, 4 La. 64; *Hyde v. Wolf*, 4 La. 234; *Bacon v. Sondley*, 3 Strob. L. 542; *Bownell v. Briggs*, 45 Barb. 470. — The party dealing with the agent may, when he discovers the principal, charge either at his election. *Thompson v. Davenport*, 9 B. & C. 78; *Wilson v. Hart*, 7 Taunt. 295; *Railton v. Hodgson*, 4 Taunt. 576, n. (a); *Robinson v. Gleadow*, 2 Bing. N. C. 161; *Paterson v. Gandasequi*, 15 East, 62; *Higgins v. Senior*, 8 M. & W. 834. But where a vendor takes the note of the agent, which shows him to rely upon the agent, he cannot afterwards sue the principal. *Patterson v. Gandasequi*, 15 East, 62; *Hyde v. Paige*, 9 Barb. 150; *Bate v. Burr*, 4 Harring. 130.

(d) *Thompson v. Davenport*, 9 B. & C. 78; *Lord Ellenborough, Kymer v. Suwer-*

¹ In *Hubbard v. Tenbrook*, 124 Pa. 291, it was held that an undisclosed principal was liable for goods purchased by his agent on credit in his own name, though the principal had instructed the agent not to purchase on credit, the reason given for the decision being that the agent had apparent power to buy on credit. But see *Fradley v. Hyland*, 37 Fed. 49. — W.

45 Am. Rep. 314; *Pelton v. Baker*, 158 Mass. 349, 33 N. E. 394. The agent is not personally liable upon a contract clearly made for his principal, though unauthorized; but both principal and agent are liable for the latter's torts within the scope of his agency. *Cole v. O'Brien*, 34 Neb. 68; *Neufeld v. Beidler*, 37 Ill. App. 34; *McPheters v. Page*, 83 Me. 234; *Block v. Haseltine*, 3 Ind. App. 491; *Gunther v. Ullrich*, 82 Wis. 222; *Baird v. Shipman*, 130 Ill. 16; *Firbank v. Humphreys*, 18 Q. B. D. 60; *British M. B. Co. v. Charnwood F. Ry.*, id. 714. Upon a written contract between agents, which is not in terms inconsistent with the existence of their agencies, one undisclosed principal may sue the other. *Darrow v. H. R. Horne P. Co.*, 57 Fed. 463. See *Buchanan v. Cleveland Linseed Oil Co.*, 91 Fed. 88, 33 C. C. A. 351; *Brigham v. Herrick*, 173 Mass. 460, 53 N. E. 906. If an undisclosed principal

sues upon a contract of sale made by his agent, the buyer can set off a debt due him from the agent only when the principal's conduct created the belief that the agent was selling on his own account. *Cooke v. Eshelby*, 12 A. C. 271; see *Rodliff v. Dallinger*, 141 Mass. 1. A contract clearly made with a principal as a sale through its nominal manager to a corporation which was never organized, does not personally bind the agent so as to divest the seller of title. *Wyckoff v. Vicary*, 75 Hun, 409; see *London Shipowners' Ass'n v. London & I. D. J. Committee*, [1892] 3 Ch. 242. An agent is usually permitted to sue in his own name upon a contract made by him for an undisclosed principal. *Gray v. Journal of Finance Pub. Co.*, 21 N. Y. S. 967; *Richmond & D. R. Co. v. Bedell*, 88 Ga. 591. He is personally liable upon such a contract made in his own name. *Hall v. Tweedy*, 63 L. T. 765.

posed that the party dealing with an agent whose agency is concealed, does not lose his election to have recourse either to the agent, or to his discovered principal, if the principal has *prematurely* settled with his agent, even without fraud; as where the agent bought on one month's credit and the principal paid him before the credit had expired. (e) But it may be open to question whether such settlement by the principal, although premature, if perfectly *bona fide*, in the course of business, and free from all suspicion that it had been hastened for the purpose of interfering with the seller, would not discharge the principal. We think it would.¹

Where the name of the principal is disclosed at the time the contract is made by the agent, the former is the proper party to sue, upon the contract. This is so whether he be a citizen of another State than that where his agent resided and made the contract or not. This doctrine is contrary to the rule laid down in Story's Agency as to contracts made for residents in a foreign State, and which was supposed to be the doctrine of the

* 64 English cases at that time. But the doctrine has more * recently been explained by the English courts, and Judge

cropp, 1 Camp. 109; Smethurst v. Mitchell, 1 E. & E. 622.

(e) Kymer v. Suwercropp, 1 Camp. 109; Waring v. Favenck, 1 Camp. 85; Heald v. Kenworthy, 10 Exch. 739.

¹ The rule stated in the text is substantially that laid down by Lord *Tenterden* and *Bayley*, J., in *Thompson v. Davenport*, 9 B. & C. 78. The language in that case was, however, criticised and the rule limited in *Heald v. Kenworthy*, 10 Exch. 739, *Parke*, B., regarding it as immaterial whether the principal had in good faith settled with the agent, unless the conduct or representations of the third party with whom the agent dealt justified the principal in believing that the third party intended to look only to the agent. In *Armstrong v. Stokes*, L. R. 7 Q. B. 598, the Court of Queen's Bench, *Blackburn*, J., delivering the opinion, approved the rule of Lord *Tenterden*, and criticised that laid down in *Heald v. Kenworthy*. In *Irvine v. Watson*, 5 Q. B. D. 102, *Bowen*, J., distinguished two classes of cases. 1. Where the third party dealt with the agent, supposing him to be a principal. 2. Where the agent disclosed the fact that he was acting for a principal, but did not disclose the latter's identity. In the first class it was held that the rule of Lord *Tenterden* was correct, and such was the case of *Armstrong v. Stokes*. In the second class, it was said, the third party dealt with the agent on the credit in part, at least, of an unknown principal, and was entitled to retain that advantage, unless he estopped himself by his own conduct or representations. Such was the case at bar. In the Court of Appeals, 5 Q. B. D. 414, the decision below was affirmed, but some doubt was expressed as to the correctness of the decision in *Armstrong v. Stokes*, and of the rule which *Bowen*, J., founded upon it; *Brett*, L. J., saying: "If the case of *Armstrong v. Stokes* arises again, we reserve to ourselves, sitting here, the right of reconsidering it." *Davison v. Donaldson*, 9 Q. B. D. 623, followed *Irvine v. Watson*, and approved the rule laid down by *Parke*, B., in *Heald v. Kenworthy*. How the court would have been inclined to deal with a case like *Armstrong v. Stokes* was left somewhat in doubt.

Such authority as there is in this country is in accord with the text and the *dictum* of Lord *Tenterden*. See *Fradley v. Hyland*, 37 Fed. Rep. 49; *Ketchum v. Verdell*, 42 Ga. 534, 538; *Thomas v. Atkinson*, 38 Ind. 243; *Emerson v. Patch*, 123 Mass. 541; *Knapp v. Simon*, 96 N. Y. 284. — W.

Story's rule rejected. The doctrine never was generally received in this country, and in the Supreme Court of the United States it was directly disavowed. (*g*)

SECTION VII.

LIABILITY OF AN AGENT.

An agent is not personally liable, unless he transcends his agency, or departs from its provisions, (*h*) or unless he expressly pledges his own liability, (*i*) in which case he is liable although he describes himself as agent, (*k*) or unless he conceals his character of agent, (*l*) or unless he so conducts as to render * his principal inaccessible or irresponsible, (*m*) or unless * 65 he acts in bad faith. If a sealed instrument is executed by an agent, and it contain covenants which expressly purport to be those of the principal, and the agent in executing it calls himself

(*g*) *Oelricks v. Ford*, 23 How. 49. See also 2 Kent Com. 630, 631, n.; *Allen v. Merchants Bank of N. Y.*, 22 Wend. 224.

(*h*) *Feeter v. Heath*, 11 Wend. 477; *Johnson v. Ogilby*, 3 P. Wms. 279; *Jones v. Downman*, 4 Q. B. 235, n. (*a*). The decision of the Queen's Bench in this case was afterwards reversed in the Exchequer Chamber on a special ground, but the doctrine of law does not seem to be impugned. — But the departure from authority, to charge the agent, must not be known to the other contracting party. Story on Agency, § 265, recognized by Lord Denman, in *Jones v. Downman*, 4 Q. B. 239.

(*i*) If an agent, executing a contract in writing, use language whose legal effect is to charge him personally, it is not competent for him to exonerate himself by showing that he acted for a principal, and that the other contracting party knew this fact at the time when the agreement was made and signed. *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littledale*, 6 A. & E. 486; *Higgins v. Senior*, 8 M. & W. 834; *Appleton v. Binks*, 5 East, 148; which was the case of a contract under seal; *Chadwick v. Maddon*, 12 E. L. & E. 180; *Tanner v. Christian*, 4 E. & B. 591; *Hancock v. Fairfield*, 30 Me. 299. See also *Duvall v. Craig*, 2 Wheat. 56; *Tippets v. Walker*, 4 Mass. 595; *Forster v. Fuller*, 6 Mass. 58; *White v. Skinner*, 13 Johns. 307; *Stone v. Wood*, 7 Cowen,

453; *Andrew v. Allen*, 4 Harring. 452; *Potts v. Henderson*, 2 Cart. (Ind.) 327; *Fash v. Ross*, 2 Hill (S. C.), 294. And see *Christoffersen v. Hansen*, L. R. 7 Q. B. 509; *Long v. Millar*, 4 C. P. D. 450; *Guernsey v. Cook*, 117 Mass. 548; *Worthington v. Cowles*, 112 Mass. 30.

(*k*) *Seaver v. Coburn*, 10 Cush. 324; *Tanner v. Christian*, 4 E. & B. 591; *Lennard v. Robinson*, 5 E. & B. 125; *Taylor v. Shelton*, 30 Conn. 122.

(*l*) *Nixon v. Downey*, 49 Ia. 166; *Franklyn v. Lamond*, 4 C. B. 637, where it was held that the fact of selling as *auctioneers* was not such an indication of agency as to absolve the defendants from personal responsibility. — As to use and occupation of lands by the sufferance and permission of the plaintiffs, see *Evans v. Evans*, 3 A. & E. 132. — The agent is, perhaps, in like manner liable (at the option of the party contracting with him) if he do not state the *name* of the principal, and notwithstanding the other contracting party have the means of knowing the principal. *Thompson v. Davenport*, 9 B. & C. 78; *Owen v. Gooch*, 2 Esp. 567; *Raymond v. Proprietors of Crown and Eagle Mills*, 2 Met. 319; *Winsor v. Griggs*, 5 Cush. 210; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Cobb v. Knapp*, 71 N. Y. 621.

(*m*) *Ashhurst, J.*, *Fenn v. Harrison*, 3 T. R. 761; *Savage v. Rix*, 9 N. H. 263; *Sydnor v. Hurd*, 8 Tex. 98; *Keener v. Harrod*, 2 Md. 63.

an agent, he is not liable on those covenants; (*n*) but if they are not expressly the principal's covenants, the agent is liable on them. (*o*) If a person dealing with an agent knows his agency, his rights and obligations will be the same as if the agent disclosed it, (*p*) unless the agent purposely represents himself as a principal and assumes the responsibility of one. And if the agent's act be open to two constructions, one of which binds him, and the other binds the principal, it is said that the law prefers the latter. (*q*)

If a party dealing with an agent as agent, and knowing that the principal is bound, takes the agent's note, it is held that the principal is discharged. (*r*)

If one describes himself as agent for some unnamed principal, he is of course liable if proved to be the real principal. (*s*) So he is if he signs as agent of a company which has no existence, or has no power to make the contract. (*ss*) And one acting as agent is liable personally, if it be shown that he acts without authority. (*t*) But it seems to be law, that an

(*n*) *Hopkins v. Mehaffy*, 11 S. & R. 126.

(*o*) *Hancock v. Hodgson*, 4 Bing. 269; *Stone v. Wood*, 7 Cowen, 453; *Spencer v. Field*, 10 Wend. 87; *Snow v. Orleans*, 126 Mass. 453; *Quigley v. De Haas*, 82 Pa. 267.

(*p*) *Chase v. Debolt*, 2 Gilman, 371.

(*q*) *Dyer v. Burnham*, 25 Me. 13.

(*r*) *Paige v. Stone*, 10 Met. 160; *Wilkins v. Reed*, 6 Greenl. 220; *Green v. Tanner*, 8 Met. 411.

(*s*) *Schmalz v. Avery*, 16 Q. B. 655; *Carr v. Jackson*, 7 Exch. 382.

(*ss*) *Woodbury v. Blair*, 18 Ia. 572. See *Blakely v. Bennecke*, 59 Mo. 193.

(*t*) *Dusenberry v. Ellis*, 3 Johns. Cas. 70; *Byars v. Doores*, 20 Mo. 284; *Bayley*, B., *Thomas v. Hewes*, 2 Cr. & M. 530, n. (*a*); *Collen v. Wright*, 7 E. & B. 301, affirmed in 8 E. & B. 647. And a subsequent ratification it seems will not (always at least) excuse him. *Rossiter v. Rossiter*, 8 Wend. 494; *Palmer v. Stephens*, 1 Denio, 471. — If A, supposing B to be agent for C in the matter, enter with him into a contract which is illegal if the contract of C, but is not illegal if B's personal contract, and it turn out that B acted without authority, the illegality of the supposed contract is no bar to an action by A against B; for the contract *actually made* contained no illegality. *Parke*, B., *Thomas v. Edwards*, 2 M. & W. 217. — It is perhaps doubtful whether or not a party contracting, without authority as agent for another, and

giving the name of the principal, can afterwards himself enforce the contract as principal. Strictly, it would seem, he cannot. Even admitting that the agent thus acting without authority might be held *liable* upon the contract as principal, because he acted in his own wrong, yet it does not follow that he himself should be allowed to take advantage of the wrong. This appears to have been the view of Lord *Ellenborough*, C. J., and *Abbott*, J., in *Bickerton v. Burrell*, 5 M. & Sel. 383; though the decision was put on the narrower and somewhat unsatisfactory ground, that the plaintiff had not *notified* the defendant, previous to bringing the action, of his claim to the character of principal. — If the other party, after knowledge of the true state of the matter, elect to act under the contract, it is clear that he has waived his right to object that it was not made originally with the plaintiff as principal. In *Rayner v. Grote*, 15 M. & W. 359, the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of J. & T. . the buyers accepted part of the goods, and the plaintiff (who in reality was himself principal in the transaction, and not agent for J. & T.) brought an action in his own name against the buyers for refusing to accept the remainder. At *nisi prius* the jury were instructed that if the defendants received the first portion of goods, with knowledge that the plaintiff was the real seller, and all

* agent is not responsible to third parties for mere neglect * 66 or omission in the discharge of his duty, for they must look to the principal. (u)

Whether an agent makes himself liable who transcends his authority, or acts without authority, but believes in good faith that he has such authority, may not be absolutely settled. It must depend upon the question whether he is regarded as always impliedly warranting his possession of authority. Where an agent fraudulently misrepresents his authority, with the purpose of deception, there it is as clear that he is liable *legally* as it is that he is liable *morally*.¹ But where he verily believes himself to possess the authority under which he acts, but is mistaken on this point, then a deciding test of his liability may perhaps be found in his means of knowledge. If he could have known the truth, and did not through his own fault, then he is ignorant by his own wrong. And if an injury is to result from this ignorance, either to a third party or to him, and the third party is wholly innocent, it ought to fall on him who so represented himself as agent, because he was not therein wholly innocent. He was not guilty of intentional deception, but he was guilty of deception in fact, and if this was caused * by his want * 67 of care or want of diligence, or by his negligence in any way, he must bear the burden of it. And this is what we should infer from some of the cases in which it is said that an agent who states that which he does not know to be true, places himself under the same liability as one who states what he knows to be not true. We think this principle just, only if it be meant that he is thus liable, who states what he does not know to be true, and by proper diligence and care might have known to be not true. But the question still remains, whether the agent is liable where he himself has been deceived wholly without his fault,—as by a forged letter which he could not detect. The case must be very rare in fact, where one acting as an agent is wholly with-

parties then treated the contract as one made with the plaintiff as principal in the transaction, the plaintiff was entitled to recover, and upon this instruction a verdict having been rendered for the plaintiff, the court held that the case was properly left to the jury, and refused to disturb the verdict.

(u) *Colvin v. Holbrook*, 2 Comst. 126 ; *Denny v. Manhattan Co.*, 2 Denio, 118, s. c. 5 Den. 639 ; *Brown v. Dean*, 123 Mass. 269 ; *Feltus v. Swan*, 62 Miss. 415 ; *Labadie v. Hawley*, 61 Tex. 177 ; *Brown v. Lent*, 20 Vt. 533.

1 "Persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority may be sued for damages for the breach of an implied warranty of authority." *Cockburn*, C. J., in *Richardson v. Williamson*, L. R. 6 Q. B. 276, 279. See also *Weeks v. Propert*, L. R. 8 C. P. 427. — W.

out the means of ascertaining his own agency. But we incline to the opinion, as resting on the better reason, that he would still be held. If he and the third party with whom he deals, are both perfectly innocent, and a loss occurs, and a loss results from his want of authority, this loss must fall somewhere; and it seems just that it should rest on him who has assumed, innocently but yet falsely, that he possessed this authority.¹ (x) But a party cannot hold him liable, if the agent acted in good faith, and the contract and all the facts were known to that party. (vv)

(vv) *Aspinwall v. Torrance*, 1 Lansing, *Michael v. Jones*, 84 Mo. 578; *Hall v. 381*. [*Ware v. Morgan*, 67 Ala. 461; *Lauderdale*, 46 N. Y. 70. In *Michael v.*

¹ The view taken in the text is that taken by most writers on the subject of agency, and seems logically consistent. It is generally admitted that an agent impliedly warrants that he has authority. If so, he must be liable for breach of the warranty, however innocent of any fraud he may have been and whatever reason he may have had to suppose he had authority. And the rule that an agent warrants his authority is usually stated broadly enough to cover every case. *Collen v. Wright*, 8 E. & B. 647; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427; *Firbank's Ex. v. Humphreys*, 18 Q. B. D. 54; *Meek v. Wendt*, 21 Q. B. D. 126; *Aff'd W. N.* (1889) 14. And see cases cited *post*, p. *68, note. But in *Lilly v. Smaler*, [1892] 1 Q. B. 456, where agents entered into a contract on behalf of their principals reciting that they did so "by telegraphic authority," it was held that evidence was admissible to show that these words were commonly adopted to negative the implication of any further warranty than that an agent had received a telegram which, if correct, authorized his action.

In *Kroeger v. Pitcairn*, 101 Pa. 311, it was expressly decided that the agent's innocence and ignorance (however justifiable) of his lack of authority did not excuse him from liability. And so in *Bank of Hamburg v. Wray*, 4 Strob. L. 87.

On the other hand, in *Polhill v. Walter*, 3 B. & Ad. 114, the right of action is held to be grounded on an affirmation of authority which the one making it knew to be false; and if he acted under an authority which was forged but which he believed genuine he would not be responsible. While this may have been somewhat qualified by *Smout v. Ilbery*, 10 M. & W. 1, Story seems not to have been justified in saying it was "entirely overthrown" (Agency, § 263 n.). *Alderson, B.*, in his opinion does indeed say that one who in good faith represented himself as agent when unauthorized might be liable, but this on the ground that he might and should have used greater diligence to discover the extent of his authority. The true principle he states to be "there must be some wrong or omission of right on the part of the agent in order to make him personally liable." The facts of the case were that the family of *Ilbery* was supplied with provisions by *Smout*. *Ilbery* was lost on a voyage to India. The action was against his widow, and the chief question was whether she was liable for goods supplied her as her husband's agent, after his death. It was held that she was not, as "there was no *mala fides* on her part, no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God." *Smout v. Ilbery* is approved in *In re Oriental Bank*, 28 Ch. D. 634, 641. And in *McCurdy v. Rogers*, 21 Wis. 197, it is held, largely on the authority of *Smout v. Ilbery*, that an agent is not liable for his want of authority unless there is some wrong or omission on his part. See also *Carriger v. Whittington*, 26 Mo. 311.

As to the measure of damages for breach of the implied warranty of authority, see *Meek v. Wendt*, 21 Q. B. D. 126, *Aff'd W. N.* (1889) 14.

(c) The proposition in the cited case of *Wright*; and the English rule now is that *Smout v. Ilbery*, p. 11, that an agent's personal liability on a contract made in his principal's name depends on some wrong or omission on his own part, is negatively by the cited case of *Collen v. Wright*; and the English rule now is that an agent is liable on an implied warranty of his authority only when the other party rightly relied on the existence of an authority in fact. *Halbot v. Lens*, [1901] 1 Ch. 344.

* The question then occurs, whether in such a case the agent can be held *on the contract*, and in some cases it has been so decided.¹ * But we think it the better opinion that the contract is wholly void. It is not the contract of the principal, because he gave no authority to the supposed agent. It is not the contract of the agent, for he professed to act for the principal. So if one forges a signature to a note, and obtains money on that note, he cannot be held on it as on his promise to pay. But in all such cases the supposed agent may be reached in assumpsit if money be paid to him or work and labor done for him under such supposed contract, or in trespass for special damages for so undertaking to act for another without authority, or in some other appropriate action; but not on the contract itself.

An agent who exceeds his authority renders himself liable to the whole extent of the contract, although a part of it was within his authority. (x) It may, however, be said, that where an agent exceeds his authority, what he does within it is valid, if that part be distinctly severable from the remainder.²

SECTION VIII.]

REVOCATION OF AUTHORITY.

It is a general principle, that an authority is always revocable; the principal may at any time put an end to the relation between

Jones, the court say: "Where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability."]

(x) Thomas v. Joslin, 30 Minn. 388; Feeter v. Heath, 11 Wend. 477. — But in

Johnson v. Blasdale, 1 Sm. & M. (Miss.) 1, it was held that if an agent in filling up a blank note exceed his authority, and the third party receive the note with knowledge that the authority has been transcended, the note will not be void *in toto*, but only for the excess beyond the sum which was authorized.

¹ The weight of authority is now strongly in favor of the view supported in the text, that an agent making a contract in the name of a principal cannot be himself charged as contractor, because he lacked authority to bind his supposed principal, but must be sued in tort for deceit or on an implied warranty of authority. *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Collen v. Wright*, 8 E. & B. 647; *Firbank's Ex. v. Humphreys*, 18 Q. B. D. 54; *Senter v. Monroe*, 77 Cal. 347; *Ogden v. Raymond*, 22 Conn. 379; *Taylor v. Shelton*, 30 Conn. 122; *Duncan v. Niles*, 32 Ill. 532; *McHenry v. Duffield*, 7 Blackf. 41; *Noyes v. Loring*, 55 Me. 408; *Bartlett v. Tucker*, 104 Mass. 336; *Patterson v. Lippincott*, 47 N. J. L. 457; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Baltzen v. Nicolay*, 53 N. Y. 467; *McCurdy v. Rogers*, 21 Wis. 197.

Contrary decisions are *Keener v. Harrod*, 2 Md. 63, 70; *Woodes v. Dennett*, 9 N. H. 55; *Weare v. Gove*, 44 N. H. 196; *Bay v. Cook*, 2 Zab. 343; *Meech v. Smith*, 7 Wend. 315. But the decisions in New Jersey and New York may be considered as overruled by the later cases in those States, cited *supra*. — W.

² Co. Lit. 258 a; *Drumright v. Philpot*, 16 Ga. 424; *Vanada v. Hopkins*, 1 J. J.

himself and his agent by withdrawing the authority, unless the authority is coupled with an interest, (x) or given for a
 * 70 * valuable consideration. (y) Notice of revocation is not necessary, where the agent had only a special authority to do a special act, and this authority is exhausted. (yy) But where third parties have dealt with an agent clothed with general powers, whose acts have therefore bound his principal, and the principal revokes the authority he gave his agent, such principal will continue
 * 71 to be bound by the further acts of his agent, unless the third parties have knowledge of the revocation, or unless

(y) *Smith v. Cedar Fall, &c. R. Co.*, 30 Ia. 244; *Phillips v. Howell*, 60 Ga. 411; *Simonton v. Minneapolis Bank*, 24 Minn. 216. It is to be noticed, that many cases which in England might be understood as examples of an authority irrevocable at the pleasure of the principal, because coupled with an interest, would not in this country be classed under that head, owing to the general adoption here of the definition of a "power coupled with an interest," given in *Hunt v. Rousmanier*, 8 Wheat. 201 [see *post*, note (d)]. All such cases, it seems, can be considered instances where the authority cannot be revoked because of the *valuable consideration* moving from the agent; as where the agent had begun to act under the authority, and would be damnified by its recall, or where the authority is part of a security. *Walsh v. Whitcomb*, 2 Esp. 565; *Gausson v. Morton*, 10 B. & C. 731; *Hodgson v. Anderson*, 3 B. & C. 842; *Broomley v. Holland*, 7 Ves. 28; *Marryat v. Broderick*, 2 M. & W. 371; *Eltham v. Kingsman*, 1 B. & Ald. 684; *Yates v. Hoppe*, 9 C. B. 541; *Reed v. Anderson*, 10 Q. B. D. 100; *Ware, J.*, *United States v. Jarvis*, 2 Ware, 278. And see *Brown v. McGran*, 14 Pet. 479, 495; *Story on Agency*, §§ 466, 467, 468, where the opinions of the civilians are cited; but compare 2 Kent Com. 644. *Fabens v. The Mercantile Bank*, 23 Pick. 330, seems to be the case of a power irrevocable by the principal, both because given for consideration and because coupled with an interest in the sense of Chief Justice Marshall. Whether after advances made by a factor, his authority to sell the goods of the principal to the extent of those advances is

revocable at the pleasure of the principal, is a question upon which the authorities are not agreed. In *Brown v. McGran*, 14 Pet. 479, it was held that the authority to sell is not revocable in such a case. The decisions in the State courts appear to be in substantial agreement with *Brown v. McGran*. If the original authority, on consideration of which the advances were made, was an authority to sell at a *limited price*, it seems plain that the fact of the advances does not alter that authority. It continues an authority to sell on certain terms, and as such, on the doctrine of the Supreme Court, may be held irrevocable to the extent of the consideration given for it, that is, to the amount of the advances. Some of the State courts have gone a step further in this direction, and held that an authority to sell at a limited price may be converted into a *general* authority to sell, by the fact of advances in conjunction with the fact of the neglect of the consignor, after reasonable notice, to repay the advances. *Hallowell v. Fawcett*, 30 Ia. 491; *Davis v. Kobe*, 36 Minn. 214; *Howard v. Smith*, 56 Mo. 314; *Parker v. Brancker*, 22 Pick. 40; *Frothingham v. Everton*, 12 N. H. 239. See also *Blot v. Boiceau*, 3 Comst. 78; *Mooney v. Musser*, 45 Ind. 115; *Butterfield v. Stephens*, 59 Ia. 596; *Dalby v. Stearns*, 132 Mass. 230; *Hilton v. Vanderbilt*, 82 N. Y. 591. In *Smart v. Sanders*, 5 C. B. 895, it was decided that a factor's authority to sell is revocable at the will of the consignor, notwithstanding advances to the full value and a request of repayment uncomplied with. See also *Raleigh v. Atkinson*, 6 M. & W. 670; *Hutchins v. Hebbard*, 34 N. Y. 24.

(yy) *Watts v. Kavanagh*, 35 Vt. 34.

Marsh, 285; *Dickerman v. Ashton*, 21 Minn. 538; *Moore v. Thompson*, 32 Me. 497; *Stowell v. Eldred*, 39 Wis. 614. — W.

(x) In such case, when there is a sufficient consideration, the authority is irrevocable. *Carmichael's Case*, [1896] 2 Ch.

643. See *Gausson v. Morton*, 10 Barn. & Cress. 731, 16 English Ruling Cas. 797, and notes.

he does what he can to make the revocation as notorious and generally known to the world as was the fact of the agency. (z) This is usually done by advertising, and usage will have great effect in determining whether such principal did all that was incumbent on him to make his revocation notorious. And third parties who never dealt with such agent before such revocation, if they, as a part of the community, were justified in believing such agency to have existed, and had no knowledge and no sufficient means of knowledge of the revocation, may hold the principal liable for the acts of the agent after revocation; (a) as in the case of a partnership, where the dissolution or change of parties was not properly made known. (b)

A revocation of authority may be made either expressly or by any action in relation to the subject-matter which is manifestly irreconcilable with a continuance of the authority. (bb)¹ And it has been held that a principal revoking an authority may compel the former agent to deliver up the paper conferring authority. (bc)

(z) *Hazard v. Tredwell*, Stra. 506; — *v. Harrison*, 12 Mod. 346; *Buller, J., Salte v. Field*, 5 T. R. 215; *Spencer v. Wilson*, 4 Munf. 130; *Morgan v. Stell*, 5 Binn. 305; *Packer v. Hinckley Works*, 122 Mass. 484; *Ins. Co. v. McCain*, 96 U. S. 84; *Meyer v. Hehner*, 96 Ill. 400; *Ulrich v. McCormick*, 66 Ind. 243; *Braswell v. Am. Ins. Co.*, 75 N. C. 8; *Clafin v. Lenheim*, 66 N. Y. 301; *Fellows v. Hartford, &c. Co.*, 38 Conn. 197. See *Eadie v. Ashbaugh*, 44 Ia. 519; *Hatch v. Coddington*, 95 U. S. 48; *Barkley v. Rensselaer, &c. R. Co.*, 71 N. Y. 205. — Where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person, who deals with him as agent on the faith of it without any notice of the revocation, the act of the agent within the scope of the authority will bind the principal. *Beard v. Kirk*, 11 N. H. 397. This necessity for actual notice of revocation, or a general notoriety equivalent

to notice, has been held to exist in full force in the case of an authority implied from cohabitation, joined with the previous sanction of acts of agency performed by the person held forth as wife. That the tradesman furnishing the goods in such a case has knowledge that the woman is only a mistress, does not affect his right to notice of separation. *Ryan v. Sams*, 12 Q. B. 460, where *Munro v. De Chemant*, 4 Camp. 215, was commented on. *Tier v. Lampson*, 35 Vt. 179.

(a) See last note.

(b) *Graham v. Hope*, 1 Peake, 154; *Parkin v. Carruthers*, 3 Esp. 248; *Wardwell v. Haight*, 2 Barb. 549.

(bb) *Potter v. Merchants Bank*, 28 N. Y. 641; *Gilbert v. Hohnes*, 64 Ill. 548; *Meyer v. Hehner*, 96 Ill. 400; *Rowe v. Rand*, 111 Ind. 206; *Moore v. Stone*, 40 Ia. 259; *Wright v. Herrick*, 128 Mass. 240.

(bc) *Spear v. Gardner*, 16 La. An. 383.

¹ If one is appointed sole agent for a time certain, neither his principal's sale of his business before that time, *Rhodes v. Forwood*, 1 App. Cas. 256; nor his bankruptcy, *Orr v. Ward*, 73 Ill. 318; nor his discontinuance from business voluntarily, entitles him to indemnity. *Ex parte Maclure*, L. R. 5 Ch. 737; *contra*, *Lewis v. Atlas Ins. Co.*, 61 Mo. 534; *Vanuxem v. Bostwick*, 7 Atl. Rep. 598 (Pa.); unless there is an agreement to pay the agent a certain sum if he lost his place, *Ex parte Logan*, L. R. 9 Eq. 149. Nor is a broker who was to find a purchaser of land within a month, and whose agency is revoked before the end of the month, entitled to his commission, though he found the purchaser within the month. *Brown v. Pforr*, 38 Cal. 550. But see *Kaufman v. Manufacturing Co.*, 78 Ia. 679; *Warren, &c. Co. v. Holbrook*, 118 N. Y. 586. — W.

A mere appointment of another agent to do the same thing is not of itself a revocation of the first appointment. (*bd*)

The death of the principal operates *per se* as a revocation of the agency. (*c*) But not if the agency is coupled with an

* 72 * interest vested in the agent. (*d*) Then it survives, and

(*bd*) Darrol v. Quimby, 11 Allen, 208.

(*c*) Co. Litt. § 66; Hunt v. Rousmanier, 8 Wheat. 201; Watson v. King, 4 Camp. 272; Lepard v. Vernon, 2 Ves. & B. 51; Smout v. Ilbery, 10 M. & W. 1; Buxton v. Jones, 1 Man. & G. 84; Campanari v. Woodburn, 15 C. B. 4; Rigs v. Cage, 2 Humph. (Tenn.) 350; Ferris v. Irving, 28 Cal. 645; Turnan v. Temke, 84 Ill. 286; Lincoln v. Emerson, 108 Mass. 87; Clayton v. Merritt, 52 Miss. 353; Weber v. Bridgman, 113 N. Y. 600; Davis v. Windsor Bank, 46 Vt. 728. In Cassiday v. McKenzie, 4 W. & S. 282; Dick v. Page, 17 Mo. 234; and Ish v. Crane, 8 Ohio St. 520, it was held, in opposition to the current of authority, that a payment made by an agent, after the death of his principal, he being ignorant thereof, was valid as an act of agency. See also Garrett v. Trabue, 82 Ala. 227; *s. c. sub nom.* Davis v. Davis, 93 Ala. 173. *Lunacy of the principal* revokes, but the better opinion (according to 2 Kent Com. 645) is, that the fact of lunacy must have been previously established by inquisition before it could control the operation of the power; and see Bell, Com. on the Laws of Scotland, § 413. — In Davis v. Lane, 10 N. H. 156, it was held, that the authority of an agent, where the agency is revocable, ceases, or is suspended, by the insanity of the principal, or his incapacity to exercise any volition upon the subject-matter of the agency, in consequence of an entire loss of mental power; but that if the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent within the scope of the authority he appears to possess, the principal and those who claim under him may be precluded from setting up the insanity as a revocation. The court in this case also held, that the principle, that insanity operates as a revocation, cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent. Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, was left undecided. Similar decisions are Drew

v. Nunn, 4 Q. B. D. 661; Matthiesson v. McMahon, 38 N. J. L. 536. See Jones v. Noy, 2 Myl. & K. 125; Waters v. Taylor, 2 Ves. & B. 301; Huddleston's case, 2 Ves. Sen. 34, 1 Swanst. 514, n.; Sayer v. Bennet, 1 Cox's Cas. 107. — *Bankruptcy of the principal* revokes the authority. Parker v. Smith, 16 East, 382; Minett v. Forrester, 4 Taunt. 541; Pearson v. Graham, 6 A. & E. 899. — [But not as to third parties who deal with the agent in ignorance of the bankruptcy. *Ex parte Snowball*, L. R. 7 Ch. 534, 548.] — *Marriage of feme sole principal* revokes. White v. Gifford, 1 Rol. Abr. *Authoritie* E. pl. 4; Charnley v. Winstanley, 5 East, 266. But generally otherwise now by statute.

(*d*) See *ante*, p. *70, n. (*y*). Hunt v. Rousmanier, 8 Wheat. 201; Merritt v. Lynch, 68 Me. 94; Bergen v. Bennett, 1 Caines's Cas. 1; Smyth v. Craig, 3 W. & S. 14; Cassiday v. McKenzie, 4 W. & S. 282; Knapp v. Alvord, 10 Paige, 205. The important question is what constitutes an *authority coupled with an interest*; and here there is some diversity in judicial definition. In Hunt v. Rousmanier, 8 Wheat. 201, it was held (Marshall, C. J., giving the opinion of the court), that the interest which can protect a power, after the death of the person who creates it, must be an interest in the *thing itself* on which the power is to be exercised, and not an interest in that which is produced by the exercise of the power. — In Smart v. Sandars, 5 C. B. 895, 917, Wilde, C. J., said that, "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an *authority coupled with an interest*:" — that is, irrevocable except by the *death* of the principal; for the *dictum*, as the whole case shows, is to be taken in connection with the doctrine, understood still to prevail in England, on the authority of Lord Ellenborough, in Watson v. King, 4 Camp. 272, that death revokes even a power coupled with an interest. See *ante*, note (*y*). A warrant of attorney to confess judgment is not revocable; and though determinable by *death*, yet, at common law, as a judgment entered up

the agent may do all that is necessary to realize his interest and make it beneficial to himself. Such an agency is not revocable at the pleasure of the principal in his lifetime (e) and if the agent dies the agency passes over to his representatives. (f) To determine whether the agency be thus irrevocable, it is an important if not a decisive question, whether the act authorized could be performed by the agent in his own name, or only by him as an agent, and in the name of the principal. In the first case, if an interest were coupled with the agency, the authority would survive the death of the principal, and the agent might perform * the act in the same manner after the death * 73 as before. In the latter case, as he could no longer use the name of the principal, for the obvious reason that one who is dead *can no longer act*, it would seem that his right must be limited to that of requiring the representatives of the deceased to perform the act necessary for his protection.

Unless the authority is thus coupled with an interest, it would seem the word "irrevocable" does not take away the power of revocation. (ff)

The revocation is not prevented by any interest in the money to come from the exercise of the authority;¹ but the interest must be in the property on which the power is to be exercised. (fg)

The authority is revoked by the death of the agent.² Hence,

during any term, or the subsequent vacation, related to the first day of such term, a warrant of attorney might be made available after the death of the principal, by entering up judgment within the term and vacation in which the death occurred. *Lord Holt*, *Oades v. Woodward*, 1 Salk. 87; *Fuller v. Jocelyn*, 2 Stra. 882; *Heapy v. Parris*, 6 T. R. 368.

(e) *Gausson v. Morton*, 10 B. & C. 731; *Walsh v. Whitcomb*, 2 Esp. 565; *Allen v. Davis*, 8 Eng. (Ark.) 29. See also *Marfield v. Goodhue*, 3 Comst. 62; *Hough-*

taling v. Marvin, 7 Barb. 412; *Wilson v. Edmonds*, 4 Foster (N. H.), 517.

(f) 2 Kent Com. 643.

(ff) *Chambers v. Seay*, 73 Ala. 372; *Frink v. Roe*, 70 Cal. 296; *Walker v. Denison*, 86 Ill. 142; *McGregor v. Gardner*, 14 Ia. 326; *Attrill v. Patterson*, 58 Md. 226; *Blackstone v. Buttermore*, 53 Pa. 266.

(fg) *Hartley's Appeal*, 53 Penn. St. 202; *Barr v. Schroeder*, 32 Cal. 609; *Blackstone v. Buttermore*, 53 Penn. St. 236.

¹ As by way of a commission, in the surplus proceeds of land to be sold. *Hawley v. Smith*, 45 Ind. 183. Or by way of payment for collecting a debt. *Flanagan v. Brown*, 70 Cal. 254. — W.

² *Adrianse v. Rutherford*, 57 Mich. 170. Similarly the death of an agent with the power of substitution, revokes the authority of a substitute. *Lehigh Coal Co. v. Mohr*, 83 Pa. 228. See *Jackson Ins. Co. v. Partee*, 9 Heisk. 296. But in case of the agent's death, as in case of the principal's, if the power was coupled with an interest it will survive and pass to the agent's representatives. *Lewis v. Wells*, 50 Ala. 198; *Merrin v. Lewis*, 90 Ill. 505; *Harnickell v. Orndorff*, 35 Md. 341. Insanity of the agent likewise terminates an agency. *Rowe v. Rand*, 111 Ind. 206; *Salisbury v. Brisbane*, 61 N. Y. 617. Or his bankruptcy. *Hudson v. Granger*, 5 B. & Ald. 27; *Audenried v. Betteley*, 8 Allen, 302. Or severance of the interest of two joint principals. *Rowe v. Rand*, 111 Ind. 206. War between the State where the principal is domiciled and that where the agent is domiciled terminates an agency. Insurance

if a firm be the agent, and one of them dies, his estate cannot be charged for the subsequent misuse of the authority by the surviving partner. (*fh*)

SECTION IX.

HOW THE PRINCIPAL IS AFFECTED BY THE MISCONDUCT OF HIS AGENT.

A principal is liable for the fraud or misconduct of his agent, so far, that, on the one hand, he cannot take any benefit from any misrepresentation fraudulently made by his agent, although the principal was ignorant and innocent of the fraud; (*g*) and on the other hand, if the party dealing with the agent suffer from such fraud, the principal is bound to make him compensation for the injury so sustained; (*h*) and this although the * 74 * principal be innocent, (*i*) provided the agent acted in

(*fh*) *Johnson v. Wilcox*, 25 Ind. 182.

(*g*) *Attorney-General v. Ansted*, 12 M. & W. 520; *Fitzherbert v. Mather*, 1 T. R. 12; *Seaman v. Fonereau*, 2 Stra. 1183; *Fitzsimmons v. Joslin*, 21 Vt. 129. "I have no doubt that if an agent of a party, say of Mr. Attwood in this case, without his knowledge, made a wilfully false representation to the *British Iron Company*, upon which representation they acted '*adhibentes fidem*,' and on that confidence had formed a contract, — I have no hesitation whatever in saying, that against that contract, equity would relieve just as much as if there was the *scienter* of the principal proved; because it is not a question of criminal responsibility which is here raised by the facts. The agent could not commit the principal to any criminal purpose, if the principal did not know it, and had not either given him an authority or adopted his act when he did know it. But as to the civil effect of vitiating the contract made upon that false representation, I have no doubt whatever that it would vacate it just as much, with the ignorance of the principal, as if he were charged with knowing it, and as if the agent had been an agent for this purpose." Lord *Brougham* in *Attwood v. Small*, 6 Cl. & F. 448. See also *Taylor v. Green*, 8 C. & P. 316; *Olmsted v. Hotelling*, 1 Hill (N. Y.), 317; *Veazie v. Wil-*

liams, 8 How. 134, s. c. 3 Story, 611; *Smith v. Tracy*, 36 N. Y. 79.

(*h*) *Holt*, C. J., in *Hern v. Nichols*, 1 Salk. 289, and *Ellenborough*, C. J., in *Crockford v. Winter*, 1 Camp. 124, lay down the broad doctrine that a principal is answerable *civiliter*, though not *criminaliter*, for the fraud of his agent. In *Jeffrey v. Bigelow*, 13 Wend. 518, it was held that the plaintiff could recover damages for the loss both of diseased sheep purchased and of other sheep receiving the infection, and all other damages necessarily and naturally flowing from the act of the defendants' agent. See also *Johnston v. South-Western Railroad Bank*, 3 Strobr. Eq. 263; *Mitchell v. Mims*, 8 Tex. 6; *Udell v. Atherton*, 7 H. & N. 172; *Sweetland v. Ill.*, &c. Tel. Co. 27 Ia. 433; *Fawcett v. Bigley*, 59 Pa. St. 411.

(*i*) *Irving v. Motley*, 7 Bing. 543; *Doe v. Martin*, 4 T. R. 39, 66; *Edwards v. Footner*, 1 Camp. 530. Where an attorney's clerk had simulated the court seal upon a writ, by taking an impression from the seal upon another writ, the writ, and all proceedings thereon were set aside, and the attorney, although personally blameless, was compelled to pay the costs. *Dunkley v. Farris*, 11 C. B. 457, 285; *Hunter v. Hudson River, &c. Co.*, 20 Barb. 493.

Co. v. Davis, 95 U. S. 425; *Howell v. Gordon*, 40 Ga. 302; *Blackwell v. Willard*, 65 N. C. 555. See *contra*, *Sands v. New York Ins. Co.*, 50 N. Y. 626; *Darling v. Lewis*, 11 Heisk. 125. See also *Manhattan Ins. Co. v. Warwick*, 20 Gratt. 614. — W.

the matter as his agent, and distinctly within the line of the business intrusted to him. (k) (x) And though there be no actual fraud on the part of the agent, yet if he makes a false representation as to matter peculiarly within his own knowledge, or that of his principal, and thereby gets a better bargain for his principal, such principal, although innocent, cannot take the benefit of the transaction.¹ But the third party may rescind the contract, and

(k) *Peto v. Hague*, 5 Esp. 135; *Huckman v. Fernie*, 3 M. & W. 505. — In *Woodin v. Burford*, 2 Cr. & M. 392, *Bayley*, B., said "What is said by a servant is not evidence against the master, *unless he has some authority given him to make the*

representation." It is not meant, as the case shows, that there must be an express authority to make that particular representation; but the authority may be implied as incident to a general authority. *Sharp v. New York*, 40 Barb. 256.

¹ A principal is liable for the false and fraudulent representations of his agent made in the course of the agent's performance of his agency, as he is for other torts of his agent under similar circumstances, by the doctrine of *respondent superior*. *Borwick v. English Joint Stock Banking Co.*, L. R. 2 Ex. 259; *MacKay v. Commercial Bank*, L. R. 5 P. C. 394; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *City Nat. Bank v. Dun*, 51 Fed. Rep. 160; *Wolfe v. Pugh*, 101 Ind. 293; *Rhoda v. Annis*, 75 Me. 17; *Lamm v. Port Deposit, &c. Assoc.*, 49 Md. 233; *Griswold v. Gebbie*, 126 Pa. 353. See also *Jewett v. Carter*, 132 Mass. 335; *Eilenberger v. Protective Mutual Ins. Co.*, 89 Pa. 464; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. 479; *Law v. Grant*, 37 Wis. 548. A contrary decision is *Kennedy v. McKay*, 43 N. J. L. 288. And see *Weir v. Bell*, 3 Ex. D. 238.

In *British Mutual Banking Co. v. Charnwood, &c. Ry. Co.*, 18 Q. B. D. 714, the secretary of the defendant company answered questions which were put to him as secretary, as to the validity of certain debenture stock. He was held out by the defendants as the proper person to answer such questions. The answers he gave were false and fraudulently made for his own benefit. The defendants did not benefit by his false statements. It was held by the Court of Appeal (reversing the decision of the Queen's Bench Division) that the defendants were not liable because the secretary was acting for his own benefit. This decision seems to be at variance with the principles laid down in the cases cited above, and to be open to criticism. Since the agent had authority to answer such questions he was acting within the scope of his authority. What his motive was in committing a tort while exercising his authority or who benefited by the tort seem immaterial. See *Bishop v. Balkis Consolidated Company*, 25 Q. B. D. 77, 84; *City Nat. Bank v. Dun*, 51 Fed. Rep. 160; *Western, &c. R. R. Co. v. Franklin Bank*, 60 Md. 36; *Reynolds v. White*, 13 S. C. 5.

Instead of suing for the tort, one defrauded by the false and fraudulent representa-

(x) The principal is civilly liable for the neglect, fraud, deceit, or other wrongful act of his agent, general or special, although himself innocent. *McIntire v. Prior*, 173 U. S. 38, 19 S. Ct. 352, 43 L. Ed. 606; *Dun v. City Nat. Bank*, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; *Donnelly v. S. F. Bridge Co.*, 117 Cal. 417; *Thorne v. Heard*, [1894] 1 Ch. 599; *Continental Ins. Co. v. Penn Ins. Co.*, 51 Fed. 884; *Mayer v. Dean*, 115 N. Y. 556; see *Wachsmuth v. Martini*, 45 Ill. App. 244. He is criminally liable for such an act as the illegal sale, by his servant, of intoxicating liquors to a minor, whether the minor be a principal or agent, only

when he abets the sale, or does not use reasonable diligence in selecting his servants, or in securing obedience to his instructions. *Com'th v. Stevens*, 153 Mass. 421, 26 N. E. 96, 25 Am. St. Rep. 647; *Com'th v. Joslin*, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; *Com'th v. Gould*, 158 Mass. 499, 33 N. E. 656; *Kelly v. Burke (Ala.)*, 31 So. 512; *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350. In general all are principals who aid or co-operate in a criminal or tortious act. See *Com'th v. Brown*, 154 Mass. 55, 13 L. R. A. 195; *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126. And an agency cannot exist for doing an unlawful act. *Jamieson v. Wallace*, 167 Ill. 388, 47 N. W. 762.

recover back any money he may have paid the principal, by reason of his confidence in such misrepresentation. (*l*) And it has been held, that if an agent, permitted by his principal to hold himself out as owner of land, sells it for the agent's own interest, the sale binds the principal. (*ll*) The declarations of an agent are not admitted as evidence against his principal, unless they are a part of the *res gestæ*. (*lm*)

SECTION X.

OF NOTICE TO AN AGENT.

A principal is affected by notice to his agent, respecting any matter distinctly within the scope of his agency, when the notice is given before the transaction begins, or before it is so
* 75 far * completed as to render the notice nugatory. (*m*) The notice to the agent may be implied as well as express. (*x*)

(*l*) Willes v. Glover, 4 B. & P. 14 ; Ashhurst, J., Fitzherbert v. Mather, 1 T. R. 16 ; Franklin v. Ezell, 1 Sneed, 497 ; National Exchange Co. v. Drew, 2 Macq. 103 ; Carpenter v. Amer. Ins. Co., 1 Story, 57. And it seems the purchaser, without rescinding the contract, may maintain case for deceit against the principal. Fuller v. Wilson, 3 Q. B. 58.

(*ll*) Calais Co. v. Van Pelt, 2 Black, 372.

(*lm*) Green v. Gonzales, 2 Daly, 412.

(*m*) Bank of U. S. v. Davis, 2 Hill (N. Y.), 451 ; Owens v. Roberts, 36 Wis. 258 ; Farmer v. Willard, 71 N. C. 284. And see Hinton v. Citizens' Ins. Co., 63 Ala. 488 ; Sooy v. State, 12 Vroom, 394 ; Houseman v. Girard Ass., 81 Penn. St. 256 ; Day v. Wamsley, 33 Ind. 145 ; Chouteau v. Allen, 70 Mo. 290. Notice to one of several joint purchasers, whatever be the nature of the estate they take, is

not in general notice to the rest, unless he who receives the notice be their agent ; and where notice was given to a husband, at the time of taking a conveyance of lands to himself and wife, of a prior unregistered mortgage, it was held not to operate as notice to the wife, so as to give the mortgage a preference in respect to her title ; especially as she had paid the consideration for the conveyance out of her separate estate. Snyder v. Sponable, 1 Hill (N. Y.) 567 ; s. c. affirmed in error, 7 Hill, 427. It seems a principal is chargeable with notice of what is known to a *sub-agent*, how many degrees soever removed, such sub-agent being appointed by his authority. See Boyd v. Vanderkemp, 1 Barb. Ch. 287. As to the time when notice may be given, see Tourville v. Naish, 3 P. Wms. 307 ; Story v. Lord Windsor, 2 Atk. 630 ; More v. Mayhew, 1 Ch. Cas. 34 ; Wigg v. Wigg, 1 Atk. 384.

tions of an agent may tender back what he has received by the bargain and rescind it. Marsh v. Buchan, 46 N. J. Eq. 595 ; McKinnon v. Vollmar, 75 Wis. 82.

If the principal fraudulently conceals from the agent material facts in order that the latter may innocently make representations which the principal knows to be false the principal is liable in deceit to one defrauded by such representations. Ludgater v. Love, 44 L. T. Rep. (N. s.) 694. And see Blackburn v. Haslam, 21 Q. B. D. 144.

A more difficult question arises where both parties are innocent of any fraud, but the agent makes representations in good faith which the principal could not have made without fraud. See *ante*, pp. *61, note (*u*), *73, note (*h*). — W.

(*x*) The only question is whether the agent had knowledge present to his mind, however acquired, which it was his duty to his principal to communicate, and which he was under no superior obligation to any other to withhold. Kettlewell v.

Knowledge obtained by the agent in the course of *that very transaction* is noticed;¹ and it has been said, that knowledge obtained in another transaction, but so short a time previous that the agent must be presumed to recollect it, is also notice affecting the principal; (*n*) but this is questionable. (*o*)² This

(*n*) Lord *Langdale*, *M. R.*, *Hargreaves v. Rothwell*, 1 Keen, 159. And see *Mountford v. Scott*, 3 Madd. 34. (*o*) *N. Y. Cent. Ins. Co. v. National Ins. Co.*, 20 Barb. 468.

¹ Knowledge of a managing tenant in common affects his co-tenants, *Ward v. Warren*, 82 N. Y. 265; and of an attorney of the intention of an insolvent to commit a fraud under the bankrupt law is imputable to his client, *Rogers v. Palmer*, 102 U. S. 263; but a wife is not affected by her husband's knowledge of incumbrances on land purchased by her, *Pringle v. Dunn*, 37 Wis. 449. So a buyer's intention, known to a seller's agent, to evade a liquor law, affects the seller, *Suit v. Woodhall*, 113 Mass. 391; but *contra*, *Stanley v. Chamberlin*, 10 Vroom, 565, affirmed in 11 Vroom, 379, to the effect that a principal, without actual knowledge of the proposed illegal use of property, could disown the agent's act and recover for such use. See further, *Hoover v. Wise*, 91 U. S. 308; *Greentree v. Rosenstock*, 61 N. Y. 583; *Farrington v. Woodward*, 82 Penn. St. 259; *Tagg v. Tennessee Bank*, 9 Heiskell, 479. — K.

² There is great conflict of authority as to whether the principal is chargeable with the knowledge of his agent acquired before the agency or while the agent is not acting as such. In the following cases he is held not to be: *Mountford v. Scott*, 3 Madd. 34; 1 Turn. & Russ. 274; *Hiern v. Mill*, 13 Ves. Jr. 114; *Pepper v. George*, 51 Ala. 190; *Renton v. Monnier*, 77 Cal. 449; *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *Campbell v. Benjamin*, 69 Ill. 244; *Sooy v. State*, 41 N. J. L. 394; *Weisser v. Denison*, 10 N. Y. 68; *Houseman v. Girard, & Co. Assoc.*, 81 Pa. 256; *Barbour v. Wiehle*, 116 Pa. 308; *Wells v. American Express Co.* 44 Wis. 342.

On the other hand it is held that the principal is so chargeable, at least if the knowledge in question was so recently acquired as to be presumably present to the agent's mind, when he acted as such, in *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Rolland v. Hart*, L. R. 6 Ch. 678; *Cave v. Cave*, 15 Ch. D. 639; *The Distilled Spirits*, 11 Wall. 356 (and see *Peters v. Bain*, 133 U. S. 670, 697); *Whitten v. Jenkins*, 34 Ga. 305; *Day v. Wamsley*, 33 Ind. 145; *Yerger v. Barz*, 56 Ia. 77; *Lunt v. Neeley*, 67 Ia. 97; *Fairfield Savings Bank v. Chase*, 72 Me. 226; *Suit v. Woodhall*, 113 Mass. 391; *Sartwell v. North*, 144 Mass. 188; *Campau v. Konan*, 39 Mich. 362; *Wilson v. Minn., & Co. Assoc.*, 36 Minn. 112; *Choteau v. Allen*, 70 Mo. 290 (see also *Bank of Commerce v. Hoerber*, 88 Mo. 37); *Scripture v. Franctown Soapstone Co.*, 50 N. H. 571; *Willard v. Denise*, 26 At. Rep. 29 (N. J.); *Hyatt v. Clark*, 128 N. Y. 563; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89.

The reason generally given for charging the principal with notice is that it is the duty of the agent to communicate to his principal the knowledge he has of the subject-matter of the agency. And in the latter class of cases it is said that he is bound to do so irrespective of when the information was acquired, and that he is presumed to discharge this duty. This reasoning is not applicable where the agent ought not to disclose the information he possesses, or where he certainly will not do so, and such cases are excepted from the rule charging the principal with notice. An illustrative case where the agent ought not to disclose the information he possesses is when he being an attorney acquired it confidentially from a former client. *The Distilled Spirits*, 11 Wall. 356, 367; *Ford v. French*, 72 Mo. 250. See also *Pepper v. George*, 51 Ala. 190; *Abel v. Howe*, 43 Vt. 403. The ordinary instance of the second exception is where the agent is endeavoring to commit an independent fraud for his own

Watson, 21 Ch. D. 685, 704; 26 id. 501; *Re Southampton*, 50 L. J. Ch. 155; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. R. 319 and note; *National Security Bank v. Cushman*, 121 Mass. 490; *Yerger v. Barz*, 56 Iowa, 77; *Texas Banking Co. v. Hutchins*, 53 Tex. 61. See *Ford v. French*, 72 Mo. 250; *City of Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79 and note.

A suit brought by an agent, in his own name, for a foreign principal, may be stayed until the latter gives discovery ordered from him as if he were the actual plaintiff. *Willis v. Baddeley*, [1892] 2 Q. B. 324.

matter has been most discussed in cases where, in consequence of the employment of solicitors or counsel in the purchase of real estate, the question has arisen how far the clients are affected with notice of incumbrances, or defects of title, which, by a more or less strong presumption, must be taken to have come to the knowledge of their agents. Two propositions seem to be well settled: the first, that the notice to the solicitor, to bind the client, must be notice in the same transaction in which the client employs him,

or at least, during the time of the solicitor's employment in

* 76 that transaction; (p) the other, that where a * purchaser

(p) *Wigram, V. C., Fuller v. Bennett*, would be very mischievous if it were other-
2 Hare, 402, 403. And Lord *Hardwicke*, wise, for the man of most practice and
in declaring the same doctrine, in *Wors-* greatest eminence would then be the most
ley v. Scarborough, 3 Atk. 392, said it dangerous to employ. And see *Warrick*

benefit or has an interest antagonistic to his principal. Here, too, the principal is not bound by the agent's knowledge. *Cave v. Cave*, 15 Ch. D. 639; *Kettlewell v. Watson*, 21 Ch. D. 685, 707; *Frenkel v. Hudson*, 82 Ala. 158; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; *Innerarity v. Merchants' Bank*, 139 Mass. 332; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *Allen v. South Boston Railroad*, 150 Mass. 200; *Clark v. Marshall*, 62 N. H. 498.

Innerarity v. Merchants' Bank may be taken as typical of these cases. There a director of the defendant bank fraudulently procured a loan to be made on securities to which the plaintiff was equitably entitled, but which the director held with authority to sell. The loan was approved at a meeting of the directors of the defendant bank, the fraudulent director being present. It was claimed for the plaintiff that the bank was therefore chargeable with notice of the fraud, but the court held otherwise as the director was engaged in a fraudulent scheme which rendered it certain that he would not communicate his knowledge.

Obviously, the presumption that an agent will communicate what he knows to his principal is purely fictitious. As was said by Field, J., in *Allen v. South Boston Railroad*, 150 Mass. 200, 206, "It may be doubted whether the rule and the exception rest on any such reasons." In *Blackburn v. Vigers*, 12 App. Cas. 531, the decision of the House of Lords and the reversal of the decision of the Court of Appeal (17 Q. B. D. 553) illustrate both the fictitious character of the reason and its liability to mislead. The plaintiffs instructed a broker to reinsure an overdue ship. While acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a reinsurance for £800 through the broker's London agents. Afterwards the plaintiffs effected in good faith other insurance through other brokers for £700, lost or not lost. The ship was in fact lost. The action was brought on the second policy. The Court of Appeal held that there could be no recovery because the plaintiffs were chargeable with the knowledge of their first brokers, the brokers being presumed to communicate their knowledge, and on the assumption that they had actually done so the second policy was fraudulently procured. The House of Lords reversed this decision, holding that the knowledge of the agent was only chargeable to his principal with reference to the matter in which he was acting as agent.

It is clear at least that a principal is chargeable with notice given to or acquired by his agent while acting as such and relating to the agency on the same ground that he is liable for acts of his agent within the scope of his authority. Further, if the agent acts for his principal in the acquisition of property or otherwise, knowing facts, whenever and however such knowledge was acquired, which would render his acts fraudulent or inequitable if he were dealing for himself, the principal cannot claim the benefit thereof without being chargeable with the improper way in which such benefit was obtained. If, however, as in *Innerarity Bank, supra*, and in most similar cases, a common agent of both parties commits a fraud, there is no reason why the law should shift the loss from one party to the other. It leaves the loss where it falls. These principles will perhaps somewhat harmonize the decisions. — W.

employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice of, in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed. (*q*) The first, it is evident, is so far qualified by the second, that where the circumstance of the solicitor's being employed for two parties is in the case, a purchaser, in the language of Sir *J. Wigram*, may be affected with notice of what the solicitor knew as solicitor for the vendor, although as solicitor for the vendor he may have acquired his knowledge before he was retained by the purchaser, — whatever the solicitor, during the time of his retainer, knows as solicitor for either party, may possibly in some cases affect both, without reference to the time when his knowledge was first acquired. Any other qualification of the principal limiting the client's liability to notice acquired in the same transaction, the distinguished judge referred to does not acknowledge. (*r*) If, however, one assume to act as agent of another and cause an act to be done for him of which the latter afterwards takes the benefit, he must take it charged with notice of such matters as appear to have been at the time within the knowledge and recollection of the agent. (*s*) (*x*)

Notice to a servant of the principal, or one employed by the principal, affects the principal, only when given about the very thing that servant is employed to do.¹ Thus, notice to a general clerk in a mercantile house, not to furnish goods, does not bind the house. (*t*)²

v. Warrick, 3 Atk. 294. In *Hood v. Fahnestock*, 8 Watts, 489, it was held that if one in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards becomes the agent, attorney, or counsel of a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. "To visit the principal with constructive notice, it is necessary that the knowledge

of the agent or attorney should be gained, in the course of the same transaction in which he is employed by his client." *Ibid.*, *Bracken v. Miller*, 4 W. & S. 102; *Campbell v. Benjamin*, 69 Ill. 244.

(*q*) *Wigram*, V. C., *Fuller v. Bennett*, 2 Hare, 402.

(*r*) See *Fuller v. Bennett*, 2 Hare, 402, where the cases are reviewed and much discussed.

(*s*) *Hovey v. Blanchard*, 13 N. H. 145.

(*t*) *Grant v. Cole*, 8 Ala. 519.

¹ Thus a servant's knowledge of the disposition of a vicious dog in his charge is the knowledge of the master. *Baldwin v. Casella*, L. R. 7 Ex. 325. — K.

² Nor is the knowledge of the janitor of a city school-house of a defect in the high-

(*x*) If the agent, while acting for his principal, is himself engaged in committing a fraud upon the latter, his knowledge is not constructive notice to the principal. *Hudson v. Randolph*, 66 Fed. 216, 13 C. C. A. 402; *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912; *Produce Exchange Trust Co. v. Bierberbach*, 176 Mass.

577, 588, 58 N. E. 162. An agent's acceptance of a draft "p. p. a." may be found to mean "per power of attorney," and carries notice requiring a discounting bank to ask for and examine his authority as defined in the written power. *Mount Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341.

On the other hand, knowledge possessed by a principal affects a transaction, although the transaction took place through an agent to whom the knowledge was not communicated. It certainly has this effect if the knowledge of the principal could have been and should have been communicated to the agent. But it may not be certain that the knowledge of the principal is the knowledge of the agent the moment the principal acquires it, without any reference to the duty or the possibility of the principal's imparting that knowledge to the agent, in season

* 77 * for him to be influenced by it. (*u*) In some cases the rights of the principal are certainly to be determined by his own knowledge only; as, if a principal knew of defences to a promissory note available only against a purchaser with knowledge, and this principal bought the note by an agent, who had no knowledge of these defences, they might still be enforced against the principal.

Much question has arisen as to the effect on a corporation, of notice to one who is a member or officer of it. By some it is held that the notice must be made formally to the corporation, (*v*) and it has been contended, on the other hand, that the notice is enough if given to any director, or any member of a board which manages the affairs of the corporation. (*w*) We consider these views extreme and inaccurate; and should state as the rule of law that a notice to a corporation binds it, only when made to an officer, whether president, director, trustee, committee-man, or otherwise, whose situation and relation to the corporation imply that he has authority to act for the corporation in the particular matter in regard to which the notice is given. (*x*)

(*u*) In *Willis v. Bank of England*, 4 A. & E. 21, 39, the doctrine of notice was thus stated by Lord *Denman*: "The general rule of law is that notice to the principal is notice to all his agents: *Mayhew v. Eames*; at any rate *if there be reasonable time*, as there was here, *for the principal to communicate that notice to his agents, before the event which raises the question happens* . . . We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive; but the argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions; and, if it were, other inconveniences of a more seri-

ous nature would obviously grow out of a different decision." It may be considered worth inquiry whether the clause we have put in italics is not an essential part of the rule. Certainly, *Mayhew v. Eames*, 3 B. & C. 601, cited by the learned chief justice is very far from establishing the naked doctrine that notice to the principal is notice *eo instanti* to the agent.

(*v*) *Louisiana Bank v. Senecal*, 13 La. 525.

(*w*) *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262.

(*x*) See *Powles v. Page*, 3 C. B. 16; *Porter v. Bank of Rutland*, 19 Vt. 410, 425; *Fulton Bank v. N. Y., &c. Co.*, 4

way in front of the same notice to the city, *Foster v. Boston*, 127 Mass. 290; nor is notice to a station agent, notice to a railroad company of the assignment of a *chose in action*. *Lambreth v. Clarke*, 10 Heiskell, 32. — K.

SECTION XI.

OF SHIPMASTERS.

A master of a ship has, by the policy of the law-merchant, some authority not usually implied in other cases of general * agency. (y) (x) Thus, he may borrow money, if the exigen- * 78
cies and necessities of his position require it, and make his owner liable, and pledge the ship (by bottomry for the most part) for the repayment. (z) But this authority does not usually extend to cases where the principal can personally act, as in the home port, (a) or in a port where the owner has a specific agent for this purpose, (b) and by parity of reason not in a port so near the owner's home that he may be consulted without inconvenience and injurious delay. (c) So, too, under such circumstances, he may, without any special authority, sell the property intrusted to him, in a case of extreme necessity, and in the exercise of a sound discretion. Nor need this necessity be *actual*, in order to justify the master and make the sale valid. If the ship was in a peril, which, as estimated from all the facts then within his means of knowledge, was imminent, and made it the only prudent course to sell the ship as she was, without further endeavors to get her out of her dangerous position, this is enough, and the sale is justified and valid, although the purchasers succeed in saving her, and events prove that this might have been done by the master. But it must be a case where a sudden

Paige, 127; National Bank v. Norton, 1 Hill (N. Y.), 575; New Hope, &c. Co. v. The Phoenix Bank, 3 Comst. 156, 166; Banks v. Martin, 1 Met. 308; Story on Agency, §§ 140 a, 140 d; Security Bank v. Cushman, 121 Mass. 490; Hightstown Bank v. Christopher, 11 Vroom, 435; Atlantic Bank v. Savery, 82 N. Y. 291; Smith v. Ayer, 101 U. S. 320; West Boston Sav. Bank v. Thompson, 124 Mass. 506; Barnes v. Trenton Gas Co., 12 C. E. Green, 33.

(y) Whether an action may be maintained against an owner, which is grounded on the exercise of this peculiar and extraordinary authority by one who was not the master on the register, but by appointment of the owner had virtually acted as master, *quære*; see Stonehouse v. Gent, 2

Q. B. 431, n.; Smith v. Davenport, 34 Me. 520.

(z) Barnard v. Bridgeman, Moore, 918; Weston v. Wright, 7 M. & W. 396; Arthur v. Barton, 6 M. & W. 138; The Gratitude, 3 Rob. Ad. 240; Stainbank v. Fenning, 11 C. B. 51; 13 C. B. n. s. 418; The Fortitude, 3 Sumner, 228.

(a) Lister v. Baxter, Stra. 695; Patton v. The Randolph, Gilp. 457; Ship Lavinia v. Barclay, 1 Wash. C. C. 49; Lord Abinger, Arthur v. Barton, 6 M. & W. 138.

(b) Pritchard v. Schooner Lady Horatia, Bee, Ad. 167; Gunn v. Roberts, L. R. 9 C. P. 331.

(c) Johns v. Simons, 2 Q. B. 425; Arthur v. Barton, 6 M. & W. 138; Mackintosh v. Mitcheson, 4 Exch. 175; Beldon v. Campbell, 6 Exch. 886, where Robinson v. Lyall, 7 Price, 592, was questioned.

(x) See *supra*, p. * 45, and note (x).

and entire change of wind or weather, or some other favorable circumstance which no one at the time could have rationally expected, became the means of her safety; for although the powers and duty of the master should not depend on matters which are alike beyond control and foresight, (d) * it is still certain that the sale of a ship by the master can be justified and made valid only by a strict necessity.

The general rights and duties of shipmasters are more fully considered in our chapter on the Law of Shipping.

SECTION XII.

OF AN ACTION AGAINST AN AGENT TO DETERMINE THE RIGHT OF A PRINCIPAL.

It is a rule of law in respect to all agencies, that where money is paid to one as agent, to which another as principal has color of right, the right of the principal cannot be tried in an action brought by the party paying the money against the agent as for money had and received to the use of such party; but such * 80 action should be brought against the principal. (e)¹ * For

(d) The Brig Sarah Ann, 2 Sumner, 206; Hunter v. Parker, 7 M. & W. 322.

(e) Bamford v. Shuttleworth, 11 A. & E. 926; Sadler v. Evans, 4 Burr. 1984; Horsfall v. Handley, 3 Taunt. 136; Costigan v. Newland, 12 Barb. 456; Strohecker v. Hoffinan, 19 Pa. St. 223. Yet if notice not to pay over has been given, then the agent may be sued. Lord Mansfield, Sadler v. Evans, 4 Burr. 1986; Edwards v. Hodding, 5 Taunt. 815; Hearsey v. Pruyn, 7 Johns. 179; Elliott v. Swartwout, 10 Pet. 137; Bend v. Hoyt, 13 id. 263; La Farge v. Kneeland, 7 Cowen, 456. See Cabot v. Shaw, 148 Mass. 459. See, however, as to the liability of collectors of the customs, Cary v. Curtis, 3 How. 236. — And in some cases it has been held that even without notice, the agent may be held liable for money had and received, if he have not *actually* paid over the money to the principal, or done something equivalent to it; and the mere entering the amount to the credit of the principal, or making a rest, is not equivalent to payment over. Buller v. Harrison, Cowp. 565; Cox v. Prentice, 3 M. & Sel. 344. But upon these cases Mr. Smith comments

as follows: "It will be observed that in neither of these cases could the principal himself ever by possibility have claimed to retain the money for a single instant, had it reached his hands, the payment having been made by the plaintiff under pure mistake of facts, and being void *ab initio*, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S. of Jamaica, who has received money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Besides which, in Buller v. Harrison, had the agent paid the money he received from the underwriter in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud, which no agent can be obliged to do. Except in such cases as these, the maxim, *respondeat superior*, has been applied, and the agent held responsible to no one but his principal." Merc. Law, B. 1, c. 5, § 7.

¹ But if the agent secures money or property by fraud, duress, extortion, or other illegal means, he will be held liable to refund unless the plaintiff is *in pari delicto*.

a party who deals with an agent (acting as such, and within the scope of his authority) has, in general, no right to separate him from his principal, and hold him liable in his personal capacity. The agent owes an account of his actions to his principal, and that he may be able to render that account, the law, except under special circumstances, refuses to impose upon him a duty to any third party. (x)

We here close all that was proposed to be said of agents as parties to contracts entered into by them in their representative capacity. The relation between agent and principal constitutes itself a distinct contract, and the considerations growing out of it might, in a strictly accurate division, find a place in that part of this work which treats of the Subject-Matter of contracts. But it has been deemed expedient in this instance, as in some others, to sacrifice logical order to the convenience of the reader; and such observations as seem to be required by the contract of Agency, properly so called, are subjoined in the following section.

SECTION XIII.

THE RIGHTS AND OBLIGATIONS OF PRINCIPAL AND AGENT AS TO EACH OTHER.

An agent with instructions is bound to regard them in every point; nor can he depart from them, without making him-

Snowdon v. Davis, 1 Taunt. 359; *Townson v. Wilson*, 1 Camp. 396; *Smith v. Sleep*, 12 M. & W. 588; *Parker v. Bristol, &c. Ry.*, 6 Ex. 702; *McDonald v. Napier*, 14 Ga. 89; *Shipherd v. Underwood*, 55 Ill. 475; *Richardson v. Kimball*, 28 Me. 463; *Edgerly v. Whalan*, 106 Mass. 307; *Ripley v. Gelston*, 9 Johns. 201; *Seidel v. Peckworth*, 10 S. & R. 442; *Wright v. Eaton*, 7 Wis. 595. (But see *Van Buren v. Downing*, 41 Wis. 122.) So if a person paying money to the agent is ignorant that he is acting for another, the agent will be liable to refund, even though he has paid the money to his principal or otherwise changed his position. *Newall v. Tomlinson*, L. R. 6 C. P. 405; *Smith v. Kelley*, 43 Mich. 390. — W.

(x) A person who holds himself out as a principal is liable as such, and one who holds himself out as agent for an unknown principal is personally liable on a contract to purchase, when he has no authority to so represent himself an agent. *Patrick v. Bowman*, 149 U. S. 411, 13 S. Ct. 811, 37 L. Ed. 790; *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 282, 44 N. W. 548; *Newberry v. Slaughter*, 98 Mich. 468, 57 N. W. 574; *Weil v. Defenbaugh*, 65 Ill. App. 489; *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504 and note.

When a creditor has a cause of action against both the agent and his principal, he must elect between them, and a judgment recovered against one discharges the other. *Mattlage v. Poole*, 15 Hun (N. Y.), 556; *Lage v. Weinstein*, 71 N. Y. S. 744, 35 Misc. Rep. 298; *New York & C. S. Co. v. Harbison*, 16 Fed. 681; *Calder v. Dobell*, L. R. 6 C. P. 486, 2 English Ruling Cas. 456 and notes; *Watte v. Thayer*, 56 Ill. App. 282.

* 81 self * responsible for the consequences. (g) If he have no instructions, or indistinct or partial instructions, his duty will depend upon the intention and understanding of the parties. This may be gathered from the circumstances of the case, and especially from the general custom and usage in relation to that kind of business. (h)(x) But he cannot defend himself by showing

(g) *Leverick v. Meigs*, 1 Cowen, 645; *Marshall, C. J., Manella v. Barry*, 3 Cranch, 415, 439; *Kingston v. Kincaid*, 1 Wash. C. C. 454; *Rundle v. Moore*, 3 Johns. Cas. 36; *Loraine v. Cartwright*, 3 Wash. C. C. 151; *Ferguson v. Porter*, 3 Fla. 27; *Sawyer v. Mayhew*, 51 Me. 398; *Whitney v. Merchants' Union Express*, 104 Mass. 152; *Robinson Machine Works v. Vorse*, 52 Ia. 207; *Clark v. Roberts*, 26 Mich. 506; *Owensboro' Bank v. Western Bank*, 13 Bush. 526; *Nicolai v. Lyon*, 8 Oreg. 56. — "And no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of the instructions." *Washington, J., in Courcier v. Ritter*, 4 Wash. C. C. 549, 551; but compare *Forrestier v. Boardman*, 1 Story, 43.

(x) An agent's authority may always be inferred, as a mere question of fact, from a course of dealing. *Mikles v. Hawkins*, 69 N. Y. S. 557, 59 App. Div. 253; *Dickinson v. Salmon*, 73 N. Y. S. 196, 36 Misc. Rep. 169. But what constitutes an agency is a question of law. *Graham v. Sadlier*, 165 Ill. 95, 46 N. W. 221; *Economy Furniture Co. v. Chapman*, 54 Ill. App. 122. As to third persons the existence of an agency does not depend upon the intentions of the supposed principal and his agent. *Bradstreet Co. v. Gill*, 72 Texas, 115. A corporation and its directors may be bound by the acts and ostensible authority of a majority of its building committee openly exercised and extending over considerable time. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277. Authority to handle goods, or a lease for the management of real estate may be in fact an agency. *Williams v. McKinley*, 65 Fed. 4; *Lenz v. Harrison*, 148 Ill. 598; *Parke & Lacy Co. v. White R. L. Co.*, 101 Cal. 37. An agent's ostensible or apparent authority is such as is usually confided to an agent of that character, and is not limited by his private instructions from his principal. *Montaignac v. Shitta*, 15 A. C. 357; *Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483; *Gosliner v. Grangers' Bank*, 124 Cal. 225, 56 Pac. 1029; *Whitehead v. Yuckett* (15 East, 400), 2 English Ruling Cas. 357 and notes;

(h) *Marzetti v. Williams*, 1 B. & Ad. 415; *Sutton v. Tatham*, 10 A. & E. 27; *Sykes v. Giles*, 5 M. & W. 645; *Kingston v. Wilson*, 4 Wash. C. C. 315; *Bailey v. Bensley*, 87 Ill. 556. — And if the agent is employed to act in some particular business or trade he may bind his principal by following the usages of that trade, whether the principal is aware of them or not. *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; there *Parke, B.*, distinguishing the case of *Bartlett v. Pentland*, 10 B. & C. 760, said: "That however is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract if it is made in the usual way."

Phillips v. Mercantile Nat. Bank, 140 N. Y. 556; *Pittman v. The Samuel Marshall*, 54 Fed. 396; *Russ v. Telfener*, 57 id. 973; *Batchelder v. Libbey*, 66 N. H. 175; *McNeile v. Cridland*, 168 Penn. St. 16; *Aldrich v. Wilmarth*, 3 So. Dak. 523; *Allis v. Voigt*, 90 Mich. 125; *Winchell v. National Express Co.*, 64 Vt. 15. See *Watteau v. Fenwick*, [1893] 1 Q. B. 346. So, whenever a property owner gives all the indicia of title to another person intending that he deal with the property, the principles of agency apply, and limits imposed by him on the agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent having no notice of the limit. *Brocklesby v. Temperance P. P. Society*, [1895] A. C. 173, [1893] 3 Ch. 130; *Rimmer v. Webster*, [1902] 2 Ch. 163. See *Pope v. Armsby Co.*, 111 Cal. 159, 43 Pac. 589.

An agency of doubtful extent is presumed to be a general rather than a special agency. *Sharp v. Knox*, 48 Mo. App. 169. General authority to carry on a retail business does not confer power to give a chattel mortgage: *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295; *Henson v. Keet & R. M. Co.*, 48 Mo. App. 214; *Anderson v. McAleenan*, 8 N. Y. S. 483; or to borrow, when the power is not necessarily implied. *Cons. Nat. Bank v. Pacific C. S. Co.*, 95 Cal. 1; nor does authority to store and ship goods enable the agent to sell them.

a conformity to usage, if he has disobeyed positive instructions.¹ If loss ensue from his disregard to his instructions, he must sustain it; if profit, he cannot retain it, but it belongs to his principal. (*i*)

A principal discharges his agent from responsibility for deviation from his instructions, when he accepts the benefit of his act. (*k*)² He may reject the transaction altogether; (*l*) and * if he advanced money on goods which his agent purchased * 82 in violation of his authority, he is not bound to return the goods to the agent when he repudiates the sale, but has his lien on them, and may hold them as the property of the agent. (*m*) But he must reject the transaction at once, and decisively, as soon as fully acquainted with it. For if he delays doing this, that he may have his chance of making a profit, or if he performs acts of ownership over the property, he accepts it, and confirms the doings of the agent. (*n*)

(*i*) *Catlin v. Bell*, 4 Camp. 184; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Segar v. Edwards*, 11 Leigh, 213.

(*k*) *Clarke v. Perrier*, 2 Freem. 48; *Prince v. Clark*, 1 B. & C. 186.

(*l*) *Roe v. Prideaux*, 10 East, 158. — If, however, an agent has done more than he was authorized to do, the execution, though void as to the excess, may be held good for the rest, at least in equity. But it is necessary in such a case that the boundaries between the excess and the execution of the power should be clearly distinguishable. *Sir Thomas Clarke, V. C.*, *Alexander v. Alexander*, 2 Ves. Sen. 644; *Campbell v. Leach*, Amb. 740; *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 294; *Sug-*

den on Powers, ch. 9, § 8. — And in some cases it has been held *at law* that an agent transcending his authority in part binds his principal for the part which was performed in accordance with the authority. *Gordon v. Buchanan*, 5 Yerg. 71; *Johnson v. Blasdale*, 1 Sm. & M. 17. — See *Wintle v. Crowther*, 1 Cr. & J. 316.

(*m*) *Lord Hardwicke*, *Cornwall v. Wilson*, 1 Ves. Sen. 510; *Lord Eldon*, *Kemp v. Pryor*, 7 Ves. 240, 247.

(*n*) *Prince v. Clark*, 1 B. & C. 186; *Cornwall v. Wilson*, 1 Ves. Sen. 509; *Marsh v. Whitmore*, 21 Wall. 178; *Eastern Bank v. Taylor*, 41 Ala. 72; *Bassett v. Brown*, 105 Mass. 551.

¹ *Osborne v. Rider*, 62 Wis. 235. See also *Greenstine v. Borchard*, 50 Mich. 434; *Sheffield v. Linn*, 62 Mich. 151. — W.

² Or otherwise ratifies it. *Bray v. Gunn*, 53 Ga. 144. — W.

Cleveland, &c. Ry. Co. v. Moline Plow Co. (Kans. App.), 41 N. E. 480; or a power to collect give power to assign for collection. *Rigby v. Lowe*, 125 Cal. 613, 58 Pac. 153. So authority to manage real estate does not give power to impose an easement thereon. *Lawrence v. Springer*, 49 N. J. Eq. 289. The principal is not bound by the compromise of pending litigation, which is unfair, unreasonable, and unusual, though made by his agent under a power of attorney authorizing a compromise. *New York v. Du Bois*, 86 Fed. 889.

An agent may testify as to the existence of the agency, which is not, however, provable by his acts, admissions, or declarations out of court. *Smith v. Liverpool, &c. Ins. Co.*, 107 Cal. 432, 40 Pac. 540;

Duffus v. Schwinger, 29 N. Y. S. 930; *American Box Machine Co. v. Bolnick*, 74 id. 846; *Am. Tel. Co. v. Kersh* (Tex. Civ. App.) 66 S. W. 74; *Americus Oil Co. v. Gurr*, (Ga.) 40 S. E. 780; *Fowlds v. Evans*, 52 Minn. 551; *Dowden v. Cryder*, 55 N. J. L. 329; *Leu v. Mayer*, 52 Kansas, 419; *Martin v. Suber*, 39 S. C. 525; *Van Sickle v. Keith*, 88 Iowa, 9; *State v. Henderson*, 86 Mo. App. 482; *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555; *Nostrum v. Halliday*, 39 Neb. 828. The latter part of this rule does not apply to suits between the principal and the agent. *New Home Sewing Machine Co. v. Seago*, 128 N. C. 158, 38 S. E. 805; *Summerrow v. Baruch*, 128 N. C. 202, 38 S. E. 861. See *Southern Express Co. v. Platten*, 93 Fed. 936, 36 C. C. A. 46.

The question has arisen, whether a principal is bound by the act of an agent who executes his commission in part only; as if, being directed and authorized to buy two houses, he buys one only; or to buy fifty shares of stock, he buys twenty-five; or to buy one hundred bales of cotton, he buys fifty. It has been said that the principal is bound by the partial execution of the agent's authority. (*o*) But it is plain that cases which present this question may differ essentially. If one is made agent to purchase a lot of woodland and a saw-mill, and purchases either alone, it would be a hardship upon the principal to be compelled to take that, when it might be nearly valueless to him without the other. But if the authority which he gave his agent to buy both, was in such a form that the seller of one, after due inquiry, was perfectly justified in believing the agent authorized to buy either separately, the principal should be held. We should say, that the principal might generally be held; but would not be, where he could show that the things embraced within the authority he gave were united in that authority, and in his intention, and that it would be a detriment to him to take a part only.

Some conflict appears to exist as to the right of an agent to delegate his authority. On the one hand, the general principle, that *delegatus non potest delegare*, is certain. (*p*) An agent * 83 can * do for his principal only that which his principal authorizes; and if the principal appoint an agent to act for him as his representative in any particular business, this agent has not thereby a right to make another person the representative of his principal. The employment and trust are personal; they may rest on some ground of personal preference and confidence,

(*o*) *Gordon v. Buchanan*, 5 Yerg. 81.

(*p*) *Combe's Case*, 9 Rep. 75 b, 76 a; *Harralson v. Stein*, 50 Ala. 347; *Drum v. Harrison*, 83 Ala. 384; *Lynn v. Burgoyne*, 13 B. Mon. 400; *Connor v. Parker*, 114 Mass. 331; *Wright v. Boynton*, 37 N. H. 9; *McCormick v. Bush*, 38 Tex. 314. — This maxim has frequent application in cases of powers. *Ingram v. Ingram*, 2 Atk. 88; *Alexander v. Alexander*, 2 Ves. Sen. 643; *Hamilton v. Royse*, 2 Sch. & L. 330. A notice to quit given by an agent of an agent, is not sufficient without a recognition by the principal. *Doe v. Robinson*, 3 Bing. N. C. 677. — And see *Clark v. Dignum*, 3 M. & W. 319; *Ess v. Truscott*, 2 M. & W. 385 — A broker cannot delegate his authority. *Henderson v. Barnewall*, 1 Y. & J. 387; *Cockran v. Irlam*, 2 M. & Sel. 301, n. — Nor can a

factor. *Solly v. Rathbone*, 2 M. & Sel. 298; *Catlin v. Bell*, 4 Camp. 183. — A distinction, however, is to be taken between the employment of a servant and the delegation of the authority. An agent, like another person, may act by the hand of a servant as well as by his own hand, in cases where the act is merely physical, or where *mind* enters into it so little that it would be absurd to say that the difference between one mind and another could be of any moment. *Lord Ellenborough*, *Mason v. Joseph*, 1 Smith, 406. See also *Powell v. Tuttle*, 3 Comst. 396; *Moor v. Wilson*, 6 Foster (N. H.), 332; *Comm. Bank of Penn. v. Union Bank of N. Y.*, 1 Kern. 203; *Williams v. Woods*, 16 Md. 220; *Grady v. American Ins. Co.*, 60 Mo. 116; *Newell v. Smith*, 49 Vt. 255.

and on the knowledge which the principal has of his agent's ability, and the belief he has of his integrity. But if the agent merely by virtue of his agency may substitute one person in his stead, he may another, or any other, and thus compel the principal to be represented by one whom he does not know, or be bound by obligations cast upon him by one he does know, and because he knows him would refuse to employ. But, on the other hand, the principal may, if he chooses, give this very power to his agent. (*q*) In the common printed forms of letters of attorney, we usually find the phrase, "with power of substitution," and after this a promise to ratify whatever the attorney, "or his substitute," may lawfully do in the premises. That the agent has this power, when it is given to him in this way, cannot be doubted. But it must be as certain that the principal may confer the same power otherwise; and not only by other

* language, but without any express words whatever. (*r*) *84 And there are many acts which an agent must necessarily do through the agency of other persons, and which are valid when so done. (*s*) (*x*) If a principal constitutes an agent to do a business which obviously and from its very nature cannot be done by the agent otherwise than through a substitute, or if there exists in relation to that business a known and established usage of substitution, in either case the principal would be held to have

(*q*) *Palliser v. Ord*, Bunb. 166. — A power coupled with an interest, given to A and his assigns, passes with the interest to A's devisee, to the executor of that devisee, and to the assignee of the devisee, &c., for the word assigns includes both assignees in law and in fact. *How v.*

Whitefield, 1 Vent. 338, 339; s. c. as *How v. Whitebanck*, 1 Freem. 476.

(*r*) *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Gillis v. Bailey*, 1 Foster (N. H.), 149.

(*s*) *Rossiter v. Trafalgar Life A. A.*, 27 Beav. 377.

(*x*) An agent may employ clerks whose acts may bind him; but he cannot, in general, delegate his agency. *Rohrbough v. U. S. Express Co.* (W. Va.), 40 S. E. 398; *Fairchild v. King*, 102 Cal. 320, 36 Pac. 649; *Ruthven v. American F. Ins. Co.*, 92 Iowa, 316, 60 N. W. 663; *Dingley v. McDonald*, 124 Cal. 682, 56 Pac. 790; *Howard's Case*, L. R. 1 Ch. 561, 2 Eng. Ruling Cas. 286 and notes. A power of attorney containing a power of substitution and revocation does not authorize the agent, while continuing to act as such, to substitute another's judgment for his own. *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367, 35 Pac. 1000. Power of substitution may arise from a known usage in a particular kind of business. *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587. See

Waterloo Milling Co. v. Kuenster, 58 id. 61. A sub-agent employed with the principal's knowledge is directly responsible to him for his conduct. *Finch v. Karste*, 97 Mich. 20, 56 N. W. 123; *Davis v. King* (66 Conn. 465), 50 Am. St. Rep. 104, and note.

A physician employed to attend the sick has not authority to employ an assistant physician. *Smith v. Chicago & N. W. Ry. Co.*, 104 Iowa, 147, 73 N. W. 581; see *Burke v. Chicago & W. M. R. Co.*, 114 Mich. 685, 72 N. W. 997; see *Pearl v. West End St. Ry. Co.*, 176 Mass. 177, 57 N. E. 339. The division superintendent of a railroad has no implied authority to settle claims against the road for injuries. *Maxson v. Michigan Central R. Co.*, 117 Mich. 218, 75 N. W. 459.

expected and have authorized such substitution. (*t*)¹ So too, where an agent without authority appoints a substitute, the principal may, either by words or acts, so confirm and ratify such substitution, as to give to it the same force and effect as if it had been originally authorized. (*u*)

A substitute of an agent who had no authority to appoint him, cannot be held as the agent of the original principal, but is only the agent of the agent who employs him, (*v*) and who is accordingly *his* principal; and the person so employed is bound only to his immediate employer, and can look only to him for compensation. (*w*)² (*z*) But a substitute appointed by an agent who has this power of substitution, becomes the agent of the original principal, and may bind him by his acts, and is responsible to him as his agent, and may look to him for compensation.

An agent is bound to great diligence and care for his principal; not the utmost possible, but all that a reasonable man under similar circumstances would take of his own affairs. (*x*) And

where the instructions are not specific, or do not cover the * 85 * whole case, there, as we have already stated, he is to conform to established usage, as that which was expected from him. (*y*) This usage may be generally proved by ordinary means;

(*t*) An architect employed by defendants to draw a specification for a building to be erected, employed the plaintiff to make out the quantities, which work was to be paid for by the successful competitor for the building contract; the jury found a usage for architects to have their quantities made out by surveyors; the plaintiff was held entitled to compensation from the defendants. *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Ledoux v. Goza*, 4 La. An. 160.

(*u*) *Tindal*, C. J., *Doe v. Robinson*, 3 Bing. N. C. 677, 679; *Mason v. Joseph*, 1 Smith, 406.

(*v*) *Cobb v. Becke*, 6 Q. B. 930; *Robbins v. Fennell*, 11 id. 248.

(*w*) *Corbett v. Schumacker*, 83 Ill. 403; *Cleaves v. Stockwell*, 33 Me. 341. See *Butler v. Michigan Cent. R. Co.*, 60 Mich. 83.

(*x*) *Co. Litt.* 89 a; *Chapman v. Walton*, 10 Bing. 57; *Lawlor v. Keaquick*, 1 Johns. Cas. 174; *Kingston v. Kincaid*, 1 Wash. C. C. 454; *Babcock v. Orbison*, 25 Ind. 75; *Pappa v. Rose*, L. R. 7 C. P. 32, 525; *Gheen v. Johnson*, 90 Pa. 38; *Matthews v. Fuller*, 123 Mass. 446. — Less than ordinary diligence is required of one who acts as agent gratuitously; unless indeed he hold himself out as a person exercising one of certain privileged professions or trades, as that of an attorney. *Doorman v. Jenkins*, 4 Nev. & M. 170, s. c. 2 A. & E. 256; *Dartnall v. Howard*, 4 B. & C. 345; *Hammond v. Hussey*, 51 N. H. 40. See *infra*, n. (*a*).

(*y*) *Ante*, p. * 81, note (*h*); *Wiltshire v. Sims*, 1 Camp. 258. — And the usage if followed (in the case where there are no express instructions), is a defence to

¹ An insurance agent may authorize his clerk to do various acts, as sign and issue policies and receive premiums. *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Grady v. Am. Cent. Ins. Co.*, 60 Mo. 116. An agent may direct his clerk to sign a document. *Norwich Univ. v. Denny*, 47 Vt. 13. A collection agent may employ a notary to present and protest a note. *Tiernan v. Commercial Bank*, 8 Miss. 648. And see *Renwick v. Bancroft*, 56 Iowa, 527. — W.

² The agent is, however, responsible to his principal for the unauthorized sub-agent's acts. *St. Louis, &c. Ry. v. Smith*, 48 Ark. 317; *Swett v. Southworth*, 125 Mass. 417; *Morgan v. Tener*, 83 Pa. St. 305. See also *Sanger v. Dun*, 47 Wis. 615. and Vol. II. pp. * 103, * 104. — W.

(*z*) *Hennebry v. Maynard*, 174 Mass. 428, 54 N. E. 871.

but in some instances, as in relation to negotiable bills and notes, it is required and defined by the law; and here it must be followed precisely. (z) And an agent is bound to possess and exert the skill and knowledge necessary for the proper performance of the duties which he undertakes. (a) (x)

The responsibility of an agent, whether for positive misconduct or for deviation from instructions, is not measured by the extent of his commission or compensation, but by the loss or * injury which he may cause to his principal. (b)¹ And * 86

the charge of negligence. *Russell v. Hankey*, 6 T. R. 12. As to the factor's duty to insure, see *Smith v. Lascelles*, 2 T. R. 189; *Tickel v. Short*, 2 Ves. Sen. 239.

(z) *Crawford v. Louisiana State Bank*, 1 Mart. N. S. 214; *Miranda v. City Bank of New Orleans*, 6 La. 740; *Smedes v. Utica Bank*, 20 Johns. 372. Yet this liability may be limited by the particular understanding of the parties; as for instance, where an agent dealing with negotiable paper, has been accustomed to do business in a certain way different from that which the law would otherwise require, and the principal employing him may from the circumstances be supposed to know this; *Mills v. Bank of U. S.*, 11 Wheat. 341; *Allen v. Merchants Bank*, 22 Wend. 215; *East Haddam Bank v. Scovil*, 12 Conn. 303. And an agent intrusted with a negotiable instrument, and failing to fulfil his duty with respect to it, is only liable like other agents to the extent of the loss he has caused, and does not have to assume the responsibilities which the law-merchant imposes upon a negligent party to the bill. *Marshall, C. J.*, *Hamilton v. Cunningham*, 2 Brock. 367. And see *Van Wart v. Woolley*, 3 B. & C. 439, and *Van Wart v. Smith*, 1 Wend. 219. An agent, acting with ordinary diligence, is not liable for injuries caused by his mistake in a doubtful matter of law. *Mechanics Bank v. Merchants Bank*, 6 Met. 13.

(a) One who undertakes to act in a professional or other clearly defined capacity, as that of carpenter, blacksmith, or the like, is bound to exercise the skill appropriate to such trade or profession; and this, it seems, although the undertaking be gratuitous. *Dartnall v. Howard*,

4 B. & C. 345. *Shiels v. Blackburne*, 1 H. Bl. 161; *Bourne v. Diggles*, 2 Chitt. 311; *Tindal, C. J.*, *Lamphier v. Phipos*, 8 C. & P. 479; *Denew v. Daverell*, 3 Camp. 451; *Leighton v. Sargent*, 7 Foster (N. H.), 460. In *Wilson v. Brett*, 11 M. & W. 113, it was held that a person who rides a horse gratuitously at the owner's request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him. *Rolfe, B.*, said: "The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another, not so skilled as he, does not, surely that makes a difference in the liability. I said I could see no difference between negligence and gross negligence, — that it was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." But *Parke, B.*, only went so far as to say that, "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." See *post*, chapter on Bailments, section II.

(b) *Sivewright v. Richardson*, 19 Law

¹ But it is also true that an agent cannot recover compensation for an act done in violation of his duty or instructions. *In re Owens*, Ir. R. 7 Eq. 235, 424; *Hoyt v. Shipherd*, 70 Ill. 309. — W.

(.) For the loss of a loan, or for goods stolen from him, the agent is responsible only when negligent. *Keystone Watch*

Case Co. v. Romero, 73 N. Y. S. 636, 36 Misc. 381; *Haines v. Christie* (Col.), 66 Pac. 883.

in general, a verdict against a principal for the act of his servant is the measure of the damages which the former may recover against the latter. (c) And the agent is responsible if the loss could not have happened but for his previous misconduct, although it was not immediately caused by it. (d) But the loss must be capable of being ascertained with reasonable certainty. (e)

An agent may not dispute the title of his principal. (x) This is well established as a general rule; but it has been held that the agent may do this, if the principal has obtained the property by fraud. (ee)¹

It may be regarded as a prevailing principle of the law, that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. (f) (y) For even if the

Times, 10; Morison v. Thompson, L. R. 9 Q. B. 480; Mason v. Bauman, 62 Ill. 76; Hamilton v. Cunningham, 2 Brock. 350; Arrott v. Brown, 6 Whart. 9; Frothingham v. Everton, 12 N. H. 239; Allen v. Suydam, 20 Wend. 321; Sawyer v. Mayhew, 51 Me. 398. Yet the principal may maintain an action against the agent for a breach of the contract between them, and recover nominal damages, although there be no actual loss. Marzetti v. Williams, 1 B. & Ad. 415; Frothingham v. Everton, 12 N. H. 239.

(c) Mainwaring v. Brandon, 8 Taunt. 202; s. c. 2 Moore, 125.

(d) Davis v. Garrett, 6 Bing. 716; Short v. Skipwith, 1 Brock. 103; Mal-lough v. Barber, 4 Camp. 150; Park v. Hamond, id. 344; s. c. 6 Taunt. 495; Smith v. Lascelles, 2 T. R. 187; Bell v. Cunningham, 3 Pet. 84, 85; De Tastett

v. Crousillat, 2 Wash. C. C. 132; Morris v. Summerl, id. 203.

(e) Webster v. De Tastet, 7 T. R. 157; The Amiable Nancy, 3 Wheat. 560; Smith v. Condry, 1 How. 28; Tidewater Canal Co. v. Archer, 9 G. & J. 479.

(ee) Hardman v. Wilcox, 9 Bing. 382, n. (a).

(f) Lees v. Nuttall, 2 Myl. & K. 819; Knave v. Ternot, 16 La. An. 132; Lees v. Nuttall, 1 Russ. & M. 53; Dunbar v. Tredennick, 2 Ball & B. 319; Norris v. Le Neve, 3 Atk. 38; Taylor v. Salmon, 4 Myl. & C. 134; Huguenin v. Baseley, 14 Ves. 273; Woodhouse v. Meredith, 1 Jac. & W. 24; Barker v. Marine Ins. Co., 2 Mason, 369; Church v. Marine Ins. Co., 1 id. 344; Parkist v. Alexander, 1 Johns. Ch. 394; Shepherd v. Percy, 4 Martin (N. S.), 267; Crook v. Williams, 20 Penn. St. 342; Coles v. Trecothick, 9 Ves. 234.

¹ Or that the property has been recovered from the agent by a higher title than the principal's. Biddle v. Bond, 6 B. & S. 224; Western Transportation Co. v. Barber, 56 N. Y. 544, 552. See also Snodgrass v. Butler, 54 Miss. 45. — W.

(x) See Shaeffer v. Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. Ed. 721, reversing 33 Fed. 218.

(y) Under the rule that "no man shall be allowed to have an interest against his duty," the invalidity of an agreement made by an agent who accepts a bribe is not affected by the effect produced by the bribe on the agent's mind. Shipway v. Broadwood, [1899] 1 Q. B. 369. General authority to transfer the principal's property for his best interest does not enable the agent to deal therewith for payment of his own debts and to secure the principal by conveying his own property to him. Barnett v. Daw, 66 N. Y. S. 880, 55 App.

Div. 202. See Rohrbough v. U. S. Express Co. (W. Va.), 40 S. E. 398. An agent to sell is not entitled to a commission from either party, if his agency for both parties was not known to them. Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29; Shepard v. Hill, 6 Wash. 605; Carpenter v. Fisher, 175 Mass. 9, 55 N. E. 479; Alvord v. Cook, 174 Mass. 120, 54 N. E. 499; Hoffin v. Moss, 67 Fed. 440, 14 C. C. A. 459; Berlin v. Farwell (Cal.), 31 Pac. 527. But if both buyer and seller have agreed to pay him, he may, it seems, recover from both. Manders v. Craft, 3 Col. App. 236; Knauss v. Gottfried K. B. Co., 142 N. Y. 70; Bonwell v. Auld, 29 N. Y. S. 15;

honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all this in his own favor. (g) This principle is recognized to some extent at law; (h) but most cases of this kind come before courts of equity. Thus, an attorney may not take a gift from his client, although there be not the least suspicion of fraud. (i) But the rule is applied not so much to those who act as servants, or instruments for some * particular thing, as to persons whose employment is * 87 rather a trust than a mere service. Thus, one holding property for another, which it is his duty to sell, cannot himself purchase it; (k) ¹ or if he be employed to buy, he cannot sell. (l) ² A technical reason given for this is, that the same person cannot both buy and sell.³ But if employed to sell, where he would not himself convey or transfer the property as agent, because the principal would do this himself, still the agent cannot bind the

(g) *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 id. 43.

(h) See *infra*, note (o).

(i) *Lord Erskine, C., Wright v. Proud*, 13 Ves. 138; *Montesquieu v. Sandys*, 18 id. 308; see *Ker v. Dungannon*, 1 Dru. & War. 542; *Middleton v. Welles*, 4 Bro. P. C. 245. See also *Cutts v. Salmon*, 12 E. L. & E. 316; *Holman v. Loynes*, 27 id. 168; *Broughton v. Broughton*, 31 id. 587.

(k) *Lowther v. Lowther*, 13 Ves. 103; *Wren v. Kirton*, 8 id. 502; *Morse v. Royal*, 12 id. 355; *Charter v. Trevelyan*, 11 Cl. & F. 714; *Bain v. Brown*, 56 N. Y. 285; *Jeffries v. Wiester*, 2 Sawyer, 135.

(l) *Lees v. Nuttall*, 2 Myl. & K. 819; *Taylor v. Salmon*, 4 Myl. & C. 139; *Bunker v. Miles*, 30 Me. 431; *Disbrow v. Secor*, 58 Conn. 35; *Keyes v. Bradley*, 73 Iowa, 589.

¹ Not even if the price be stipulated, *Ruckman v. Bergholz*, 8 Vroom, 437; unless the principal assents after full information in regard to it. *Ingle v. Hartman*, 37 Iowa, 274; *Raymond v. Palmer*, 41 La. Ann. 425. Nor can he sell it to his wife. *Tyler v. Sanborn*, 128 Ill. 136. Nor to a stranger, if he himself is to receive an interest. *Miller v. Louisville, &c. R. R. Co.*, 83 Ala. 274. But an agent after the termination of his agency may purchase the property sold by him as agent. *Walker v. Derby*, 5 Bissell, 134; *Walker v. Carrington*, 74 Ill. 446. See also *O'Reiley v. Bevington*, 155 Mass. 72. — W.

² Not even in good faith and for the market price. *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Taussig v. Hart*, 58 N. Y. 425; *Tewksbury v. Spruance*, 75 Ill. 187. — K.

³ A broker acting for both parties to a sale or exchange can recover compensation from neither, unless each knows his employment and agrees to pay. *Rice v. Wood*, 113 Mass. 133; *Rowe v. Stevens*, 53 N. Y. 621; *Alexander v. N. W. Univ.*, 57 Ind. 466; *Meyer v. Hanchett*, 39 Wis. 419; 43 Wis. 246; notwithstanding his good faith, *Scribner v. Collar*, 40 Mich. 375; nor if in accordance with a custom or usage. *Raisin v. Clark*, 41 Md. 158. See generally, *Carman v. Beach*, 63 N. Y. 97; *Shirland v. Monitor Iron Works Co.*, 41 Wis. 162; *Lynch v. Fallon*, 11 R. I. 311. — K.

Lorimer v. Boylan, 98 Mich. 18; *Armstrong v. O'Brien*, 83 Texas, 635. In some cases it is held that a broker's agreement for compensation from both parties will not be recognized by the courts, although this rule does not apply when the broker is a

middleman only, and not an agent. See *Clark v. Allen*, 125 Cal. 276, 57 Pac. 985; *Carr v. National Bank & Loan Co.*, 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725 and note.

principal to make the transfer to him or for his benefit, by any contract which he makes as his agent. As agent to sell, it is his duty to get the highest fair price; and this duty is incompatible with his wish to buy; and so, *vice versa*, if he is an agent to purchase. At one time it was understood to be necessary to show that a trustee had taken undue advantage of his position, in order to set aside a purchase by him of that which he was a trustee to sell. (*m*) But this is not so now. (*n*) At present, the rule in equity appears to be, that any act by an agent with respect to the subject-matter of the agency injurious to his principal, may be avoided by the principal. If an agent to sell become the purchaser, or if an agent to buy be himself the seller, a court of chancery, upon the timely application of the principal, will *presume* that the transaction was injurious, and will not permit the agent to contradict this presumption, — unless, indeed, he can show that the principal, when furnished with all the knowledge he himself possessed, gave him previous authority to be such buyer or seller, or afterwards assented to such purchase or sale. (*o*)

And even where the sale is a judicial sale, under a title * 88 superior to that of the trustee or the *cestui que* * *trust*, one standing as trustee in respect to such property in his posses-

(*m*) Lord *Loughborough*, *Whitchote v. Lawrence*, 3 Ves. 750.

(*n*) *Ex parte* Lacy, 6 Ves. 627; *Ex parte* Bennett, 10 Ves. 385; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Harrison v. McHenry*, 9 Ga. 164; *Sturdevant v. Pike*, 1 Cart. (Ind.) 277; *Mason v. Martin*, 4 Md. 124.

(*o*) Lord *Eldon*, *Coles v. Trecothick*, 9 Ves. 234, 247; Lord *Erskine*, *Lowther v. Lowther*, 13 id. 103; *Ex parte* Hughes, 6 id. 617; *Murphy v. O'Shea*, 2 Jones Law, 422; *E. I. Comp. v. Henchman*, 1 Ves. Jr. 289; *Ex parte* Bennett, 10 Ves. 385; *Oliver v. Court*, 8 Price, 127; *Fox v. Mackreth*, 2 Bro. Ch. 400; *The York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Molony v. Kernan*, 2 Dru. & War. 31; *Davoue v. Fanning*, 2 Johns. Ch. 252; *McConnell v. Gibson*, 12 Ill. 128; *Pensonneau v. Bleakley*, 14 id. 15; *Dwight v. Blackmar*, 2 Mich. 330; *Clute v. Barron*, id. 192; *Allen v. Bryan*, 7 Ired. Eq. 276; *Moore v. Moore*, 1 Seld. 256; *Conger v. Ring*, 11 Barb. 356; *White v. Trotter*, 14 Sm. & M. 30; *Michoud v. Girod*, 4 How. 503; *Green v. Sargeant*, 23 Vt. 466; *Cumberland Coal and Iron Co. v. Sherman*, 30 Barb. 553; *Buell v. Buckingham*, 16 Iowa, 284; *Stewart*

v. Lehigh Valley R. Co. 9 Vroom, 505.

Unless the principal object, the transaction stands good; and a third party cannot open it. *Jackson v. Van Dalfsen*, 5 Johns. 43; *Jackson v. Walsh*, 14 id. 407; *Williams's Ex'rs v. Marshall*, 4 G. & J. 376; *Litchfield v. Cudworth*, 15 Pick. 31; *Pitt v. Petway*, 12 Ired. L. 69. How far a court of law, at the instance of the principal, will go in avoiding such sales or purchases by the agent for his own benefit is not quite clear. Probably in no jurisdiction where chancery powers have existed from the beginning, and where courts of law have not been compelled to act, in order to prevent parties from being without remedy, would it be held that a sale by an agent to himself is avoided *at law* by the mere dissent of the principal, without proof of fraud, or breach of a positive instruction to make sale to some third party. See *Jackson v. Walsh*, 14 Johns. 414, 415; *Williams v. Marshall*, 4 G. & J. 376, 380; *Harrington v. Brown*, 5 Pick. 521, *per curiam*; *Shelton v. Homer*, 5 Met. 467; *Perkins v. Thompson*, 3 N. H. 144; *Lessee of Lazarus v. Bryson*, 3 Binn. 54; *Den v. Hammel*, 3 Harrison, 74, 81; *Mackintosh v. Barber*, 1 Bing. 50.

sion is not, it seems, permitted to purchase and hold for his own benefit. (*p*)

Among the obvious and certain duties of an agent is that of keeping a correct account of all money transactions, and rendering the same to the principal with proper frequency, or whenever called on. (*q*)¹ The court has compelled the rendering of such account after twenty years had elapsed. But, in general, after a considerable time has elapsed, and there are no circumstances to repel the presumption of an account rendered, *accepted, and settled, the jury are instructed to make * 89 that presumption. (*r*) The agent of an agent is generally accountable only to his own principal, and not to the principal of the party for whom he acts; that is, only his immediate employer can call him to account. (*s*) And a sub-contractor cannot pass by his immediate employer and sue the principal or proprietor of the work. (*t*)

If an agent, without necessity, has mixed the property of his principal with his own, in such a way that he cannot render an account precisely discriminating between the two, the whole of what is so undistinguishable is held to belong to the principal; (*u*)

(*p*) *Jewett v. Miller*, 6 Seld. 402.

(*r*) *Topham v. Braddick*, 1 Taunt. 571.

(*q*) *Topham v. Braddick*, 1 Taunt. 572; *Lord Chedworth v. Edwards*, 8 Ves. 49; *White v. Lady Lincoln*, 8 Ves. 363; *Lord Hardwicke v. Vernon*, 14 Ves. 510; *Lady Ormond v. Hutchinson*, 13 Ves. 47; *Lupton v. White*, 15 Ves. 436; *Pearse v. Green*, 1 Jac. & W. 135; *Motley v. Motley*, 7 Ired. Eq. 211; *Kerfoot v. Hyman*, 52 Ill. 512; *Robson v. Sanders*, 25 S. C. 116. See, as to the classes of persons whom equity will compel to account, *Terry v. Wachter*, 15 Sim. 448. — It seems that where the agent has made a mistake in the account he will not be bound by the account as given, although his principal has acted upon the presumption of its correctness in his dealings with third parties, — provided there was ground from which the principal might reasonably have inferred the existence of the error. In the case adjudged, the principal, like the agent, was a broker, and the mistake in the account was one which a knowledge of the usage of the stock market might have enabled him to detect. *Dails v. Lloyd*, 12 Q. B. 531.

(*s*) *Stephens v. Badcock*, 3 B. & Ad. 354, where it was held that money had and received could not be maintained against an attorney's clerk, who, in the absence of his master, and authorized by him, received certain money due to the plaintiff which the attorney had been employed by the plaintiff to collect; although the absence of the attorney (who proved to be in a state of insolvency) continued, and the defendant had not paid over the money to him or his estate. The agent when he received the money had given a receipt signed "for Mr. S. J. [the attorney], J. B." [the defendant]. See also *Pinto v. Santos*, 5 Taunt. 447; *Myler v. Fitzpatrick*, Mad. & G. 360. See *ante*, p. * 84.

(*t*) *Lake Erie R. Co. v. Eckler*, 13 Ind. 67; *Corbett v. Schumacker*, 83 Ill. 403.

(*u*) *Lupton v. White*, 15 Ves. 436, 440; *Chedworth v. Edwards*, 8 Ves. 46; *Wren v. Kirton*, 11 Ves. 377; *Atkinson v. Ward*, 47 Ark. 533; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108.

¹ And the agent cannot defeat his principal's right by setting up that the transactions by which the money was obtained were illegal. *Brooks v. Martin*, 2 Wall. 70; *First Nat. Bank v. Leppel*, 9 Col. 594; *Snell v. Pells*, 113 Ill. 145; *Reed v. Dougan*, 54 Ind. 306; *Gilliam v. Brown*, 43 Miss. 641; *Souhegan Bank v. Wallace*, 61 N. H. 24; *Baldwin v. Potter*, 46 Vt. 402; *Kiewert v. Rindskopf*, 46 Wis. 481. — W.

for it was the duty of the agent to keep the property and the accounts separate, and he must bear the responsibility and the consequences of not doing so.¹

As the principal is entitled to receive from the agent property intrusted to him, with its natural increase, (*v*) he may charge the agent with interest for balances in his hands, unless the nature of the transaction, or evidence, direct or circumstantial, shows that the intention of the parties was otherwise. (*w*) This may be inferred, for instance, where there has been a long accumulation, and the money has lain useless in the agent's hands, and the principal has known this, and made no objection. (*x*)

It is a general rule, that all profits or advantages made by an agent in the business of his agency, beyond his due compensation, belong to his principal. (*xx*)² (*x*)

(*v*) *Brown v. Litton*, 1 P. Wms. 140; *J. As to receivers, see — v. Jolland*, 8 *Massey v. Davies*, 2 Ves. Jr. 317; *Diplock v. Blackburn*, 3 Camp. 43; *Short v. Skipwith*, 1 Brock. 103. See *Colt v. Clapp*, 127 Mass. 476.

(*w*) *Dodge v. Perkins*, 9 Pick. 368, 388. "Upon the principles of the common law, we think it clear that interest is to be allowed, where the law by implication makes it the duty of the party to pay over the money to the owner, without any previous demand on his part." *Putnam*, (c) Lord *Kenyon* seems to have been of opinion, in *Rogers v. Boehm*, 2 Esp. 704, that neither at law nor in equity, if money had been remitted to an agent, and he suffered it to remain dead in his hands, could he be made liable for interest; though he should be chargeable with interest if he mixed the money with his own, or made any use of it.

(c.c) *Lafferty v. Jelley*, 22 Ind. 471.

¹ Thus if the agent deposits the principal's money in the same bank account with his own, he is liable to his principal for the loss if the bank fails. *Williams v. Williams*, 55 Wis. 300. So, even though the agent deposits his principal's money separately, if there is nothing to indicate that it is held in a fiduciary capacity. *Naltner v. Dolan*, 108 Ind. 500. — *W.*

² Thus if the agent receive an improper commission or bribe, his principal can recover it. *Mayor, &c. of Salford v. Lever*, 25 Q. B. D. 363.

The same principle is applicable if the agent deals in the business of the agency for his own benefit in any way, — as by buying up claims against his principal at a discount and seeking to enforce them for the full amount. *Noyes v. Landon*, 59 Vt. 569. Or by buying land for one price and turning it over to his principal at a greater price. *Crump v. Ingersoll*, 44 Minn. 84. Or by buying property for himself which it was his duty to buy for his principal. *Hughes v. Washington*, 72 Ill. 84; *Rose v. Hayden*, 35 Kan. 106; *Snyder v. Wolford*, 33 Minn. 175; *Cameron v. Lewis*, 56 Miss. 76; *Wood v. Rabe*, 96 N. Y. 414; *Seichrist's Appeal*, 66 Pa. 237. Or renewing a lease in his own name of premises used for the business of the principal. *Gower v. Andrews*, 59 Cal. 119; *Davis v. Hamlin*, 108 Ill. 39. Or acquiring for his own benefit a title adverse to his principal's. *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Continental Life Ins. Co. v. Perry*, 65 Iowa, 709. In *Collins v. Sullivan*, 135 Mass. 461, the defendant agreed to help find a man who would advance money to enable the plaintiff to recover

(*x*) See *Tyrrell v. Bank of London* (10 H. L. Cas. 26), 2 English Ruling Cas. 496, and notes; *Schmidt v. Leopold*, 51 Minn. 455, 53 N. W. 719. An agent who sells property for a higher price, or makes a more valuable exchange, than he was expected and instructed to obtain, is liable for the excess of value to his principal, and cannot appropriate it to himself. *Bassett v. Rogers*, 165 Mass. 377, 43 N. E. 180. And if the agent, for his own purposes, understates to his principal the amount of an offer received, he is liable in tort for loss thus caused to the principal. *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126.

If an agent employed for any special purpose, discharges his * duty and does all he was required to do, he is entitled * 90 to full compensation, although the principal declines or refuses to take advantage of the agent's act, or even to adopt it. Thus, if an agent employed to sell land succeeds in finding, for his principal, a buyer on the stipulated terms, but the principal refuses to make the sale and rescinds the authority, the agent may have his action for his services; and the measure of damages (which would be a matter of law) would, generally, be his regular commission on the sale. (y) ¹

It has been held to be the duty of an agent appointed to collect money, to give immediate notice when any is collected. (z)

SECTION XIV.

OF PUBLIC AGENTS.

A public agent,² as for example a collector, has been held liable for the acts of his deputy in exacting illegal compensa-

(y) *Prickett v. Badger*, 1 C. B. (N. S.) (z) *McMahan v. Franklin*, 38 Mo. 548. 296; *Vinton v. Baldwin*, 88 Ind. 104.

land which he had lost by foreclosure. The plaintiff relying on this agreement made but little effort himself, the defendant dissuading him from seeking other assistance with the secret intent of buying the land himself, which he subsequently did. It was held these facts were not sufficient to enable the plaintiff to charge him as trustee. This case, though it seems open to criticism, has been followed in *Fletcher v. Bartlett*, 157 Mass. 113, 31 N. E. 760. See for further illustrations of the rule that an agent cannot profit by his agency beyond the agreed compensation, *De Bussche v. Alt*, 8 Ch. D. 286; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Dodd v. Wakeman*, 11 C. E. Green, 484; *Dutton v. Willner*, 52 N. Y. 312; *Price v. Keyes*, 62 N. Y. 378; *Savage v. Savage*, 12 Oregon, 459; *Coursin's Appeal*, 79 Pa. 220.

¹ The agent further may claim reimbursement from the principal for all expenses properly incurred by him in the course of his agency. *Beach v. Branch*, 57 Ga. 362; *Searing v. Butler*, 69 Ill. 575; *Maitland v. Martin*, 86 Pa. 120; *Ruffner v. Hewitt*, 7 W. Va. 585.

But not for expenses which were unnecessary or only made necessary by the agent's improper conduct or neglect. *Godman v. Meixsel*, 65 Ind. 32; *Maitland v. Martin*, 86 Pa. 120.

The agent is also entitled to be indemnified from claims of third persons arising from the execution of the agency. *Betts v. Gibbins*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66, 72; *Moore v. Appleton*, 26 Ala. 633; s. c. 34 Ala. 147; *Stocking v. Sage*, 1 Conn. 519, 522; *Beach v. Branch*, 57 Ga. 362; *Drummond v. Humphreys*, 39 Me. 347; *Greene v. Goddard*, 9 Met. 212; *Guirney v. St. Paul, &c. Ry. Co.*, 43 Minn. 496; *Howe v. Buffalo, &c. R. R. Co.*, 37 N. Y. 297; *Maitland v. Martin*, 86 Pa. 120; *Clark v. Jones*, 16 Lea, 351; *Saveland v. Green*, 36 Wis. 612.

But if the act of the agent, though authorized by the principal, is in itself necessarily and obviously illegal, the agent being *in pari delicto* cannot recover from his principal. *Coventry v. Barton*, 17 Johns. 142. — W.

² The government is not bound by the act or declaration of its agent, unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for the government.

tion, notwithstanding he believed the compensation authorized by law and accounted for it to the treasury. (a)

If he gives a promissory note purporting to bind a public body, as a school district, which he has no authority to bind, he is liable on it himself. (b)¹

He cannot act for the body whom he represents in lending money to himself. (c)

Public agents are not liable for injury sustained by an innocent but mistaken exercise of their discretion, unless it amounts to their own personal negligence. (d) Nor for the negligence of workmen properly employed by them. (e) But a public body, although acting gratuitously for the public, is responsible for their own personal negligence, and for wanton or malicious injury. (f) (x) Although a private agent, acting within the scope

(a) *Ogden v. Marshall*, 3 Blatchford, 319. See *ante*, p. * 79, note.

(b) *Weave v. Gove*, 44 N. H. 196.

(c) *Holderness v. Baker*, 44 N. H. 414.

(d) *Yealy v. Fink*, 43 Penn. 212.

(e) *Holliday v. St. Leonard*, 11 C. B. (N. s.) 192; *Richmond v. Long*, 17 Gratt. 375.

(f) *Clothier v. Webster*, 12 C. B. (N. s.) 790.

Clifford, J., in *Whiteside v. United States*, 93 U. S. 247, 257. A purchasing agent cannot bind the government before actual delivery of the goods. *Noble v. United States*, 11 Ct. of Cl. 608. — K.

¹ But on non-negotiable contracts a public agent is not personally bound unless he clearly intended to be. *Hodgson v. Dexter*, 1 Cranch, 345; *Knight v. Clark*, 48 N. J. L. 22. — W.

(x) A public hospital, chartered as a charitable corporation, or other public charity, is not liable for the negligence of its nurses or employees, if selected with due care. *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595; *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; *Collins v. New York Hospital*, 69 N. Y. S. 106, 59 App. Div. 63; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 24 S. W. 1065, 44 Am. St. Rep. 243; *Donaldson v. Com'rs*, 30 New Bruns. 279. See *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Bates v. Worcester Protective Dept.*, 177 Mass. 130, 58 N. E. 200. General powers conferred by statute on such a public body as a hospital will not necessarily be so construed as to authorize a nuisance. *Metropolitan Asylum District Managers v. Hill* (6 App. Cas. 193), 16 English Ruling Cas. 556 and notes.

Water commissioners of a city are such agents that the city is liable for their acts. *St. Germain v. Fall River*, 177 Mass. 550,

59 N. E. 447. But a special police officer, serving without pay from the city which appoints him on the application of the proprietor of a place of amusement, is not the agent or servant of such proprietor. *Healey v. Lothrop*, 178 Mass. 151, 59 N. E. 653.

A public agent or officer forfeits no rights by not resigning when requested so to do by the government: *Knight's Case*, 35 Ct. Cl. 129; but an officer whose resignation is tendered and accepted is out of the service and cannot afterwards be discharged. *Douw's Case*, 36 Ct. Cl. 112. Only an officer *de jure*, and not an officer *de facto*, is entitled to the salary of a public office. *Belcher's Case*, 34 Ct. Cl. 400; *Glavey's Case*, 35 Ct. Cl. 242. There is an implied obligation to reimburse a public officer who in the performance of his duties incurs necessary expenses not prohibited by law. *Luse's Case*, 35 Ct. Cl. 164. The skill and duties required of a Federal officer, such as an army officer, are not measured by the criminal laws of a State; but if he exceeds his authority, or asks maliciously, he is amenable to such laws. *In re Fair*, 100 Fed. 149.

A public contract which is made

of a general authority, but violating private instructions, unknown to the party with whom he acts, binds his principal, the rule is held otherwise as to a public agent; because his authority is matter of record in the books of a corporation, or of some public record, and may be inquired into and ascertained. (*g*) And municipal corporations are to be regarded rather as agents than as principals, and as responsible to their constituents. (*h*)

A public agent acting for the government is not personally responsible; and this has been held, although the contract was under his seal. But if the credit given him were not within the line of his duty, and covered by his authority, he is personally liable. (*i*)¹ And the presumption derived from his office or employment, may be overcome by evidence of the intention of the parties to make the contract on his personal responsibility. (*j*)

Public agents, where they stand in the relation of trustees, are treated of in the subsequent chapter on Trustees.

(*g*) *Baltimore v. Reynolds*, 20 Md. 1.

(*i*) *Yulee v. Canora*, 11 Fla. 9.

(*h*) *Idem*.

(*j*) *Lapsley v. McKinstry*, 38 Mo. 245.

¹ An agent of a foreign government is not liable personally, nor can a creditor indirectly sue such a government by bringing an action against the agent, *Twycross v. Dreyfus*, 5 Ch. D. 605; nor will a promise by a public agent to pay a debt when he receives money from his principal make him personally liable. *Brazelton v. Colyar*, 2 Baxter, 234. A State may, however, by statute ratify an agent's act in selling its property in excess of his authority and receiving a note in payment, and may then enforce payment the same as an individual. *State v. Torinus*, 26 Minn. 1. — K.

"subject to the approval" of an army approval. *Monroe v. United States*, 184 officer refers only to a prospective U. S. 524, 18 S. Ct. 444, 46 L. Ed.

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* CHAPTER IV.

FACTORS AND BROKERS.

SECT. I. — *Who is a Factor, and who a Broker.*

FACTORS and Brokers are both and equally agents; but with this difference: the Factor is entrusted with the property which is the subject-matter of the agency; the Broker is only employed to make a bargain in relation to it. The compensation to both is usually a commission; and when the agent guarantees the payment of the price for which he has sold the goods of his principal, then the commission is larger, as it includes a compensation for this risk. In this case he is said in the books to act under a *del credere commission*. But this phrase is seldom used in this country, nor indeed is the word "factor" often employed by mercantile men. The business of factors is usually done by commission merchants, who are generally called by that name, and who do or do not charge a guaranty commission as may be agreed upon by the parties. But the charge of a guaranty commission gives the factor no increased authority over the property. (a) (x)

(a) *Morris v. Cleasby*, 4 M. & Sel. 566; *Thompson v. Perkins*, 3 Mason, 232.

(x) At common law a factor, when authorized to sell goods, has no power to pledge them. *Read v. Telephone Co.*, 93 Tenn. 482, 27 S. W. 662; *Charles H. Childs & Co. v. Waterloo Wagon Co.*, 57 N. Y. S. 520, 60 N. E. 1108; *National Exchange Bank v. Graniteville Manuf. Co.*, 79 Ga. 28, 3 S. E. 414; *George v. Fourth Nat. Bank*, 41 Fed. 257; *Lallande v. His Creditors*, 42 La. Ann. 711, 7 So. 896; *Holton v. Hubbard*, 49 La. Ann. 737, 22 So. 346; 3 Kent's Com. (14th ed.) 625. And the duty of a lender to inquire into his authority to pledge is not fulfilled by acting on a mere authority to sell. *Thurber v. Cecil Nat. Bank*, 52 Fed. 518. He has implied authority to sell on credit, but must use due care in selling only to responsible persons. *M. M. Walker Co. v. Dubuque Fruit Co.*, 113 Iowa, 428, 85 N. W. 614, 53 L. R. A. 775; *Western*

Union Cold Storage Co. v. Winona Produce Co., 94 Ill. App. 618. When, by his contract, the factor is to buy at a named price all such goods consigned to him as remain unsold at a certain time, but is to become their owner only on full payment, he holds at first as a mere agent for sale, and, after the specified date, on a conditional sale, and not as agent; and his mortgagee thereof without notice is entitled to them as against his consignor. *Norton v. Melick*, 97 Iowa, 564, 66 N. W. 780; *Norton v. Fisher (Iowa)*, 85 N. W. 801. A factor who, by concealing insurance collected, commits a fraud upon his principal, forfeits all claim to commissions. *Fish v. Seeberger*, 154 Ill. 30. This subject is now everywhere regulated largely by statute; in England by the Factors Act, 1889, consolidating earlier statutes, and making "mercantile agent"

SECTION II.

OF FACTORS UNDER A COMMISSION.

Whether a factor who sells under a *del credere* or guaranty commission becomes thereby a principal debtor to his principal * or only a surety, has been somewhat doubted; (b) if * 92 he be a principal debtor, his employer may demand the price of him without looking to the buyer. If he be only a surety, he is bound to pay only if the buyer does not. It appears to be now settled that he is still only a surety, and that recourse must be had first to the principal debtor, on whose default only the factor is liable; (c) (x) not that the employer must sue the buyer before he sues the factor, but that he can sue the factor only because the buyer neglects or refuses to pay, and when he so neglects or refuses. It seems, however, to be still held, that the promise of the factor to guarantee the debt is not within the Statute of Frauds, as a promise to pay the debt of another. (d) If he takes a note from the purchaser of the goods, this note belongs to his prin-

(b) *Grove v. Dubois*, 1 T. R. 112; 38 Md. 412, 429; *Sherwood v. Stone*, 14 Leverick v. Meigs, 1 Cowen, 645, 663, N. Y. 267. See *Wolff v. Koppell*, 2 Denio 664, 368, where conflicting opinions are given on this question by *Porter* and *Hand*, Senators.

(c) *Houghton v. Matthews*, 3 B. & P. 485; *Morris v. Cleasby*, 4 M. & Sel. 566; *Gall v. Comber*, 7 Taunt. 558; *Peele v. Northcote*, 7 Taunt. 478; *Couturier v. Hastie*, 8 Exch. 40; *Bradley v. Richardson*, 23 Vt. 720; *Thompson v. Perkins*, 3 Mason, 232; *Wolff v. Koppell*, 5 Hill (N. Y.) 458. *Contra*, *Lewis v. Brehme*, 38 Md. 412, 429; *Sherwood v. Stone*, 14 N. Y. 267. See *Wolff v. Koppell*, 2 Denio 368, where conflicting opinions are given on this question by *Porter* and *Hand*, Senators.

(d) *Swan v. Nesmith*, 7 Pick. 220; *Wolff v. Koppell*, 5 Hill (N. Y.) 458; s. c. 2 Denio, 368; *Couturier v. Hastie*, 8 Exch. 40; *Bradley v. Richardson*, 23 Vt. 720.

the term by which factors are known. See 4 Chitty's Statutes (5th ed.), "Factors." The decisions on the New York factors' act will be found collected in 6 Abbott's N. Y. Cycl. Digest, p. 618 *et seq.* See also *Hollins v. Hubbard*, 165 N. Y. 534, 59 N. E. 317. Under the Missouri statute, a pledge of goods by a factor only protects the pledgee to the extent of the factor's advances and charges. *Steiger v. Third Nat. Bank*, 6 Fed. 569. And see *Commercial Bank v. Hurt*, 99 Ala. 134, 12 So. 569, 42 Am. St. Rep. 39, 19 L. R. A. 702; *Same v. Lee*, 99 Ala. 493, 12 So. 572, 19, L. R. A. 706.

(x) The purchaser is the debtor for goods sold and the *del credere* agent only

a surety. *Gindre v. Kean*, 31 Abb. N. C. 100; *Moore v. Hillabrand*, 16 id. 477; 37 Hun, 491; *Albion Phosphate M. Co. v. Wyllie*, 77 Fed. 541, 23 C. C. A. 276; *Guy v. Churchill*, 60 L. T. 740, 744; 62 id. 132. A *del credere* commission for selling goods and guaranteeing prompt payment by the purchasers is earned when the guaranty is made. *Springville Manuf. Co. v. Lincoln*, 16 Daly, 318. The agent's guaranty of a note received for goods sold by him is waived by a settlement made by his principal with the maker, as the agent can have no further right of subrogation. *Doty v. Case & W. T. Co.*, 50 Hun (N. Y.), 595; *Kilpatrick v. Dean*, 3 N. Y. S. 60.

cipal. But if he takes depreciated paper he must make it good. (e) If money be paid him, and he remits it, he does not guarantee its safe arrival, but is bound only to use proper means and proper care in sending it; (f) unless it is agreed that he shall guarantee the remittance, and may charge therefor a commission; in which case he is liable although he does not charge the commis-
 * 93 sion. (g) He has the same claim on *his principal for advances as if he did not charge a commission. (h)

SECTION III.

OF THE DUTIES AND THE RIGHTS OF FACTORS AND BROKERS.

A broker or factor is bound to ordinary care, and is liable for any negligence, error, or default, incompatible with the care and skill properly belonging to the business that he undertakes. (i) It is his business to sell; but the power to sell does not necessarily include the power to pledge. This rule was formerly applied with great severity; (j) but it seems to be now the law, aided by some

(e) *Dunnell v. Mason*, 1 Story, 543.

(f) *Lucas v. Groning*, 7 Taunt. 164. In *Muhler v. Bohlens*, 2 Wash. C. C. 378, the defendants received consignments from the plaintiff, and engaged to sell them on a *del credere* commission, and to guarantee the debts. They sold to one Walters part of the goods, and when the money for which the goods were sold became due, they took Walters' bill of exchange for the amount and remitted the same to the plaintiff. They also purchased another bill of one Imbert, which they also remitted to the plaintiff, in part payment for sales of his goods. Walters and Imbert failed, and the bills were protested; and this action was brought to recover the amount of the defendants' guaranty. *Washington, J.*: "The guaranty of the defendants extended no further than to the sales and receipts of the money arising from them. As to Imbert's bill, therefore, there is no pretence for charging the defendants with that, as it was a bill purchased by the defendants from a man in good credit, and it was purchased for the purpose of a remittance, as the defendants had been directed. But the guaranty extends to Walters' bill which was not purchased with the proceeds of the plaintiff's goods, but was given by the purchaser of

those goods instead of money. If the defendants were bound to guarantee the payment of this debt when contracted, the guaranty continues, because a bill which is dishonored is no payment."

(g) *Henbach v. Mollman*, 2 Duer, 227.

(h) *Graham v. Ackroyd*, 10 Hare, 192.

(i) *Vere v. Smith*, 1 Vent. 121.

(j) The factor cannot pledge the goods of his principal as security for his own debt. *Paterson v. Tash*, 2 Str. 1178. The principal may recover goods pledged by the factor, by tendering to him the sum due to him, without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 604; *M'Combie v. Davies*, 7 East, 5; *Solly v. Rathbone*, 2 M. & Sel. 298. See also *De Bouchout v. Goldsmid*, 5 Ves. 211; *Martini v. Coles*, 1 M. & Sel. 140; *Fielding v. Kymer*, 2 Br. & B. 639; *Quieroz v. Trueman*, 3 B. & C. 342; *Kinder v. Shaw*, 2 Mass. 398; *Odiome & Maxcy*, 13 Mass. 178; *Bowie v. Napier*, 1 McCord, 1; *Van Amringe v. Peabody*, 1 Mason, 440; *Whitaker on Lien*, 123, 136; *Rodriguez v. Heffernan*, 5 Johns. Ch. 429; *Nowell v. Pratt*, 5 Cush. 111. He cannot barter the goods of his principal, but must sell them outright. *Guerreiro v. Peile*, 3 B. & Ald. 616.

statutes both of England and of this country, (*k*) that he may pledge the goods for advances made in good faith for his principal, and perhaps otherwise if distinctly for the use and benefit of the principal, (*l*) or for advances made to himself to the extent of his lien; (*m*) or, perhaps, if the owner has clothed the factor with all the *indicia* of ownership so as to enable him to mislead others, and the pledgee had no notice or knowledge that he was not owner. (*n*) But this has been denied in this country. (*nn*)¹ The power of a factor to pledge for his own benefit the goods of a consignor cannot be considered as settled in this country. But it seems that * he may pledge negotiable paper intrusted to * 94 him by his principal, to a party who has no notice or knowledge of his want of title. (*o*) (*x*)

(*k*) See *ante*, p. * 58, n. (*h*), for statutes which regulate the power of the factor to pledge the goods of his principal. For interpretations of these acts, see *Stevens v. Wilson*, 6 Hill (N. Y.), 512; s. c. 3 Denio, 472; *Zachrisson v. Ahman*, 2 Sandf. 68; *Jennings v. Merrill*, 20 Wend. 1; *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441.

(*l*) *Mann v. Shiffner*, 2 East, 523; *M'Combie v. Davies*, 7 East, 5; *Solly v. Rathbone*, 2 M. & Sel. 298; *Pultney v. Keymer*, 3 Esp. 182. "A factor may deliver the possession of goods on which he has a *lien* to a third person, with notice of the *lien* and with a declaration that the transfer is to such person as

agent of the factor, and for his benefit." *Kent*, C. J., *Urquhart v. McIver*, 4 Johns. 103, 116.

(*m*) *Id.* First National Bank *v.* Boyce, 85 Ky. 42. *Contra*, *Merchants' Bank v. Trenholm*, 12 Heisk. 520.

(*n*) *Boyson v. Coles*, 6 M. & Sel. 14; *Williams v. Barton*, 3 Bing. 139.

(*nn*) *Michigan State Bank v. Gardner*, 15 Gray, 362.

(*o*) *Collins v. Martin*, 1 B. & P. 648; *Treuttell v. Barandon*, 8 Taunt. 100; *Miller v. Boykin*, 70 Ala. 469; *Miller v. Pollock*, 99 Pa. 202; *Morris v. Preston*, 93 Ill. 215; *Exchange Bank v. Butner*, 60 Ga. 654.

¹ Such a pledge is not good unless protected by statute. *Cole v. Northwestern Bank*, 10 C. P. 354; *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32; *Allen v. St. Louis Bank*, 120 U. S. 20; *Gray v. Agnew*, 95 Ill. 315; *McCreary v. Gaines*, 55 Tex. 485. See also *City Bank v. Barrow*, 5 A. C. 664. — W.

(*x*) Authority to "negotiate" securities may, under proper circumstances, include the right to pledge them. *Illinois Trust & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197. In a written contract, words of agency are treated as importing character and capacity, and not as descriptive merely; in California this rule is now extended to apply to sealed as well as unsealed instruments. *So. Pac. Ry. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650.

A bank which has no ground for suspicion is entitled to hold negotiable securities pledged for advances by it to a broker, but owned by his customers. *London Joint Stock Bank v. Simmons*, [1892] A. C. 201. The words "manager in trust," added to the signature of a bank manager,

show only a trust for his employers, and are not notice of any trust for other persons. *London & Canadian Loan Co. v. Duggan*, [1893] A. C. 506. But a bank which has any ground for belief that the treasurer of a corporation, or other fiduciary, is drawing checks on his principal's funds for the payment of his own debts, is liable to the principal. *Rochester & Charlotte T. Road Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790 and note; *McCarthy v. Provident Inst'n for Savings*, 159 Mass. 527, 34 N. E. 1073.

In England, when a person who has possession of goods under an agreement for their hire with an option to purchase them, sells them to a purchaser without notice, the conviction of the hirer for larceny as a bailee appears to divest the purchaser's

A broker employed to sell has no authority to receive payment; and in a case in New York it was not permitted to overcome this rule by proof of usage. (oo)

A principal does not, in general, lose his property in his goods by any act of the factor, as long as he can trace and identify them, either in the factor's hands, or into the hands of any representative of the factor, who holds them only in the factor's right, and not in his own independent right, as purchaser, pledgee, etc. (p)

He is bound to obey positive instructions precisely, but not mere wishes or inclinations; (q) and will be justified in departing from precise instructions if an unforeseen emergency arises, and he acts in good faith and for the obvious and certain advantage of his principal. (r)

If a factor buys goods at a price exceeding the limit set by his principal, or otherwise in disregard of his instructions, and the principal repudiates the contract, the goods become the property of the factor, and the principal is not liable for them. (rr)

Factors or brokers must conform to the usages of the business; and they have the power such usages would give them, and can bind the principal only to a usual obligation. (s) A factor need not advise insurance, still less make insurance; but having possession of the goods he may insure them for the owner. (s)¹ A factor has

(oo) *Higgins v. Moore*, 34 N. Y. 417.

(p) *Warner v. Martin*, 11 How. 209; *Beach v. Forsyth*, 14 Barb. 499; *Blackman v. Green*, 24 Vt. 17; *Benny v. Pegram*, 18 Mo. 191. See *Fahnestock v. Bailey*, 3 Met. (Ky.) 48, which is a strong case upon this point.

(q) *Brown v. McGran*, 14 Pet. 479; *Ekens v. Marklish*, Anbl. 184; *Lucas v. Groning*, 7 Taunt. 164.

(r) *Judson v. Sturges*, 5 Day, 556; *Drummond v. Wood*, 2 Caines, 310; *Loitard v. Graves*, 3 Caines, 226; *Lawler v. Keaquick*, 1 Johns. Cas. 174; *Forrestier v. Bordman*, 1 Story, 43.

(rr) *The Sally Magee*, 3 Wall. 451.

(s) *De Forest v. The Fire Insurance Co.*, 1 Hall, 84.

¹ If a factor promises to insure, or if so ordered or if usage imposes that duty upon him he fails to do so, he is liable himself as insurer, and, in the event of a loss, title in them. See *Helby v. Matthews*, [1895] A. C. 471; *Payne v. Wilson*, [1895] 1 Q. B. 653; 2 id. 537.

Privity of contract exists between those who employ a stock-exchange broker to sell stock or securities for them and the purchaser. See *Beckhuson v. Hamblet*, [1900] 2 Q. B. 19; *Anderson & Co. v. Beard*, id. 260; *Clews v. Jamieson*, 182 U. S. 461, 21 S. Ct. 845, 45 L. Ed. 1183.

(x) The principal's order to a broker to purchase in a certain market or trade carries with it reasonable authority to deal according to its lawful usages, especially when the principal is informed thereof. *Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819; *Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746.

A broker who is to receive commissions only upon the completion of the contemplated transaction cannot recover them, if, after preliminary negotiations, his principal abandons the transaction. *Hale v. Kumler*, 85 Fed. 161, 172 U. S. 646, 19 S. Ct. 885, 43 L. Ed. 1180; *Caston v. Quimby*, 178 Mass. 153, 59 N. E. 653; see *Murray v. Currie* (7 Car. & P. 584), 2 English Ruling Cas. 527 and notes. A broker's commission is not lost if the completed contract is not carried out because of inability to perform on the part either of his principal or of the accepted purchaser. *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152. See *Burnham v. Upton*, 174 Mass. 408, 54 N. E. 873.

discretionary power in regard to the time, mode, and circumstances of a sale; but he must exercise this discretion in good faith, and if he hastens a sale improperly, and without good reason, it is void. (t)

If he has any instructions how to dispose of the goods, and has made no advances on them, he is certainly bound by these instructions. (u)

A factor for commission must account to him from whom he received the goods, until an adverse claimant establishes his right to them. (uu)

* A factor is a general agent from the nature of his * 95 employment; and if he be known as a general commission merchant or factor, he binds the principal who employs him, although for the first time, by any acts fairly within the scope of his employment, even if they transcend the limits of his instructions; if the party dealing with him had no knowledge of those limits.

If he sends goods to his principal, contrary to order or to his duty, the principal may refuse to receive them, and may return them, or if the nature of the goods or other circumstances make it obviously for the interest of the factor that they should be sold, the principal may sell them as his agent. (v)

If he has no *del credere* commission, he may still be personally liable to his principal; as where he makes himself liable by neglect or default; or if he sells the goods of several principals to one purchaser on credit, taking a note to himself, and getting the same discounted. (w) Or if he sells on credit, and when that expires takes a note to himself. (x) But if he sell on credit and at the time takes a negotiable note which is not paid, the loss falls on the principal; and the factor is not bound to pay it, if

(t) "But it seems, if the sale be hurried in order to enable the factor to realize his advances, and it is not made in due course of business, it will be void." . . . The agents "were bound as factors to sell at reasonable and fair prices; and it would be contrary to their duty, and a fraudulent proceeding on their part, to sell the goods at a greatly reduced price, or, in common parlance, to sacrifice them, in order the more hastily to realize the proceeds." *Shaw, C. J., Shaw v. Stone*, 1 Cush. 228, 248.

(u) *Marfield v. Goodhue*, 3 Const. 62;

Brown v. McGran, 14 Pet. 479; *Smart v. Sandars*, 5 M. G. & S. 895; *Union Hardware Co. v. Plume*, 58 Conn. 219.

(uu) *Bain v. Clark*, 39 Mo. 352.

(v) *Kemp v. Pryor*, 7 Ves. Jr. 237, 240, 247; *Cornwall v. Wilson*, 1 Ves. Sen. 509.

(w) *Jackson v. Baker*, 1 Wash. C. C. 394; s. c. 445; *Johnson v. O'Hara*, 5 Leigh, 456. But not necessarily so. *Goodenow v. Tyler*, 7 Mass. 36; *Corlies v. Cumming*, 6 Cowen, 181.

(x) *Hosmer v. Beebe*, 2 Martin (N. s.) 368.

is entitled to credit for premiums that he should have paid. *Shoenfeld v. Fleisher*, 73 Ill. 404; *Area v. Milliken*, 35 La. Ann. 1150 — K.

he has no guaranty commission, although the note be made payable to the factor. (y)

A foreign factor is one who acts for a principal in another country; a domestic factor acts in the same country with his principal. A foreign factor is, as to third parties, under ordinary circumstances, a principal.¹ And though his principal may sue such third parties, they cannot sue his principal, for they act with the factor only, and on the factor's credit. But it seems to be otherwise with the domestic factor. A third party dealing with him may have a claim on his principal, unless it can be shown

that credit was given to the factor exclusively. (z) That * 96 is, in the case of a foreign factor the presumption * of law is, that credit was given to him exclusively; in the case of a domestic factor, that credit is given to his principal; but the presumption may be said to exist only in the absence of evidence; for the intention of the parties, to be drawn from the terms of the contract and from circumstances, will determine whether the party dealing with the factor dealt with him as agent or as principal. (a) It seems very nearly and perhaps quite settled, that

(y) *Messier v. Amery*, 1 Yeates, 540; *Davenport*, 9 B. & C. 78; *Kirkpatrick Goodenow v. Tyler*, 7 Mass. 36. *v. Stainer*, 22 Wend. 244.

(z) *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574. In this case it is declared that "there is no rule of law that a person contracting the foreign and domestic factors; *Gonzales v. Sladen*, Bull. N. P. 130; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Thomson v.* In all cases, whether the principal or

¹ The present state of the law of England on this point is thus expressed by Lord *Blackburn* in a recent case: "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known that we are justified in treating it as a matter of law, and saying that in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605; quoted with approval in *Maspons v. Mildred*, 9 Q. B. D. 530, 541. See also *Elbinger Actien-Gesellschaft, &c. v. Claye*, L. R. 8 Q. B. 313; *Hutton v. Bulloch*, L. R. 8 Q. B. 331; L. R. 9 Q. B. 572; *Kaltenbach v. Lewis*, 24 Ch. D. 54; 10 App. Cas. 617.

In this country the question is generally treated as a question of fact depending on the intention of the parties in each case as in the case of the agent of a domestic principal. *Oelricks v. Ford*, 23 How. 49; *Berwind v. Schultz*, 25 Fed. Rep. 912; *Maury v. Ranger*, 38 La. An. 485; *Bray v. Kettell*, 1 Allen, 80; *Kaulback v. Churchill*, 59 N. H. 296; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Taintor v. Prendergast*, 3 Hill, 72. *Contra*, *Rogers v. March*, 33 Me. 106. And see *Vawter v. Baker*, 23 Ind. 63. — W.

for the purpose of this rule, our States are not foreign countries to each other, although for most purposes of the law-merchant they are so.¹

* The factor and the principal may sometimes have conflicting claims against a purchaser; as the factor for his lien for advances, etc., and the principal for his price. In general it may be said that a purchaser who pays to either, will be protected against the other, if he has no notice or knowledge of any valid claim or right belonging to the other. (c) But, excepting when such rights exist in the factor, the principal has a higher right than he, and may enforce a contract with a third party for his own benefit. (x)

* A factor may buy and sell, sue and be sued, collect money, receive payments, give receipts, etc., in his own name; but a broker, only in the name of his principal. (d)² A factor has a lien on the property in his hands, for his commissions, advances, and expenses; e⁽³⁾ but whether the possession

agent is liable is a question of intention, to be ascertained by the terms of the contract and the surrounding circumstances." In *Thomson v. Davenport*, 9 B. & C. 78, a purchaser in Liverpool represented that he bought for persons in Scotland, but did not mention their names. The seller did not inquire who they were, and debited the party purchasing; and it was held that he might afterwards sue the principal for the price. Lord *Tenterden*, C. J., said: "There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner."

(c) *Drinkwater v. Goodwin*, Cowper, 251; *Atkyns v. Amber*, 3 Esp. 493; *Cop-*

pin v. Craig, 7 Taunt. 243; *Hudson v. Granger*, 5 B. & Ald. 27.

(d) *Baring v. Corie*, 2 B. & Ald. 143; *Hearshy v. Hichox*, 7 Eng. (Ark.) 125.

(e) *Williams v. Littlefield*, 12 Wend. 362; *Holbrooke v. Wight*, 24 Wend. 169. The factor has a general lien, to secure all advances and liabilities, upon all goods which come to his hands as factor. *Godin v. London Ass. Co.*, 1 Burr. 494; *Hollingworth v. Tooke*, 2 H. Bl. 501; *Cowel v. Simpson*, 16 Ves. 276; *Stevens v. Robins*, 12 Mass. 180; *Bryce v. Brooks*, 26 Wend. 367; *The Frances*, 8 Cranch, 419; *Dixon v. Stansfield*, 10 C. B. 398. And the factor obtains an interest sufficient to support his lien, upon accepting a draft drawn upon the faith of the goods. *Nesmith v. Dyeing, &c. Co.* 1 Curtis, 130; *Bank of Rochester v. Jones*, 4 Comst. 497; *Vail v. Durant*, 7 Allen, 408.

¹ *Wawter v. Baker*, 23 Ind. 63. — W.

² A broker cannot sue in his own name upon contracts made by him as a broker, *Fairlie v. Fenton*, L. R. 5 Ex. 169; nor, although signing a contract note as selling as broker for an undisclosed principal, can he sue as principal in the contract. *Sharman v. Brandt*, L. R. 6 Q. B. 720. Likewise a broker, signing a contract note in terms, "I have this day sold by your order and for your account to my principals," is not, in the absence of usage, personally liable on the contract. *Southwell v. Bowditch*, 1 C. P. D. 374. — K.

³ Commission merchants making advances on goods insured by them which are burned without their fault, have the same lien on the insurance money when collected as they had on the goods. *Johnson v. Campbell*, 120 Mass. 449. Also where an

(x) When a factor sells goods in his own name, the purchaser is usually entitled, when sued by the factor's principal, to set off a debt due him from the factor. See *Rabone v. Williams* (7 T. R. 360, n.), 2 English Ruling Cas. 390 and notes.

of a bill of lading duly indorsed gives the factor a right to take possession of the goods and hold them by his lien, is uncertain. We should doubt whether the bill of lading, alone, would give him such a right. (*f*)¹ But a factor who accepts a bill drawn on goods, which goods are in the hands of a third person to be delivered to the factor, acquires undoubtedly a lien on the goods as against an attaching creditor. (*g*) The consignor may always transfer the goods to a third person free from any lien or claim of the factor on them to secure his debt, if he transfers them before they come into the hands of the factor. (*h*). Nor has a factor any lien on goods in his hands, unless they came to him as factor. (*i*) (*x*)

It may be doubted, whether, in England, a factor can sell the goods against the orders of the principal, even if the principal expressly refuses to pay or secure his debt to the factor. (*j*) Here, the factor certainly may sell enough to cover his balances, if the principal, after proper demand, refuses to pay or secure them; but the factor must protect the principal's interest, as to the time and manner of the sale. (*k*) And the Supreme Court of the United States denies that a consignor, having received advances, * 99 has any right, by any orders, to suspend or * control the factor's right of sale, except as to the surplus of the goods beyond the factor's advances or liabilities. (*l*) But instructions

(*f*) See, however, *Rice v. Austin*, 17 Mass. 197; *Patten v. Thompson*, 5 M. & Sel. 350.

(*g*) *Smith v. Dyeing Co.*, 1 Curtis, 130.

(*h*) *Bank of Rochester v. Jones*, 4 Comst. 497.

(*i*) *Elliot v. Bradley*, 23 Vt. 217; *Dixon v. Stansfield*, 10 C. B. 398.

(*j*) See *Smart v. Sandars*, *supra*.

(*k*) *Frothingham v. Everton*, 12 N. H. 239; *Parker v. Brancker*, 22 Pick. 40; *Marfield v. Goodhue*, 3 Comst. 62; *Blot v. Boiceau*, 1 Sandf. 111, and 3 Comst. 78; *Blackmar v. Thomas*, 28 N. Y. 67. See *ante*, p. *70, n. (*y*).

(*l*) *Brown v. McGraw*, 14 Pet. 479. So *Mooney v. Musser*, 45 Ind. 115; *Howard v. Smith*, 56 Mo. 314.

agent has advanced money or incurred liability for a principal, and the latter becomes insolvent while the agent has in his possession or within reach the proceeds or fruit of the advances, he has a lien upon them before they come into the principal's actual possession. *Muller v. Pondir*, 55 N. Y. 325. See *Brown v. Coombs*, 63 N. Y. 598; *Daniel v. Swift*, 54 Ga. 113. — K.

¹ The mere possession of bills of lading of cotton confers no lien on the factors to whom it was shipped as against an attachment. *Saunders v. Bartlett*, 12 Heiskell, 316; *Oliver v. Moore*, 12 ib. 482; *Chaffraix v. Harper*, 26 La. An. 22. But delivery of cotton to a factor's agent and the placing it on the factor's drays gives such a lien as against an attachment put on the cotton while still on the drays. *Burrus v. Kyle*, 56 Ga. 24. — K.

(*x*) Real-estate brokers have no lien on papers or money placed in their hands to use in purchasing land. *Arthur v. Sylvester*, 105 Penn. St. 233; *Robinson v. Stewart*, 97 Mich. 454, 56 N. W. 853.

or an agreement as to this right of sale will be enforced. (*ll*) Nor need a factor make a sale; but after reasonable delay and endeavors to sell, he may maintain an action against his principal for his commissions or charges. (*m*) As to the measure of damages in actions against factors for wrongful sales, see second volume.

Possession is necessary to give a lien, and a broker has therefore no lien. (*n*)¹ In the transactions of business these relations are sometimes confounded, and it is not always easy to distinguish between the factor and the broker. The best test, however, is in the fact of possession; but even one who has possession may sometimes be held to be a broker. (*o*) Neither can delegate his authority. (*p*) The broker may certainly be the agent of both parties, and often is so; but it would seem from the nature of his employment, that the factor can be, generally at least, the agent only of the party who employs him. The whole subject of the lien of a factor and the rules and principles applicable to it, are considered in our chapter on Liens; and the distinction between a factor and a broker, in respect to the Statute of Frauds, is stated in the section on Bought and Sold Notes.

Neither has a right to his commissions, as a general rule, until the whole service, for which these commissions are to compensate, is performed. (*q*)² But where the service is begun, and an impor-

(*ll*) *Milliken v. Dehon*, 27 N. Y. 364.

(*m*) *Frothingham v. Everton*, 12 N. H. 239; *Upham v. Lefavour*, 11 Met. 174; *Dolan v. Thompson*, 126 Mass. 183. See *Strong v. Stewart*, 9 Heisk. 137.

(*n*) See *Jordan v. James*, 5 Ham. 99, where the several classes of liens are discussed, and the cases cited. But it is of

the very essence of a lien that possession accompanies it..

(*o*) *Pickering v. Busk*, 15 East, 38.

(*p*) *Catlin v. Bell*, 4 Camp. 183; *Solly v. Rathbone, and Cockran v. Irlam*, 2 M. & Sel. 298, n. (*a*).

(*q*) *Hamond v. Holiday*, 1 C. & P. 384; *Dalton v. Irving*, 4 C. & P. 289; *Broad v. Thomas*, 7 Bing. 99.

¹ But a broker may have a lien for his commissions upon the proceeds of a sales remaining in his hands, although he cannot retain the amount of his entire claim against the owners. *Barry v. Boninger*, 46 Md. 59. And an insurance broker has a lien on policies of insurance in his hands or the proceeds of them for the balance due him for commissions and premiums. *Fisher v. Smith*, 4 App. Cas. 1. — W.

² Nor for unsuccessful efforts unless the failure is due to the principal. *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378. But a real estate broker is entitled to his commissions if he procures a purchaser, although his principal concludes the sale himself. *Timberman v. Craddock*, 70 Mo. 638; *Arrington v. Cary*, 5 Baxter, 609; *Dolan v. Scanlan*, 57 Cal. 261; but such purchaser must be ready to carry out the terms agreed on between his principal and himself. *Fraser v. Wyckoff*, 63 N. Y. 445; *McArthur v. Slauson*, 53 Wis. 41; *Hyams a. Miller*, 71 Ga. 608; *Kerfoot v. Steele*, 113 Ill. 610; or be acceptable to him, *Coleman v. Meade*, 13 Bush, 358; nor can the principal, by changing such terms, prevent the recovery of such commissions, *Bash v. Hill*, 62 Ill. 216; *Stewart v. Mather*, 32 Wis. 344; or by a refusal to ratify a sale, *Bailey v. Chapman*, 41 Mo. 536; *Cawker v. Apple*, 15 Col. 141; *Fiske v. Soule*, 87 Cal. 313; *Greenwood v. Burton*, 27 Neb. 808; or otherwise preventing a sale, *Phelps v. Prusch*, 83 Cal. 626. If, however, a broker breaks off negotiations, his principal can afterwards

tant part performed, and the factor or broker is prevented by some irresistible obstacle from completing it, and is himself without fault, there it would seem that he may demand a proportionate compensation. (*r*)¹ (*x*) So a broker, employed to sell land and making a proper bargain, has been held entitled to his commission although the purchaser refused to take the land from a defect in the title. (*rr*) And if he makes a contract for the purchase of goods to arrive, he may recover his commissions although the goods do not arrive. (*rs*) Neither factor nor broker can have any

(*r*) *Hamond v. Holiday*, 1 C. & P. 384; *Yearly*, 31 Md. 270; *Gonzales v. Broad*, 10 B. & C. 438. *Broad v. Thomas*, 7 Bing. 99; *Read v. Rann*, 10 B. & C. 438. 57 Cal. 224; *contra*, *Rockwell v. Newton*, 44 Conn. 333. See, as to the rights of a

(*rr*) *Doty v. Miller*, 43 Barb. 529; *Middleton v. Findler*, 25 Cal. 76; *Knapp v. Wallace*, 4 N. Y. 477; *Schwartz v.* ship-broker, *Cook v. Fisk*, 12 Gray, 491, and *Cook v. Welch*, 9 Allen, 350. (*rs*) *Paulsen v. Dallet*, 2 Daly, 40.

renew and complete them without entitling the broker to a commission. *Wylie v. Marine Bank*, 61 N. Y. 415. — A broker to sell is also entitled to compensation when he finds one who makes a written contract for the property, *Veazie v. Parker*, 72 Me. 443; though never carried out. *Pearson v. Mason*, 120 Mass. 53, and though the sale falls through because the seller is unable to give a good title, *Birmingham, &c. Co. v. Thompson*, 86 Ala. 146; *Cheatham v. Yarbrough*, 90 Tenn. 77. — A broker, leaving copies of a written authority to procure a loan with several persons, one of whom without the broker's knowledge lends the money, is entitled to his commissions. *Derrickson v. Quimby*, 14 Vroom, 373. But where the broker's advertisement attracted a purchaser to whom the principal made a sale, the broker was held to recover not even his outlays, in *Charlton v. Wood*, 11 Heiskell, 19. — A broker to sell a colliery, who was to receive as a commission all he could get above a certain sum, was held entitled to such excess, although very largely above such sum. *Morgan v. Elford*, 4 Ch. D. 352. — A broker, in the absence of agreement, is entitled to the customary rate of commissions. *Potts v. Aechternacht*, 93 Penn. St. 138. One who renders service as a broker is not entitled to commissions unless employed by the principal to do so. *Twelfth Street Market Co. v. Jackson*, 102 Pa. 269; *Coffin v. Linxweiler*, 34 Minn. 320. See in general as to the right to commissions, 30 Amer. Law Reg. 114. — W.

¹ Or if he opens a negotiation, and his principal completes the sale, he can recover the proper proportion of the commission. *Martin v. Sillman*, 53 N. Y. 615. See *Thomas v. Lincoln*, 71 Ind. 41, to the effect that a broker can receive a commission only on the actual completion of a sale of personal property. — K.

(*x*) An agent must sue at law for commissions earned, not in equity for an accounting. *Johnson v. Berlin*, 71 N. Y. S. 454, 35 Misc. Rep. 146. A factor may be allowed commissions on the sale of collateral securities held by him. *Foster Black Co. v. Fennessey*, 159 Mass. 538, 34 N. E. 1077. He is not "a person intrusted with merchandise" for sale when he obtains the goods fraudulently from their owner. *H. A. Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279; *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503. See *Hastings v. Pearson*, [1893] 1 Q. B. 62. A broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys, but he must show that

his services were the efficient or effective means of bringing about the actual sale. *Dowling v. Morrill*, 165 Mass. 491, 43 N. E. 295; *Crowningshield v. Foster*, 169 Mass. 237, 47 N. E. 879. When two or more brokers are employed, there is no implied promise to pay more than one commission, and though each of them may have contributed something towards reaching the result, and one may succeed where another has failed, yet that one only is entitled to a commission whose services were the predominating effective cause of earning it. *Whitcomb v. Bacon*, 170 Mass. 479, 49 N. E. 742. As to the right of a broker, who did not close the trade, to recover on a *quantum meruit* for work done, see *Cadigan v. Crabtree*, 179 Mass. 474, 61 N. E. 37.

valid claim for his commissions or other compensation if he has not discharged all the duties of the employment which he has undertaken, with proper care and *skill, *100 and entire fidelity. (s) And for his injurious default, he not only loses his claim, but the principal has a claim for damages. (t) He must account for all the profits made from contracts entered into on behalf of his principal. (tt) And if he has stipulated to give his whole time to his employer, he will not be permitted to derive any compensation for services rendered elsewhere. (u) Neither the factor nor broker can acquire any claim by services which are in themselves illegal or immoral, or against public policy. (v)¹

A factor to whom goods were sent for sale cannot be sued until after demand or instructions to remit. (vv)

A broker to whom a certificate of shares has been intrusted with special instructions, can make no disposition of them which these instructions do not permit; nor can evidence of a contrary usage be received;² and if he does this, he is liable for what was the market price of the shares on the day when he violated his instructions. (vw)

A commission merchant cannot detain proceeds of a sale from his principal, in favor of claims or equities between a third party and the principal, in which the commission merchant has no interest. (vx)

(s) *Denew v. Deverell*, 3 Camp. 451; *Hamond v. Holiday*, 1 C. & P. 384; *White v. Chapman*, 1 Stark, 113; *Hurst v. Holding*, 3 Taunt. 32; *Dodge v. Tileston*, 12 Pick. 328. See also *Shaw v. Arden*, 9 Bing. 287; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Fisher v. Dynes*, 62 Ind. 348. As to his duty to keep accounts, see *White v. Lady Lincoln*, 8 Ves. 363. He must not confound the principal's property with his own. *Lupton v. White*, 15 Ves. 432. He cannot recover his compensation if he has embezzled the principal's funds, although it exceeds the amount embezzled. *Turner v. Robinson*, 6 C. & P. 16, n. (g).

(t) See note (b), p. *86.

(tt) *Payne v. Waterston*, 16, La. An. 239.

(u) *Thompson v. Havelock*, 1 Camp. 527, and cases cited in note; *Massey v. Davies*, 2 Ves. Jr. 317; *Gardner v. M'Cutcheon*, 4 Beav. 534.

(v) *Haines v. Busk*, 5 Taunt. 521; *Josephs v. Pebber*, 3 B. & C. 639; *Wyburd v. Stanton*, 4 Esp. 179; *Buck v. Buck*, 1 Camp. 547; and *Rex v. Shatton*, in note; *Armstrong v. Toler*, 11 Wheat. 258; *Pearce v. Foote*, 113 Ill. 228; *Whitesides v. Hunt*, 97 Ind. 191; *Johnson v. Hunt*, 81 Ky. 321; *Crawford v. Spencer*, 92 Mo. 498.

(vv) *Wright v. People*, 61 Ill. 382; *Burns v. Pillsbury*, 17 N. H. 66.

(vw) *Parsons v. Martin*, 11 Gray, 111.

(vx) *Aubery v. Fiske*, 36 Y. N. 47.

¹ Thus a broker cannot recover premiums paid for illegal insurance, *Allkins v. Jupe*, 2 C. P. D. 375; nor money advanced to cover losses in stock-gambling, nor his commissions therein. *Fareira v. Gabell*, 89 Penn. St. 89. But a broker carrying stocks on a margin, is entitled to his expenditures, especially where he informs his principal frequently of the state of his accounts, and the latter, knowing the custom, makes no objection until called upon to pay. *Robinson v. Norris*, 51 How. Pr. 442. — K.

² As to the admissibility of evidence of usage, see *Robinson v. Mollett*, L. R. 7 H. L. 802; *Perry v. Barnett*, 15 Q. B. D. 388; *Irwin v. Williar*, 110 U. S. 499, 513; *Bailey v. Bensley*, 87 Ill. 556; *Commonwealth v. Cooper*, 130 Mass. 285. — W.

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* CHAPTER V.

SERVANTS.

IN England the relation of master and servant is in many respects regulated by statutory provisions, and upon some points is materially affected by the existing distinction of ranks, and by rules which have come down from periods when this distinction was more marked and more operative than at present. In this country we have nothing of this kind. With us, a contract for service is construed and governed only by the general principles of the law of contracts.

The word "servant" seems to have in law two meanings. One is that which it has in common use, when it indicates a person hired by another for wages, to work for him as he may direct.

We may call such a person a servant in fact; but the word is also used in many cases to indicate a servant by construction of law; it is sometimes applied to any person employed by another, and is scarcely to be discriminated in these instances from the word "agent." This looseness in the use of the word is the more to be regretted, because it seems to have given rise to some legal difficulties and questions which might have been avoided.

There are important consequences flowing from the relation of master and servant, and it is therefore an important question, where this relation exists, and how far it extends. Thus, if one wishes to build or repair a house, and contracts with another to do this, and the contractor with another, and this other with still a third, for perhaps a part of the work, or the supply of materials, and the servant of the third by his negligence injures some person, has the injured party his right of action against the owner of the land or of the house? Undoubtedly, if all employed about the house were his *servants*, but not otherwise. So if an

* 102 owner of coaches lets one with the horses * and the coachman for a definite time or a definite journey, and while the hirer is using the coach the coachman by his negligence injures a person; has the injured party now an action against the owner? Yes, if the coachman were at the time of the wrongful act *his*

servant, and not otherwise. Hence, when a master gives general directions to his servant, trusting to his discretion, the master may be liable for the servant's misuse of his discretion; but if he gives specific directions, and the servant transcends them, the master is not liable. (a) Again, if one employs a person to drive home for him cattle which he has bought, and gives the cattle up to the driver, going elsewhere himself, and the driver, or a person employed by the driver, by his negligence, injures any one, the injured person has, we think, as in the other instances, an action against the original party, if the party who did the wrong were at the time his servant, and not otherwise. So one was held responsible, who employed a day laborer to clean out a drain, in doing which he broke up the highway, whereby the plaintiff was injured. (b) The general principle is that a master is responsible for the tortious acts of his servant, *which were done in his service.* (x)

(a) *Oxford v. Peter*, 28 Ill. 434.

(b) *Sadler v. Henlock*, 4 E. & B. 570.

(x) See the extended notes to *Goodloe v. Memphis & C. R. Co.* (107 Ala. 233), 54 Am. St. Rep. 67, 71; *Ritchie v. Waller* (63 Conn. 155), 27 L. R. A. 161; *Limpus v. London General Omnibus Co.*, (1 H. & N. 526), 17 English Ruling Cas. 258; *Brown v. Boston Ice Co.*, 178 Mass. 108, 59 N. E. 644; *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038. For such torts as the violation of a trademark or copy-right, involving misfeasance, servants are liable jointly and severally with their employers. *Estes v. Worthington*, 30 Fed. 465; see *Gudger v. Western N. C. R. Co.*, 21 id. 81; *Young v. Foerster*, 37 id. 203; *Fischel v. Lueckel*, 53 id. 499; *Kelly's Directories v. Gavin*, [1902] 1 Ch. 631. As to the liability of officers and agents of a corporation for its infringement of a patent, see *United Nickel Co. v. Worthington*, 13 Fed. 392; *Tyler v. Galloway*, id. 477; *Seimens v. Sellers*, 16 id. 856; *Smith v. Standard L. M. Co.*, 19 id. 826; *Eagle Manuf. Co. v. Miller*, 41 id. 351; *Featherstone v. Osmonde Cycle Co.*, 53 id. 110; *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504.

In an agreement for service between master and servant, or for apprenticeship, the stipulations are independent, and illegality in one of them does not vitiate the whole contract of employment. *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, 17 English Ruling Cas. 194, and notes. Under an eight-hour labor statute, an employee cannot recover for extra time without an express stipulation therefor. *Christian County v. Merrigan*, 191 Ill. 484, 61 N. E. 479.

In contracts for permanent employment, where the employee gives up other business, there is not necessarily a want of mutuality because he does not agree to continue it for any definite time. See *Carnig v. Carr*, 167 Mass. 544, 35 L. R. A. 512 and note; *St. Louis, & C. Ry. Co. v. Matthews* (64 Ark. 398), 39 id. 477. Where no limit of time is fixed for the agency of a broker employed to sell property, it may be terminated at any time, if there is no bad faith. *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94; *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119. So, any contract of employment without limit of time is a contract at will. *Savannah, & C. Ry. Co. v. Willett* (Fla.), 31 So. 246. The statute of frauds applies to an oral employment for a year beginning at a future date. *Lally v. Crookston Lumber* (Minn.), 88 N. W. 846; *Bracegirdle v. Heald* (1 B. & Ald. 722), 17 English Ruling Cas. 177, and notes pp. 181, 184. As a common carrier cannot usually, in this country, exempt himself from the consequences of his own negligence, see *Compania La Flecha v. Brauer*, 168 U. S. 104, 117, 18 S. Ct. 12, 42 L. Ed. 398; *The Irawaddy*, 171 U. S. 187, 190, 18 S. Ct. 831, 43 L. Ed. 130; *infra*, vol. 2, p. *233; so it is against public policy for an employer, by contract with his employee, to exempt himself from liability for injuries caused by his negligence. *Consolidated Coal Co. v. Lundak*, 97 Ill. App. 109. But the employer is not required to guard his servants from violence by a mob or by strikers. *Lewis v. Taylor Coal Co.* (Ky.), 66 S. W. 1044.

It is certain and obvious that a master is not responsible for all the torts of his servant; for those, for instance, of which the servant is guilty, when they are entirely aside from his service, and have no connection with his duties, or with the command or the wish of his master; (*bb*) as if he should leave his master's house at night and commit a felony. There must, then, be some principle which limits and defines the rule *respondet superior*. And we think it may be clearly seen and stated. It is this: the responsibility of the master grows out of, is measured by, and begins and ends with, his control of the servant. (*c*) It is true

(*bb*) *Evansville, &c. R. Co. v. Baum*, 26 Ind. 70.

(*c*) On this ground rests the distinction now well established, between the negligence of the servant and his wilful and malicious trespass; the act in either case being done in the course of his employ. For the former the master must answer; for the latter he is held not liable, unless the trespass is proved to have been authorized or ratified by him. *McManus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & Ald. 590; *Lyons v. Martin*, 8 A. & E. 512; *Goodman v. Kennell*, 1 Mo. & P. 241, s. c. 3 C. & P. 167; *Sadler v. Henlock*, 4 El. & Bl. 570; *Foster v. Essex Bank*, 17 Mass. 479; *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comst. 479; *Corbin v. American Mills*, 27 Conn. 274. But it seems that where the duty of the master to the party, whose property is injured, is not merely that which every man owes to his neighbor, but a peculiar duty arising from a special relation, there that special relation may occasion a liability even for the wilful tort of the servant. As where the relation is one of bailment. In *Sinclair v. Pearson*, 7 N. H. 227, *Parker, J.*, giving the judgment, said: "It is evident, therefore, that the liability of a bailee, for a loss occasioned by the act of a servant, cannot be made to depend upon the question whether the act was wilful or otherwise; or whether the servant, in committing it, was doing, or forbearing what his master had directed; for if that were the criterion, the bailee would never be liable for the act or neglect of his servants, unless done by his command, either expressed, or in fact to be inferred; but it must depend upon the question whether the degree of care and diligence required about the preservation, safe-keeping, &c., of the thing bailed, has been exercised by master and servant." And *Ellis v. Turner*, 8 T. R. 531, was referred to, where a loss of part of

a cargo having occurred in consequence of the misconduct of the master of the vessel, and an action having been brought by the owner of the goods against the owners of the vessel, Lord *Kenyon* said: "Though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage." — The rule established in *McManus v. Crickett*, is criticised by *Reeve, Dom. Rel.* 357; and in the case of *The Druid*, 1 Wm. Rob. 485, Dr. *Lushington* commented in forcible terms upon the hardship of the rule, and expressed regret at its adoption. — If a master give general directions which naturally occasion the commission of a tort by the servant executing them, the master is liable notwithstanding he never commanded that particular act. *Rex v. Nutt, Fitzg.* 47; *Lord Tenterden, Rex v. Gutch, Mo. & M.* 437, 438; *Attorney-General v. Siddon*, 1 Tyr. 49; *Gregory v. Piper*, 9 B. & C. 591; *Lord Lonsdale v. Littledale*, 2 H. Bl. 267, 299; *Sly v. Edgley*, 6 Esp. 6; *Holmes v. Union*, 2 C. B. (N. s.) 790. In *Powles v. Hider*, 3 E. & B. 208, the owner of a cab, plying in London, was held liable for goods lost by the negligence of the cab-driver, although the driver paid the owner every day a certain sum for the use of the cab and horses. And where the servant is in the employ of the master, and the acts complained of are done in the course of the employment, the master is responsible although the acts were done in a way directly contrary to his instructions. *Philadelphia, &c. R. Co. v. Derby*, 14 How. 468; *Southwick v. Estes*, 7 Cush. 385. — But in cases where the

that the policy of holding a master to a * reasonable care and * 103
discretion in the choice of a servant may cause a liberal construction of the rule in respect to an injured party, and may therefore be satisfied in some instances with a * slight * 104
degree of actual control; but we see no greater difficulty in the application of the principle than may always be apprehended from the variety and complexity of the facts to which this and other legal principles may be applied. (x) The master is responsible for what is done by one who is his servant in fact, for the reason that he has such servant under his constant control, and may direct him from time to time as he sees fit; and therefore the acts of the servant are the acts of the master, because the servant is at all times only an instrument; and one is not liable for a person who is a servant only by construction, excepting so far as this essential element of control and direction exists between them. We should therefore say that, in the instances we have before supposed, the owner of the land or the house was not responsible for the tort of the servant of the sub-contractor, nor would he have been for the tort of the sub-contractor or of the first contractor. They were not *his servants* in any sense whatever; they were to do a job, and when this was done he was to pay the party whom he had promised to pay; and this was all; for if, although a contractor be employed, by the terms of the contract control is left with the

master is held liable on the ground of an *implied* authority to the servant to do the particular act for him, if the tort is a trespass on the part of the servant, the master must not be sued in trespass, but case. *Gordon v. Rolt*, 4 Exch. 365; *Sharrod v. London, &c. R. Co.*, 4 Exch. 580; where a railway train, driven at the rate of forty miles an hour according to the general directions of the company to the driver, ran over and killed some sheep which had strayed upon the line in consequence of the defective fences of the company. It appeared that if the driver (running the engine at the speed directed) had seen the sheep, he could not have stopped the train in time to prevent the collision. *Held*, that

the company were not liable in trespass for the injury; but that the action should have been *case*, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the railway. It was observed in the judgment, that, notwithstanding the order to the driver to proceed at a great speed, it did not follow as a *necessary* consequence that the engine would infringe on the plaintiff's cattle; and the case was distinguished from *Gregory v. Piper*, 9 B. & C. 591, on this ground. See *Howe v. Newmarch*, 12 Allen, 49; *Du Pratt v. Lick*, 38 Cal. 691.

(x) According to the rule now fully adopted in Illinois, servants are fellow-servants only when their employment requires co-operation and brings them together in such relation that they exercise an influence upon each other promotive of proper caution; and when they do thus have association and co-operation, they are fellow-servants though not acquainted

with each other. *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111; *World's Columbian Exposition v. Lehigh* (Ill.), 63 N.W. 1089.

A railroad corporation is liable for the shooting of a co-employee by one of its servants who is directed to guard against burglars. *Lipscomb v. Houston & Texas Cent. Ry. Co.* (Tex.), 55 L. R. A. 869.

owner, he is still liable. (cc) Nor is the contractor held if he properly executes the plan and follows the direction of an architect employed to direct him, and injury occurs through the fault of the plan. (cd) In accordance with this rule it is declared that where the negligent party exercises a distinct and independent calling, his employer is not liable, (d) and if the negligence be committed in the performance of a piece of work undertaken in consequence of a *special contract*, in such case the contractor is solely responsible. (e) ¹(x) Nor does it make any difference if the contractor be, in matters beside the contract, the servant of the other contracting party. (f) And the party with whom the contractor engages is not liable, although acts are done by the contractor or his servants amounting to a public nuisance, so long as the act contracted for is not in itself a nuisance. (g) But if an employer interferes with the contractor and gives special directions, and the mischief is done while the contractor is obeying them, the employer would be liable. (gg) If the act to be done be itself an unlawful one, or necessarily involves in its performance the commission of a public nuisance, the employer is not

* 105 discharged from liability on the ground that the * party employed was a contractor, because in such case he has sufficient control, and expressly commands the act to be done. (h) ²

(cc) *Schwartz v. Gilmore*, 45 Ill. 455.

(cd) *Daegling v. Gilmore*, 49 Ill. 248.

(d) *Milligan v. Wedge*, 12 A. & E. 737; *Martin v. Temperley*, 4 Q. B. 298; *De Forrest v. Wright*, 2 Mich. 368; *Pierce v. O'Keefe*, 11 Wis. 180; *Butler v. Hunter*, 7 H. & N. 826.

(e) *Allen v. Hayward*, 7 Q. B. 960; *Gayford v. Nicholls*, 9 Exch. 702.

(f) *Knight v. Fox*, 5 Exch. 72.

(g) *Overton v. Freeman*, 3 Car. & K. 49.

(gg) *Hefferman v. Benkard*, 1 Rob. 432.

(h) *Peachey v. Rowland*, 13 C. B. 182; *Ellis v. Sheffield Gas Co.*, 2 El. & Bl. 767. — It is a consequence from the principles stated in the text, that if a contractor himself employ a servant, he and not the

¹ Thus the owner of a house, employing a carpenter to raise it and put another story under it complete, is not liable for an injury to an adjoining house during the work, unless the carpenter is unskilful or unsuitable, or the work creates a nuisance. *Conners v. Hennessey*, 112 Mass. 96. See *Robinson v. Webb*, 11 Bush, 464. But *Bower v. Peate*, 1 Q. B. D. 321, decided that if a house-owner employs a contractor to pull the house down, excavate the foundations, and rebuild it, he is liable for an injury thereby caused to an adjoining house, on the ground that the owner was bound to see to it that no accident happened, although the contractor undertook to support the adjoining house as far as might be necessary. — K.

² Thus by employing a person to fill an ice-house by the cord, the employer cannot escape liability for injuries caused by an obstruction of the street in so doing. *Darmstaetter v. Moynahan*, 27 Mich. 188. — K.

(x) The land-owner is not responsible for injury caused by an independent contractor when he does not interfere with the work, and his premises are reasonably safe for work of the character attempted. *Bower v. Peate*, 1 Q. B. D. 321; *Hughes v. Percival*, 8 A. C. 443; *Reedie v. London*

& N. W. Ry. Co. (4 Exch. 244), 19 English Ruling Cas. 168 and notes, pp. 183, 186; *Goodloe v. Memphis & Charleston R. Co.* (107 Ala. 233), 54 Am. St. Rep. 67 and note, p. 91; *Wright v. Big Rapids Door & Blind Manuf. Co.* (Mich.), 50 L. R. A. 495 and note.

A contractor to build houses, employing a sub-contractor, has been held liable for injury caused by the sub-contractor's negligence. (*hh*) (*x*) Some exceptions seem to be made on the ground of public policy, although the case could hardly come within the law or reason of nuisance, as where railroads have their work done by contract, and are yet held liable. (*i*) And a railroad company has

original employer is liable for the conduct of that servant. And the general employer does not become liable even if he have a degree of control over the servant, and the power of removal, provided this authority is not so extensive as in effect to render the servant no longer the contractor's servant. Where a company, empowered by act of parliament to construct a railway contracted with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen, for incompetence; and the workmen in constructing a bridge over a public highway, negligently caused the death of a person passing beneath the highway by allowing a stone to fall upon him: *Held*, in an action against the company, upon stat. 9 & 10 Vict. c. 93, by the administratrix of the deceased, that they were not liable; and that the terms of the contract in question did not make any difference. *Reedie v. London, &c. R. Co.* 4 Exch. 244.

Yet a man is none the less liable for the negligence of his own servants because they were not directly employed by him, but mediately, through the intervention of another, whom he has authorized to appoint servants for him. And *Littledale, J.*, in the able opinion so much cited, instances several cases where the liability exists, although the master has neither the direct appointment nor the superintendence of the servants; as the liability of a shipowner for the crew selected and governed by the master; of the owner of a farm, who conducts its operations through a bailiff, for the inferior working men hired by the bailiff; and of the owner of a mine for the workmen employed by his steward, and paid by him on behalf of the master. To which may be added the liability of the owner of a chartered ship

for the negligence of the crew while under the immediate direction of the charterer. See *Fenton v. Dublin Steam Packet Co.*, 8 A. & E. 835. The following convenient tests for ascertaining in a particular case whether a certain person was the master of the servants in question, are suggested by *Coleridge, J.*, 7 Jur. 152: Had he the power of selecting them?—was he the party to pay them?—were they doing that work under his control in the ordinary way?—Where the other elements of liability exist, it is no defence that the master, voluntarily performing part of his work by means of servants, was obliged by law to take those servants from a prescribed class. Whether he would be liable where the law absolutely forbade him to do that part of his business himself, and still allowed him to select out of a class more or less numerous, is perhaps unsettled, but the probability is he would still be held. Where there is this personal prohibition, and also an obligation by law to take a *particular individual*, and thus no liberty of choice whatever is permitted it seems the master's liability ceases. See *Martin v. Temperley*, 4 Q. B. 298; *The Agricola*, 2 Wm. Rob. 10; *The Maria*, 1 Wm. Rob. 95; *Lucy v. Ingram*, 6 M. & W. 302; *Yates v. Brown*, 8 Pick. 23; *Stone v. Codman*, 15 Pick. 297; *Lowell v. Boston, &c. R. Co.*, 23 Pick. 24; *Sproul v. Hemingway*, 14 Pick. 1; *Ruffin, C. J.* in *Wiswall v. Brinson*, 10 Ired. L. 563; *Blake v. Ferris*, 1 Seld. 48; *Stevens v. Armstrong*, 2 id. 435; *Kelley v. Mayor, &c. of New York*, 1 Kern. 432.

(*hh*) *Creed v. Hartman*, 29 N. Y. 591, and 8 Bosw. 123.

(*i*) See some of the cases cited in preceding note, and *Mayor, &c. of New York v. Bailey*, 2 Denio, 445; *Hilliard v. Richardson*, 3 Gray, 352. See also *Camus v. Citizens Co.*, 40 Barb. 380.

(*x*) Sub-contractors, whether regarded as servants or contractors, are liable for injury to the original employer's property as to which they are employed, apart from their contract, and although the original contractor may still be liable to the plaintiff for breach of contract. *Stock v. Boston*,

149 Mass. 410, 414, 21 N. E. 871, 14 Am. St. Rep. 430; *Bickford v. Richards*, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224. They are not entitled to recover from their contractor because he fails to provide a safe place for their work. *Eldred v. Mackie*, 178 Mass. 1, 59 N. E. 673.

been held liable for an injury caused by the wilful misconduct of its engineer. (ii) And mortgagees of a railroad who are in possession and who manage the road, are liable for the negligence of their servants. (ij) So, too, a distinction seems to be taken

between an injury caused by the manner of doing a work, *106 and one caused by the work itself. As, for example, a * municipal corporation building a sewer, would not be liable for the negligent act of a workman employed by the contractor; but would be liable for an accident caused by the sewer being left open at night, and improperly lighted and guarded. (j) So commissioners of emigration are not responsible for the good conduct of persons whom they lawfully license. (jj) And the city of New Bedford was not liable for injury caused by negligence of firemen appointed and paid under a statute; it was held that the action would not lie. (jk) (x) If the contracting party employs persons to do the work, not on a contract, but on day's wages, he would still retain the power of directing them from day to day in their work; and this might render him liable. But we should still hold that if the work done at day wages were such as to carry with it no implication or probability of actual supervision or control, and none such were proved in fact, the employer would not be liable. For the same reason we should say that the owner and letter of a coach, horses, and coachman, was or was not responsible to one injured by the negligence of the coachman, as the terms of the hiring and the circumstances of the case led to the conclusion that the coachman was or was not at the time of the negligence the servant of the owner or of the hirer of the coach. (k)¹ The owner might doubtless be

(ii) *New Orleans R. Co. v. Allbritton*, 38 Miss. 242.

(ij) *Ballou v. Farnum*, 9 Allen, 47.

(j) *Storrs v. City of Utica*, 17 N. Y. 104. This case throws some doubt on *Blake v. Ferris*, 1 Seld. 48.

(jj) *Murphy v. Commissioners, &c.*, 28 N. Y. 134.

(jk) *Hafford v. New Bedford*, 16 Gray, 297.

(k) A party who is not the general master of a servant may make him his servant in a particular transaction, by specially directing him thereto, or by a subsequent adoption of what he has done, and in this way a special liability may be incurred. And in *Quarman v. Burnett*, 6 M. & W. 508, the owners of the carriage having provided the driver with a livery which he left at their house at the end of

¹ In *Omoa, &c. Co. v. Huntley*, 2 C. P. D. 464, it was decided that an owner who charters a vessel for certain specified objects, but who engages and pays the master and crew, is liable for the loss of the cargo through their negligence. — K.

(x) In maritime law, when the officers of a vessel which is in port and on fire, request the municipal authorities to throw water into her, the damage so caused to her cargo is a subject of general average.

Ralli v. Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742; *Reliance Marine Ins. Co. v. New York, &c. Mail S. S. Co.*, 77 Fed. 317, 23 C. C. A. 183, 165 U. S. 720, 17 S. Ct. 998, 41 L. Ed. 1184.

held responsible * to the hirer, if the injured party compelled * 107 him to make compensation, and it could be shown that the owner had knowingly employed an insufficient and dangerous servant, for this would be only to hold him responsible for his own negligence. The rule we have given would not require the tort to be committed in the master's presence in order to hold him responsible. It is enough if, when the tort was committed, the wrong-doer was in the service of the master, and was *then* acting as his servant. And this question has been held to be a question of fact for the jury. (*l*) If, however, the servant, when doing the wrong, was employed in the service of the master, it is no defence for the master, that he was also, and in some degree, acting in his own business. (*m*)

each drive, and the injury in question being occasioned by his leaving the horses, while so depositing the livery in their house, the court acknowledged that if it had appeared that the coachman went into the house to leave his livery on that occasion under a special order of the owners, or under a general order to do so at all times, without leaving any one at the horses' heads, a liability would have been incurred. In the course of the judgment, Baron Parke observed: "It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." See also *Burgess v. Gray*, 1 C. B. 578. — Where question is not made of the fact of service, but simply whether it is a service of *that party* whom it is attempted to charge, — there can be no doubt that the servant cannot have, with respect to the same act of service, two unconnected masters. Two persons may be joint masters, and thereby subject to a joint liability; and such joint liability may be converted into a several one by the election of the plaintiff to sue one separately, — which the law allows to be done in actions of tort; but "two persons cannot be made separately liable at the election of the party suing, *unless* in cases where they would be jointly liable." *Littledale, J., Laughner v. Pointer*, 5 B. & C. 559. This principle serves as a test in that difficult class of cases where the negligent servant seems to be in some respects in the employment of one party and in some

respects in that of another. In such a case, as soon as it is ascertained that, as to the transaction in question, he is the servant of either one, it follows immediately that he cannot be regarded as the servant of the other, who therefore is not liable for his negligence. Hence in the great case of *Laughner v. Pointer*, 5 B. & C. 547, it was held by *Abbott, C. J.*, and *Littledale, J.* (whose opinion has since been authoritatively approved), in opposition to the view of *Bayley* and *Holroyd, JJ.*, that where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the owner of the carriage was not liable to be sued for such injury. And the case is not affected though the owners of the carriage asked for that particular servant among many. "If the driver be the servant of the job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference." See also *Quarman v. Burnett*, 6 M. & W. 508; *Stevens v. Armstrong*, 2 Seld. 435; *Dalyell v. Tyrer*, El. Bl. & El. 899.

(*l*) Per Lord *Abinger*, at *nisi prius*, *Brady v. Giles*, 1 Mo. & R. 494.

(*m*) *Patten v. Rea*, 2 C. & B. 605.

There seems to be some extension of the responsibility of the master, when the work, in the doing of which the injurious negligence occurred, related to real estate; on the ground that the owner of such property is bound to be careful how his use of it, or acts in relation to it, affect third parties or the public; but the limits of this extension are not well settled. If it have any foundation whatever, it must rest upon the maxim *sic utere tuo ut alienum non lædas*, which, while it imposes a certain restriction upon the use of all property, may be held perhaps to apply more especially to lands; and whoever permits anything * 108 to be done upon his ground, to the positive damage * of another, may be responsible for the nuisance. Thus it has been decided that one who has directed his servant to remove snow and ice from the roof of his house, is responsible for an injury received by a passer, whether the negligence was that of the servant or of a stranger employed by the latter, or of one who volunteered to assist him. (*n*) This duty, however, cannot extend so far as to oblige the owner of land to see to it in all cases that a nuisance is not erected thereon. The measure of his responsibility must be his reasonable power of control, and therefore it should be sufficient for his exculpation, that he never, either expressly or impliedly, *sanctioned* the nuisance. But if he let his land with a nuisance upon it, he would, on the same principle, be liable for its *continuance*, as well as for its erection, although he had reserved to himself no right to enter upon the land and abate the nuisance. And so if he let land for a particular use which must result in a nuisance, he should be liable therefor. (*o*) But the general doctrine, that the owner of fixed property was liable for injury caused by mismanagement thereof by any one, in a manner quite distinct from that in which the owner of a chattel would be held, although once in much favor, (*p*) is now quite often disregarded. (*q*)

(*n*) Althorpe v. Wolfe, 22 N. Y. 355.

(*o*) See Rich v. Basterfield, 4 C. B. 783; Rex v. Pedley, 1 A. & E. 822, 3 Nev. & M. 627; Fish v. Dodge, 4 Denio, 311; Carle v. Hall, 2 Met. 353. And this doctrine may enter into the decision in Burgess v. Gray, 1 C. B. 578, above referred to.

(*p*) Littledale, J., Laughner v. Pointer, 5 B. & C. 560; Quarman v. Burnett, 6 M. & W. 510.

(*q*) See Allen v. Hayward, 7 Q. B. 960; and in Reddie v. London, & C. R. Co., 4 Exch. 244, this doctrine was expressly overruled. There Rolfe, B., giving the judgment, said: "On full consideration,

we have come to the conclusion, that there is no such distinction, unless perhaps the act complained of is such as to amount to a nuisance. . . It is not necessary to decide whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some case he is so responsible. But then, his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to

* Of the general principles of the law of contracts, * 109 applicable to the contract of service, we have already considered some under the head of Agency; and we shall defer the consideration of others, and of the questions which they present, to the third Book of this Part, which relates to the subject-matter of contracts, and to the chapter upon the topic of the Hiring of Personal Service.¹

prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, '*Sic utere tuo ut alienum non lædas.*'" *Bush v. Steinman*, 1 B. & P. 404; *Randleson v. Murray*, 8 A. & E. 109, and other cases of that class, must be regarded as substantially overruled;

and such American decisions as were made before the recent investigations, in deference to those cases, will not, it is presumed, be adhered to. *De Forrest v. Wright*, 2 Mich. 368. See, however, *Mayor, &c. of New York v. Bailey*, 2 Denio, 433; and *Buffalo v. Holloway*, 14 Barb. 101; cases which it seems difficult to reconcile with the current of recent English decisions. See also *Lowell v. Boston, &c. R. Co.*, 23 Pick. 24; *Gardner v. Heartt*, 2 Barb. 165; *Stone v. Codman*, 15 Pick. 297.

¹ Recent cases illustrative of a master's liability for acts of his servant in the course of or incident to his employment, are as follows:—

The owner of a cab is liable for the driver's negligence in driving back to the stable furiously and running over a person. *Venables v. Smith*, 2 Q. B. D. 279; approved and followed in *King v. London, &c. Cab Co.*, 23 Q. B. D. 281; and see *Schaefer v. Osterbrink*, 67 Wis. 495. A stevedore is liable for the negligence of his foreman whose duty was to superintend the shipping of rails after a carman had unloaded them, and who being dissatisfied with latter's unloading, so unloaded some of them himself as to injure a passer-by. *Burns v. Poulson*, L. R. 8 C. P. 563. A master is liable for flooding caused by the neglect of his clerk in leaving a faucet in a lavatory running, whether the use of the lavatory was or was not within the scope of the clerk's employment, it being an incident to his employment. *Ruddiman v. Smith*, 60 L. T. R. 708. And see *Simonton v. Loring*, 68 Me. 164. But not if a separate lavatory is maintained for the use of clerks, and the use of the one where the damage occurs is in disobedience of orders. *Stevens v. Woodward*, 6 Q. B. D. 318. So a railway company is liable for the act of a porter in violently pulling a passenger out of a railway carriage, under an erroneous belief that the passenger was in a wrong train, part of the porter's duty being to prevent people from travelling in wrong trains. *Bayley v. Manchester, &c. Ry. Co.*, L. R. 7 C. P. 415; L. R. 8 C. P. 148. And railway companies are liable for assaults of their officials upon passengers. *Walker v. South Eastern Ry. Co.*, 23 L. T. R. 14; *Western, &c. R. R. Co. v. Turner*, 72 Ga. 292; *North Chicago Ry. Co. v. Gastka*, 128 Ill. 613; *Louisville, &c. Ry. Co. v. Wood*, 113 Ind. 544; *Williams v. Pullman, &c. Co.*, 40 La. An. 417; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; *Dwinelle v. New York Central R. R. Co.*, 120 N. Y. 117. And this has been so held, though the assault arose out of a personal quarrel unconnected with the official's duty. *Chicago, &c. R. R. Co. v. Flexman*, 103 Ill. 546; *Hanson v. European, &c. Ry. Co.*, 62 Me. 84; *Stewart v. Brooklyn, &c. R. R. Co.*, 90 N. Y. 588. But see *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110. Railroad companies have also been held liable to a female passenger for improper advances made by a conductor or porter. *Campbell v. Pullman, &c. Co.*, 42 Fed. Rep. 484; *Louisville, &c. R. R. Co. v. Ballard*, 85 Ky. 307; *Craker v. Chicago, &c. R. R. Co.*, 36 Wis. 657. See also *Pittsburgh, &c. Ry. Co. v. Kirk*, 102 Ind. 399; *Atchison, &c. R. R. Co. v. Randall*, 40 Kan. 421; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

On the other hand, where a ticket clerk of a railway company gave into custody one whom he wrongly suspected of robbing, the company was held not liable, as the act was entirely without the scope of the ticket clerk's authority. *Allen v. London, &c. Ry. Co.*, L. R. 6 Q. B. 65. So where a porter in charge of a station gave into custody

one whom he wrongly suspected of stealing the company's property, *Edwards v. London, &c. Ry. Co.*, L. R. 5 C. P. 445; and where a station-master detained the plaintiff for alleged non-payment of freight on goods, it being said that, as the company itself had only a right to detain the goods in such a case, no authority could be implied for the station-master to detain the owner. *Poulton v. London, &c. Ry. Co.*, L. R. 2 Q. B. 534. And see *Charleston v. London Tramways Co.*, 33 W. R. 367. And a banking corporation is not liable to an action for malicious prosecution, on account of a prosecution instituted by its manager against the plaintiff for an alleged attempt to defraud the bank, without evidence that the manager was authorized to institute such a prosecution. *Bank of New South Wales v. Owston*, 4 A. C. 270. Where it was the duty of a carman to deliver beer with a horse and cart and collect the empty casks, and he used the horse and cart on an errand of his own, his master was held not liable for an accident occurring while the carman was returning, though he had incidentally picked up some empty casks. *Rayner v. Mitchell*, 2 C. P. D. 357, cf. *Whatman v. Pearson*, L. R. 3 C. P. 422. A master sent his servant on an errand directing him to return by a certain route. On reaching his destination, the servant, at the request of a third person, went four miles further, instead of returning. Held, the master was not liable for an accident occurring while the servant was deviating from the course directed. *Stone v. Hills*, 45 Conn. 44.

Recent cases illustrative of the proposition that one hiring work done by an independent contractor is not liable for the negligence of the contractor or his servants are, *Hale v. Johnson*, 80 Ill. 185; *Wabash, &c. Ry. Co. v. Farver*, 111 Ind. 195; *Brown v. McLeish*, 71 Ia. 381; *Waltemeyer v. Wisconsin, &c. Ry. Co.*, 71 Ia. 626; *St. Louis, &c. R. R. Co. v. Willis*, 38 Kan. 330; *Davie v. Levy*, 39 La. An. 551; *McCarthy v. Second Parish*, 71 Me. 318; *New Orleans, &c. R. R. Co. v. Reese*, 61 Miss. 581; *Devlin v. Smith*, 89 N. Y. 470; *Hughes v. Railway Co.*, 39 Ohio St. 461; *Edmundson v. Pittsburgh, &c. R. R. Co.*, 111 Pa. 316. — W.

CHAPTER VI.

* 110

OF ATTORNEYS.

ATTORNEYS are made so by a letter or power of attorney, (a) or they are Attorneys of Record.

It is a general rule, that one acting under a power of attorney cannot execute for his principal a sealed instrument, unless the power of attorney be sealed. (b) (x) And where a statute

(a) "Few persons are disabled to be private attorneys to deliver seizin; for monks, infants, femes covert, persons attainted, outlawed, excommunicated, villains, aliens, &c., may be attorneys. A feme may be an attorney to deliver seizin to her husband, and the husband to the wife." Co. Lit. 52 a. An infant cannot execute a power *coupled with an interest*. *Hearle v. Greenbank*, 3 Atk. 695, 714.

(b) *Harrison v. Jackson*, 7 T. R. 209; *Elliot v. Davies*, 2 B. & P. 338; *Berkeley v. Hardy*, 5 B. & C. 355; *Stetson v. Patton*, 2 Greenl. 358; *Watson v. Sherman*, 84 Ill. 263. — If a partner seal for himself and co-partner, *in the presence of the co-partner*, it is sufficient, though his authority be only by parol. *Ball v. Dunsterville*, 4 T. R. 313. — In *Brutton v. Burton*, 1 Chitt. 707, it was held that a warrant of attorney under seal, executed by one person for himself and partner in the absence of the latter, but with his consent, was a sufficient authority for signing judgment against both; on the ground that a warrant of attorney to confess judgment need not be under seal. — And *Hunter v. Parker*, 7 M. & W. 322, contains another application of the same equitable and reasonable principle. Compare *Banorjee v. Hovey*, 5 Mass. 11, 24. — An instrument to which the agent of a corporation has affixed his seal, may be evidence of the contract in an action of assumpsit against the corporation; for the seal of the agent of a corporation, unlike that of the agent of a natural person, never can be the seal of his principal.

Randall v. Van Vechten, 19 Johns. 60; *Damon v. Inhabitants of Granby*, 2 Pick. 345; *Bank of Columbia v. Patterson's Admr.*, 7 Cranch, 299. But see *Bank of Middlebury v. Rut. & W. R. R.*, 30 Vt. 159. — There is a class of *Partnership* cases, in which it has been held that any express ratification through parol, by a partner of a contract under seal entered into for the firm by his co-partner, makes the instrument the deed of the firm. *Darst v. Roth*, 4 Wash. C. C. 471; *Mackay v. Bloodgood*, 9 Johns. 285; *Drumright v. Philpot*, 16 Ga. 424. — The *dicta* of several judges have extended this exception to include an *original* parol authority. See *Skinner v. Dayton*, 19 Johns. 513, where the decision seems to be too broadly stated in the reporter's note. Some *decisions* also go to this extent, as *Gram v. Seton*, 1 Hall, 262. — In *Cady v. Shepherd*, 11 Pick. 400, the cases are reviewed, and among others *Brutton v. Burton*, 1 Chitt. 707 (see *supra*), the decision in which is stated nakedly, without the addition of the reason by which the Court of Queen's Bench appear to have been governed, and which goes to reconcile it with the authorities. *McDonald & Mills v. Eggleston*, *Barker & Co.*, 26 Vt. 156, is also to the same effect. And see *Hunter v. Parker*, 7 M. & W. 331, 332, 344; *Price v. Alexander*, 2 Greene (Ia.), 427; *Cady v. Shepherd* and *McDonald & Mills v. Eggleston*, *Barker & Co.*, however, must be taken to decide the law for Massachusetts and Vermont to be, that a partner may bind his co-partner by a contract under seal, made in the name and for the use of the firm, in the

(x) Authority under seal is not necessary to the validity of a sealed instrument

executed for another. *McIntosh v. Hodges*, 110 Mich. 319, 70 N. W. 550.

* 111 prescribes * certain formalities, and makes them requisite for the execution of an instrument, a power to make that instrument must, in general, be itself executed with similar formalities. (c) But as oral or written powers are equally parol, one by oral authority may sign the name of his principal without a seal thereto; and so he may be authorized orally to bind his principal by written contracts, where the Statute of Frauds requires a writing signed by the parties sought to be charged, as the foundation of an action. (d)

The effect of a written authority in limiting the power of an attorney precisely within what is written, may be illustrated by the execution of a deed by one person for another. If a grantor requests a person in his presence to sign for him his (the grantor's) name to a deed, and the person thus requested writes the name of the grantor without writing his own, or adding any words to indicate that the grantor acted by attorney, this would seem to be nevertheless the signature of the grantor, and the deed would be valid. But if the grantor has given to A a power of attorney in the ordinary form, authorizing him to execute a deed for him as his attorney, and this person writes

* 112 the * name of the grantor in his absence, without saying "by A, his attorney," or writing his own name; this would not seem to be a sufficient execution of the deed. Because A had no other power to act for the grantor than that which the letter of attorney gave him; and that did not give him any other power than to act as the grantor's attorney; that is, to sign the deed himself,

course of the partnership business, provided the co-partner assents to the contract previously to its execution, or afterwards ratifies and adopts it, and this assent or adoption may be by parol. *Parol ratification*, though frequently confounded in the cases with an *original parol authority*, stands on quite a different footing and may be defended by reasons which do not apply to the other. It is delivery that completes the deed, and a subsequent parol assent, or contemporaneous parol assent, may amount to delivery, though a *previous* assent, by the nature of things, as well as by common law, never can. The deed must exist before it can be delivered; and it may be delivered at any time *after* it once does exist in a complete form. See *Byers v. McClanahan*, 6 G. & J. 250; *Parke, B., Hibblewhite v. McMorine*, 6 M. & W. 215, citing *Hudson v. Revett*, 5 Bing. 368; *Blood v. Goodrich*, 12 Wend. 525, 9 Wend. 68; *Bragg v. Fessenden*, 11 Ill. 544. And, besides, on the doctrine of

estoppel, a principal, by admitting that to be his deed which was executed by his agent, might be held to have disabled himself to say that the agent was not duly authorized. As yet, however, the law must certainly be taken to be that even a *parol ratification* does not make an instrument under seal, executed by an agent who had not an authority under seal, the deed of the principal. Where, however, a partner makes a mortgage of personal property in the name of the firm and seals it, the seal being unnecessary, the mortgage binds the firm. *Milton v. Mosher*, 7 Met. 244; see also *ante*, p. * 52, and notes, and *post*, p. * 140.

(c) *Gage v. Gage*, 10 Foster (N. H.), 420; *Clark v. Graham*, 6 Wheat. 577.

(d) *Shaw v. Nudd*, 8 Pick. 9; *Coles v. Trecothick*, 9 Ves. 234; *Clinen v. Cooke*, 1 Sch. & L. 22; *McComb v. Wright*, 4 Johns. Ch. 659; *Graham v. Musson*, 5 Bing. N. C. 607. See *Baum v. Dubois*, 43 Penn. St. 260.

declaring that the grantor signed it by him. In the first case, evidence is admissible to show the authority under which the signature was made; and when this exhibits the grantor as present, and as authorizing the signature made in that way, then it becomes the signature of the grantor made by another hand than his own.¹ But in executing a deed by attorney, the power being delegated to the attorney is with him, and the deed takes effect from his act; and therefore the instrument which gives the power is to be strictly examined and construed. (e) It is however

(e) This point, upon which there seems to be no express decision, arose in the case of *Wood v. Goodridge*, 6 Cush. 117. This was the case of a mortgage deed and note made under a power of attorney under seal, by simply signing the name of the principal opposite to a seal, in the case of the deed, and in the case of the note, by simply writing the principal's name at the foot. It was not necessary to decide the point, the court being of opinion that the power, though very general in its terms, did not confer authority to mortgage, nor to borrow money and bind the principal by a promissory note. But the question of the manner of execution was much considered, and the court, per *Fletcher, J.*, signified an inclination to hold, that where an attorney signs the name of his principal to an instrument which contains nothing to indicate that it is executed by attorney, and without his adding own signature as such, it is not a valid execution.—A deed was signed in the presence and by the direction of P. G. (and in the presence of an attesting witness), thus: "P. G. by M. G. G." It was objected that M. G. G., signing in that manner for the principal, should have had a power under seal; but the deed was held valid. *Gardner v. Garner*, 5 Cush. 483. In delivering the judgment in this case, *Shaw, C. J.*, said: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly examined and construed."—Perhaps it will still be regarded as an open question

whether the simple signing of the principal's name without evidence on the face of the instrument that the execution is by an agent, may not be sufficient. From a passage in *Dixon on Title Deeds*, vol. ii. p. 533, it may be inferred that the author's view is similar to that now taken by the Supreme Court of Massachusetts. On the other hand the books contain numerous intimations that it has not generally been supposed, heretofore, that any other form is necessary to the valid execution of a deed by attorney than is requisite when the principal makes a deed in his proper person. See 1 *Prest. Abstr.* 2d ed. 293, 294; *Smith, Mer. Law*, B. I. ch. 5, § 4, *Wilks v. Back*, 2 East, 142, 145; *Elliot v. Davis*, 2 B. & P. 338; *Bac. Abr. Leases*, J. § 10, also *Hanson v. Rowe*, 6 Foster (N. H.), 327. It seems the better opinion that, even since the Statute of Frauds, a signing is not essential to a deed. *Aveline v. Whisson*, 4 Man. & G. 801; *Cherry v. Homing*, 4 Exch. 631; *Shep. Touch.* by Preston, 56, n. If this be so, it may be considered going very far to hold that the addition of the name of the principal, by the hand of an authorized attorney, invalidates an instrument which would have been perfectly good without any signature at all. In some States the Statutes of Conveyance modify the common law in this particular, and require signing as well as the affixing of a seal. With respect to instruments not under seal, the opinion seems equally to have prevailed that an authority to sign for a principal is well executed by the mere subscription of the principal's name. *Chitty on Bills*, 9th ed., 33; *Byles on Bills*, 6th ed., 26.—An auctioneer or auctioneer's clerk performs his implied authority by simply writing the purchaser's name in the memorandum of sale. *Bird v. Boulter*, 4 B. & Ad. 443. This indeed is of no great weight in itself, since that case might be viewed as falling within the class expressly distinguished by the Su-

¹ See *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193, and reporter's note.

held, that a deed which is inoperative at law from a defective execution by an attorney, is nevertheless valid in equity if the attorney had authority to make the deed. (*ee*) And also that if the seal of a corporation be affixed to its deed, it will be held valid without signature; and a presumption of authority to affix the seal will arise from the seal itself. (*ef*)

* 113 * An attorney of record, more commonly called an attorney at law, is one who has been duly admitted by competent authority to practise in the courts. An attorney at law, by his admission as such, acquires rights of which he cannot be deprived at the mere *discretion* of a court. (*f*) Such an attorney need not prove his authority to appear for any party in court, and act for him there, unless his authority be denied, and some evidence be offered tending to show that he has no such authority. (*g*)

* 114 But * a person who is not an attorney at law, and who offers to appear for another in court, by special authority, must prove such authority if requested. (*h*)

preme Court of Massachusetts, namely, where the signature is made in the *presence* of the principal, and by his immediate direction; yet there is a case of *White v. Proctor*, 4 Taunt. 209, where the objection was expressly taken that the *name* of the auctioneer ought to appear as well as that of the purchaser. There *Best*, Serjeant, referring to *Emerson v. Helis*, 2 Taunt. 38, said that in that case the auctioneer wrote his own name in the heading of the paper, and that the decision was given on that ground. But *Mansfield*, C. J., replied: "In that case there was no argument upon the circumstance that the auctioneer had signed, nor was the case at all decided upon that ground; his saying 'sold by *John Wright*,' did not make him agent for the buyer; the only question was whether *his signing the purchaser's name was done by him as agent for the purchaser.*" The power of one partner to bind the firm by a note or bill has been referred to principles of agency; and it is well established that the signature of the firm name without more is a complete execution. See *Norton v. Seymour*, 3 C. B. 792; *Kirk v. Blurton*, 9 M. & W. 284. — *Watkins v. Vince*, 2 Stark. 368, though meagrely reported, seems to be a case where Lord *Ellenborough* entertained no doubt that the signing of the principal's name, by an agent having authority to contract in his behalf, was a sufficient signature. And see *Helmsley v. Loader*, 2 Camp. 450, which is somewhat more explicit.

(*ee*) *Love v. Sierra Nevada, &c. Co.*, 32 Cal. 639.

(*ef*) *Sheehan v. Davis*, 17 O. St. 571.

(*f*) *Fletcher v. Daingerfield*, 20 Cal. 427; *Cohen v. Wright*, 22 Cal. 293; *Ex parte Yale*, 24 Cal. 241.

(*g*) *Osborn v. U. S. Bank*, 9 Wheat. 738, 830. Where this rule of evidence was applied in the case of an attorney assuming to act in behalf of a corporation. See also *Jackson v. Stewart*, 6 Johns. 34; *Denton v. Noyes*, id. 296; *Hardin v. Hoyonobby's Lessee*, 27 Miss. 567; *Henck v. Todhunter*, 7 Har. & J. 275; *Huston, J., Lynch v. Commonwealth*, 16 S. & R. 369; *Woodbury, J., Eastman v. Coos Bank*, 1 N. H. 23; *Manchester Bank v. Fellows*, 8 Foster (N. H.), 302; *Williams v. Butler*, 35 Ill. 544; *Leslie v. Fischer*, 62 Ill. 118; *Hager v. Cochran*, 66 Md. 253; *Norberg v. Heineman*, 59 Mich. 210; *Hamilton v. Wright*, 37 N. Y. 502; *Schlitz v. Meyer*, 61 Wis. 418. The authority from the client need not in general be in writing; yet an oral authority to appear in a cause is not sufficient to enable the attorney to release the interest of a witness. *Murray v. House*, 11 Johns. 464. As to the evidence required to support a claim for services rendered by an attorney to his client, see *Burghart v. Gardner*, 3 Barb. 64; *Wilson v. Wilson*, 1 Jac. & W. 457. — *Solicitor* is the legal designation of one who fills the place in a court of equity corresponding to that of an attorney in a court of law. *Maughan*, c. 1, § 1.

(*h*) *Marshall, C. J., Osborn v. U. S. Bank*, 9 Wheat. 829.

The power of the court to disbar an attorney is not unfrequently exercised. And it is said that the court is bound to prefer charges against an attorney, whenever satisfied that the ends of justice require this. (*hh*) (*x*) But an attorney should not be disbarred, unless a case of malpractice is proved with certainty. (*hi*) And where a statute declares the causes for which an attorney may be disbarred, it is said that he may not be for a cause not declared in the statute. (*hj*)

An attorney who places his client's money in the hands of his own banker, on his own private account, though he does this *bona fide*, and has money of his own in the hands of the same banker, is liable for the loss thereof by the bankruptcy of the banker. (*i*) But it seems that he is not liable if he deposits the money as the property of the owner, and opens a special account specifying whose it is. (*j*) His implied duty to use reasonable skill, care, etc., is the same as that of other persons to whose care and skill anything is intrusted; (*y*) which will be spoken of hereafter. (*k*) He is not responsible for mistake in a doubtful point of law, (*l*) or of practice, (*m*) nor for the fault of counsel retained by him. (*n*) But the estate of an attorney was held liable after his death, for erroneous advice given to a client in ignorance

(*hh*) *In re Percy*, 36 N. Y. 651.

(*hi*) *People v. Harvey*, 41 Ill. 277.

(*hj*) *Ex parte Smith*, 28 Ind. 47; *Redman v. State*, ib. 205.

(*i*) *Robinson v. Ward*, 2 C. & P. 59. And see *ante*, p. *89, n. 1.

(*j*) *Abbott, C. J.*, *Robinson v. Ward*, 2 C. & P. 60.

(*k*) *Pitt v. Yalden*, 4 Burr. 2060; *Baikie v. Chandless*, 3 Camp. 17, 19; *Shilcock v. Passman*, 7 C. & P. 289; *Godefroy v. Dalton*, 6 Bing. 460; *Meggs v. Binns*, 2 Bing. N. C. 625; *Lynch v. Commonwealth*, 16 S. & R. 368; *Dearborn v. Dearborn*, 15 Mass. 316; *Varnum v. Martin*, 15 Pick. 440; *Wilson v. Coffin*, 2 Cush. 316; *Cooper v. Stephen-*

son, 12 E. L. & E. 403; *Parker v. Rolls*, 28 id. 424. See *ante*, p. *84, note (*x*). See, for a full discussion of duties of counsel, *Swinfen v. Lord Chelmsford*, 5 H. & N. 890.

(*l*) *Kemp v. Burt*, 4 B. & Ad. 424; s. c. 1 Nev. & M. 262; *Elkington v. Holland*, 9 M. & W. 659; *Pitt v. Yalden*, 4 Burr. 2060.

(*m*) *Laidler v. Elliott*, 3 B. & C. 738.

(*n*) *Lowry v. Guilford*, 5 C. & P. 234. — Yet an attorney cannot, by consulting his counsel, shift from himself the responsibility of a matter presumed by the law to lie within his own knowledge. *Tindal, C. J.*, *Godefroy v. Dalton*, 4 Mo. & P. 149; s. c. 6 Bing. 460.

(*x*) See *State v. Finley (Fla.)*, 18 L. R. A. 401 and note; *Manning v. French (Mass.)* 4 id. 339; *Re Thompson (Oregon)*, 40 id. 194; *In re Philbrook* (105 Cal. 471), 55 Am. St. Rep. 59 and note. *O'Connell, petitioner*, 174 Mass. 253, 54 N. E. 558.

The proceeding for disbarment is a civil one. *Re Kirby (So. Dak.)*, 39 L. R. A. 856. The disbarment may be absolute or for a stated period. *Boston Bar Ass'n v. Greenwood*, 168 Mass. 169, 46 N. E. 568.

(*y*) See the note to *Godefroy v. Dalton* (6 Bing. 460) in 24 English Ruling Cas.

656. An attorney at law is so far the agent of his client that the latter may be held liable for his negligence, or for his malicious levy of an excessive attachment, causing injury to the party sued. *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747. But, in the absence of fraud, accident, or mistake, equity will not enjoin the enforcement of judgments at law because the defendant has not, through the negligence of his attorney or of himself, made a proper defence. *Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570.

of a recent change of the law. (*nn*) He is liable for disclosing privileged communications. (*o*) If discharged by one party, * 115 * he may act for an opposite party, provided he makes no improper use of knowledge obtained by him while acting for the first party. (*p*) But it seems that he may not act for an opposite party if discharged by his first client for misconduct. (*q*) If, being employed about a purchase of land, he buys an adverse or outstanding title, he is held to buy it for his client, if his client so elects. (*qq*)

The law implies a contract on the part of the client, to pay his attorney the legal fees, or statute rate of compensation. (*r*) And if the client asserts that the services were to be rendered for a less compensation, the burden rests on him to prove this bargain. (*s*)

(*nn*) A. B.'s estate, 1 Tuck. 247.

(*o*) And his liability is not removed by the fact that he was previously retained for the party to whom the disclosures were made, and that his employer knew of that former retainer. *Taylor v. Blacklow*, 3 Bing. N. C. 235. In *Thomas v. Rawlings*, 27 Beav. 140, a solicitor declined answering on the ground that he had obtained his information while acting as the solicitor of his co-defendant. — *Held*, that he had not brought himself within the rule as to professional privilege. His reply that he had obtained his information "either as a creditor or as the solicitor" of his client was taken most strongly against the solicitor; and he was held bound to give the discovery. In *Hall v. Renfro*, 3 Met. (Ky.) 51, it is held that an attorney is a competent witness for or against his client in all cases except concerning any communication made to him by his client in that relation, or his advice thereon; and in this with the client's consent. Such communications to be privileged must have been addressed to the attorney in his professional character with a view to legal advice which, as an attorney, it was his duty to give. *Borum v. Fouts et al.*, 15 Ind. 50. See also *Shaughnessy v. Fogg*, 15 La. An. 330. But in *King v. Barrett*, 11 O. St. 261, it was held that if a party to a suit offers himself as a witness and gives evidence generally in a case, he thereby loses the privilege, and under the code of civil procedure consents to the examination of his attorney touching such admissions as are pertinent to the issue. In *De Wolf v. Strader*, 26 Ill. 225, it is said that a retainer or fee paid is necessary to constitute the relation of attorney and client,

and that an attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged.

(*p*) *Bricheno v. Thorp*, 1 Jac. 300. — It is not clear, however, if it be distinctly shown that confidential disclosures have been made to the attorney or solicitor, which if communicated to the other party must be directly prejudicial to the former client, that a court of equity would not forbid the acceptance of the second retainer, although the attorney was dismissed for no misconduct. Lord *Eldon*, *Bricheno v. Thorp*, 1 Jac. 303, 304; *Cholmondeley v. Clinton*, 19 Ves. 261, 275. In the latter case Lord *Eldon* said: "My opinion is that he [the attorney] ought not, if he knows anything that may be prejudicial to the former client, to accept the new brief, though that client refuse to retain him." — In *Johnson v. Marriott*, 4 Tyr. 78, where the court refused to restrain an attorney, who, without his misconduct, had been dismissed from the employment of the plaintiffs, from acting for the defendant, the judges rested their decision on the ground that there was no affidavit by the plaintiffs that the attorney, while in their employment, had obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant.

(*q*) Lord *Eldon*, *Cholmondeley v. Clinton*, 19 Ves. 261; *Gurney, B., Johnson v. Marriott*, 4 Tyr. 78.

(*qq*) *Smith v. Brotherline*, 62 Penn. St. 461.

(*r*) *Brady v. Mayor, &c.* 1 Sandf. 569; *Smith v. Davis*, 45 N. H. 566; *Vilas v. Downer*, 21 Vt. 419.

(*s*) *Id.*

If a bargain be proved, the attorney cannot recover more by showing that his services were worth more. (*t*) And even if he shows that the case was deemed, with good reason, a desperate one, this will not sustain his claim for an excessive compensation; as half the sum recovered. (*u*) If, during the suit, an attorney make a contract with his client, which is void for champerty, he may still recover a proper compensation for services rendered before the illegal bargain. (*v*) (*x*)

An attorney cannot maintain an action for compensation for services, merely by proof that the services were rendered; but must go farther and show that they were requested, or, in other words, that he was retained as attorney or counsel. (*w*)¹ And his own pocket or office docket book, in which he has entered *the name of the suit and the parties in question, is not of *116 itself evidence that the services were either requested or rendered. (*x*)

An attorney cannot recover his bill against his client, if his client has received no benefit whatever from his services by reason of his want of care and skill. (*y*) But if the client has received any benefit, he must in England pay the bill, and may then have an action for damages. (*z*). It has been there held, however, that a jury may discriminate between the several *items* in an account, and reject those for work entirely useless; (*a*) and it may be supposed, that in America the client might reduce the attorney's claim, by showing the little value of the benefit received, by the fault of the attorney, as in actions for other services.

An attorney has a lien on the judgment he recovers, and on the papers of the case, for his costs and fees; (*b*) and it will

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| (<i>t</i>) Coopwood v. Wallace, 12 Ala. 790. | 111; Bracey v. Carter, 12 A. & E. 373; |
| (<i>u</i>) Christy v. Douglas, Wright, 485. | Hill v. Featherstonhaugh, 7 Bing. 569; |
| (<i>v</i>) Thurston v. Percival, 1 Pick. 415; | Hopping v. Quinn, 12 Wend. 517. See |
| Rust v. Larue, 4 Litt. 417; Caldwell v. | Runyan v. Nichols, 11 Johns. 547. |
| Shepherd, 6 Monr. 392; Smith v. Thomp- | (<i>z</i>) Templar v. McLachlan, 2 B. & P. |
| son, 7 B. Mon. 305. | 136. |
| (<i>w</i>) Burghart v. Gardner, 3 Barb. 64. | (<i>a</i>) Shaw v. Arden, 9 Bing. 289. |
| (<i>x</i>) Briggs v. Georgia, 15 Vt. 61. | (<i>b</i>) Mooney v. Lloyd, 5 S. & R. 412; |
| (<i>y</i>) Huntley v. Bulwer, 6 Bing. N. C. | Dubois' Appeal, 38 Penn. St. 231; Gray v. |

¹ In fixing the value of an attorney's services, his professional skill and standing, his experience, the nature of the controversy, both in regard to the amount involved and the nature of the questions raised, as well as the result, must all be taken into consideration. Phelps v. Hunt, 40 Conn. 97; Bruce v. Dickey, 116 Ill. 527; Smith v. Chicago, &c. R. Co., 60 Ia. 515; Eggleston v. Boardman, 37 Mich. 14. — K.

(*x*) See the extended note to Shirk v. Neible (156 Ind. 66, 59 N. E. 281), in 83 Am. St. Rep. 150; Bowman v. Phillips (41 Kans. 364), 13 id. 292, 297; Newman v. Freitas (Cal.), 50 L. R. A. 548, and note; Dell v. Marvin (Fla.), 45 id. 201; Luddy's Trustee v. Peard (33 Ch. D. 501), 24 English Ruling Cas. 670, and notes.

prevail against a set-off acquired by the judgment-debtor after the rendition of the judgment; (*bb*) but it seems to be settled that a set-off in ordinary course prevails over the lien; (*bc*) and he has no lien on a claim for unliquidated damages in tort, until after a judgment. (*bd*) In most of our States this rule applies to barristers, counsellors, attorneys, and proctors in admiralty (*be*) equally. But it has been said that an attorney's lien covers only his costs and expenses, and his fees as attorney, but not his fees as counsellor, nor incidental expenses not taxable. (*c*)¹ We think this is not law. The lien of an attorney, its extent and its limitations, are considered more fully in our chapter on Liens.

An attorney is, in general, personally liable on an agreement made by him in his own name, although only professionally concerned in the matter. (*d*)

Brackenridge, 2 Penn. 75, 2 Greenl. Ev. § 144, n. 4; McGregor v. Comstock, 28 N. Y. 237; Newbert v. Cunningham, 50 Me. 281; Myers v. McHugh, 16 Ia. 335; Waters v. Grace, 23 Ark. 118; Hursh v. Sheets, 21 Ia. 501.

(*bb*) Warfield v. Campbell, 38 Ala. 527.

(*bc*) De Figanieri v. Young, 2 Rob. 670.

(*bd*) Wood v. Anders, 5 Bush, 641.

(*be*) The Soblomsten, L. R. 1 Adm. & Eccl. 293.

(*c*) Heartt v. Chipman, 2 Aik. 162. The subject of the attorney's lien has been much discussed in this country. Wilson v. Burr, 25 Wend. 386; Stevens v. Adams, 23 id. 57; Newman v. Washington, Mart. & Y. 79; Wells v. Hatch, 43 N. H. 246. And see Van Atta v. McKinney, 1 Harr. 235. An attorney has, in some States, a lien upon his client's papers left with him, for any general balance due him. Dennett v. Cutts, 11 N. H. 163; Walker v. Sargeant, 14 Vt. 247; *aliter* in Pennsylvania. Walton v. Dickerson, 7 Barr. 376. So by statute in many States he has a lien upon a judgment actually recovered in favor of his client, for his fees and disbursements. Dunklee v. Locke, 13 Mass. 525; Potter v. Mayo,

3 Greenl. 34; Gammon v. Chandler, 30 Me. 152; Ocean Ins. Co. v. Rider, 22 Pick. 210; Hobson v. Watson, 34 Me. 20. And even without statute provisions. Sexton v. Pike, 8 Eng. (Ark.) 193. A counsel who, with his client's consent, withdraws from a case after having tendered beneficial services, does not thereby lose his right to compensation for the services rendered, unless at the time of his withdrawal he waives or abandons his claim to compensation. Coopwood v. Wallace, 12 Ala. 790; Stephens v. Farrar, 4 Bush, 13.

(*d*) Hall v. Ashurst, 1 Cr. & M. 714; Iveson v. Conington, 1 B. & C. 160; Burrell v. Jones, 3 B. & Ald. 47; Scrase v. Whittington, 2 B. & C. 11; Watson v. Murrell, 1 C. & P. 307. — In New Hampshire, it is held that where a plaintiff resides within that State, and employs an attorney in his behalf, to commence an action for him, such attorney is authorized by the employment to place the name of the plaintiff upon the writ as indorser, and to bind him as such; and in such case, if the indorsement be thus: "A, plaintiff, by his attorney, B," the plaintiff is regarded as the indorser, and the attorney is

¹ The attorney's lien for costs and charges attaches to deeds or papers or upon moneys received by him on his client's behalf in the course of his employment. *In re Paschal*, 10 Wall. 483; McPherson v. Cox, 96 U. S. 404; Cooke v. Thresher, 51 Conn. 105; Bowling Green Bank v. Todd, 52 N. Y. 489; Ward v. Craig, 87 N. Y. 550; Weed v. Boutelle, 56 Vt. 570, on the ground that they are the fruits of his own labor or expense. *Ex parte Yalden*, 4 Ch. D. 129. See Pilcher v. Arden, 7 Ch. D. 318; Gen. Trust Co. v. Chapman, 1 C. P. D. 771. He may also have a lien on his client's real estate. Perkins v. Perkins, 9 Heiskell, 95; Brown v. Bigley, 3 Tenn. (Ch.) 618. *Contra*, Garner v. Garner, 1 Lea, 29. See Twiggs v. Chambers, 56 Ga. 279. But an attorney has no such lien before judgment as will prevent his client from making a settlement. Simmons v. Almy, 103 Mass. 33; Wright v. Wright, 70 N. Y. 96. — K.

If his client's papers are stolen from him without his fault, he is not liable for the loss. (*dd*)

* How far an attorney at law may bind his clients by * 117 his arrangements in a case, without special instructions or authority, may not be quite certain. We take the practice to be, however, that his entries on the docket, his agreements about continuances, about evidence, or the conduct of the trial, or, perhaps, about costs and the like, would, in general, bind the client. (*de*)¹

According to most American authorities, an attorney employed in the usual way to conduct a suit, has, in general, no authority to enter into a compromise without the sanction of his client, express or implied;² but it is said that a compromise so made will not be set aside, unless for reasons arising from the character or circumstances of the compromise. (*df*) (*x*) An attorney cannot sell

not personally bound; but if the plaintiff reside out of the State, the attorney having no authority to bind the plaintiff, is himself personally bound by such indorsement, and the writ accordingly is properly and sufficiently indorsed. *Pettingill v. McGregor*, 12 N. H. 179; *Woods v. Blodgett*, 15 N. H. 569.

(*dd*) *Hill v. Barner*, 18 N. H. 607.

(*de*) *Sampson v. Ohleyer*, 22 Cal. 200. For a case strongly asserting the right of an attorney to manage a case, see *Board of Commissioners v. Younger*, 29 Cal. 147.

(*df*) *Potter v. Parsons*, 14 Iowa, 286; *Christie v. Sawyer*, 44 N. H. 298.

¹ An attorney has implied authority to release an attachment before judgment. *Benson v. Carr*, 73 Me. 76; *Moulton v. Bowker*, 115 Mass. 36. He has not implied authority to release property from the lien of a judgment. *Phillips v. Dobbins*, 56 Ga. 617; *Horsev v. Chew*, 65 Md. 555. Nor to agree to postpone execution after judgment in favor of his client. *Lovegrove v. White*, L. R. 6 C. P. 440. Nor to confess judgment. *Pfister v. Wade*, 69 Cal. 133; *Wadhams v. Gay*, 73 Ill. 415. He has implied authority to consent not to appeal. *In re West Devon, &c. Mine*, 38 Ch. D. 51; *Rhodes v. Swithinbank*, 5 T. L. R. 253. But see *Daniels v. City of New London*, 58 Conn. 156. Or to withdraw a motion for new trial. *In re Heath's Will*, 48 N. W. Rep. 1037 (Ia. 1891). Or to agree that only one of several cases involving the same principle should be tried, and that the result of that one should determine all. *Ohlquest v. Farwell*, 71 Ia. 231.

² *Whipple v. Whitman*, 13 R. I. 512; *Mandeville v. Reynolds*, 68 N. Y. 528; *Ambrose v. McDonald*, 53 Cal. 28; *Fritchey v. Bosley*, 56 Md. 94; *Levy v. Brown*, 56 Miss. 83; *Walden v. Bolton*, 55 Mo. 405; *Pickett v. Memphis Bank*, 32 Ark. 346; *Roller v. Wooldridge*, 46 Tex. 485; *Isaacs v. Zugsmith*, 103 Pa. 77; *Kelly v. Wright*, 65 Wis. 236; *Granger v. Batchelder*, 54 Vt. 248; *Hall Safe Co. v. Harwell*, 88 Ala. 441. That in England and Massachusetts an attorney may in good faith compromise a claim, see *Butler v. Knight*, L. R. 2 Ex. 109; *Matthews v. Munster*, 20 Q. B. D. 141 (ch. *Lewis v. Lewis*, 45 Ch. D. 281); *Wieland v. White*, 109 Mass. 392. — K.

(*x*) See note to *Shirk v. Neible* (156 Ind. 66, 59 N. E. 281), in 83 Am. St. Rep. 150, 180; *Beliveau v. Amoskeag Co.* (N. H.), 44 L. R. A. 167. General authority to an attorney to conduct a cause implies, in England and Massachusetts, an authority to compromise in good faith and in a reasonable manner; such an agreement may be specifically enforced by a motion or petition in the cause, or by bill in equity. Cases *supra* in note 1; *New York, &c. R.*

Co. v. Martin, 158 Mass. 313, 33 N. E. 578. Such authority cannot exist if contrary to the client's express instructions; and the courts may ignore such a settlement or vacate a judgment founded thereon. *Dalton v. West End Street Ry. Co.*, 159 Mass. 221, 34 N. E. 261.

In general, and apart from usage, an attorney, such as the general attorney of a railroad, cannot, with the principal's consent, delegate his authority and duty to a

or assign his client's claim. (*dg*) In an important case before the English Court of Exchequer it was held that no action lies against a counsel who, being employed to conduct a cause, enters into a compromise of the matter at issue, even though contrary to his client's instructions, provided it is done *bona fide*. (*e*) He cannot release an interested witness without special authority from his client. (*ee*)

If an attorney cannot by virtue of his general authority bind his clients by bargains, as for compromise or settlement of a case, still less can he enter into agreements quite independent of any action. (*f*) He cannot indorse for his client a note left with him for collection. (*ff*) Nor can he receive anything but money for a debt left with him for collection. (*fg*)

It is said, in many cases, that an attorney has the right to submit his client's case to arbitration. (*g*) But in other cases this power, for what seem to us good reasons, is confined to suits actually commenced. (*h*)

The right of a party to change his attorney in an action has of late passed under adjudication in some cases. The lien of the attorney on the papers for past services must of course be preserved. But otherwise, the right of the client to change his attorney is sometimes asserted very strongly. (*hh*) The weight of authority would seem, however, in favor of the rule that the consent of the court must be obtained, and will not be given but for reason. (*hi*)

There are many English statutes relating to the powers, duties, and responsibilities of attorneys, which have no force in

* 118 * this country. Most of our courts have their own rules of practice bearing somewhat on this subject; (*i*) but these

(*dg*) Rowland v. State, 58 Penn. St. 196.

(*e*) Swinfen v. Lord Chelmsford, 5 H. & N. 590. See Fray v. Voules, 1 Ell. & E. 839.

(*ee*) Succession of Weigel, 18 La. An. 49.

(*f*) This subject is fully considered in Swinfen v. Swinfen, 1 C. B. (N. s.) 364. See also Smith's Heirs v. Dixon, 3 Met. (Ky.) 438, for the discussion of the extent of an attorney's power to bind his client.

(*ff*) Child v. Eureka Works, 44 N. H. 354.

(*fg*) Wright v. Daily, 26 Tex. 730.

(*g*) Filmer v. Delber, 3 Taunt. 486; Faviel v. Eastern Co. R. Co., 2 Exch. 344;

Wilson v. Young, 9 Barr, 101; Holker v. Parker, 7 Cranch, 436; Talbot v. M'Gee, 4 Monr. 375; Morris v. Grier, 76 N. C. 410; Lee v. Grimes, 4 Col. 185; Connett v. Chicago, 114 Ill. 233; Sargeant v. Clark, 108 Pa. 588; *contra* is McPherson v. Cox, 86 N. Y. 472.

(*h*) Jenkins v. Gillespie, 10 Sm. M. 31. And see Scarborough v. Reynolds, 12 Ala. 252, and Wade v. Powell, 31 Ga. 1.

(*hh*) Hazlett v. Gill, 5 Rob. 611.

(*hi*) Wolf v. Trochelman, 5 Rob. 611; Sloo v. Law, 4 Blatch. C. C. 268; Walton v. Sugg, Phill. L. 98.

(*i*) The nature and scope of the authority of attorneys at law in this country

local attorney. Cross v. Atchison, &c. Ry. Co., 141 Mo. 132, 42 S. W. 675; Davis

v. King (66 Conn. 465), 50 Am. St. Rep. 104, 115.

have no binding force in other courts. The rules of the Supreme Court of the United States are, however, binding on the Circuit and District Courts of the United States, so far as they are applicable to them.

are considered in *Holker v. Parker*, 7 Cranch, 436; *Erwin v. Blake*, 8 Pet. 18; *Union Bank of Georgetown v. Geary*, 5 id. 99; *United States v. Curry*, 6 How. 106; *United States v. Yates*, id. 605; *Smith v. Lamberts*, 7 Gratt. 138; *Lewis v. Gamage*, 1 Pick. 347; *Jenney v. Delesdernier*, 20 Me. 183; *Jewitt v. Wadleigh*, 32 id. 110; *Slackhouse v. O'Hara*, 14 Penn. 88; *Walker v. Scott*, 8 Eng. (Ark.) 644; *Smith v. Dixon*, 3 Met. (Ky.) 438; *West v. Raymond*, 21 Ind. 305; *Ricketson v. Compton*, 23 Cal. 636; *East River Bank v. Kennedy*, 9 Bosw. 543; *Flanders v. Sherman*, 18 Wis. 575; *Hathaway v. Brady*, 26 Cal. 581; *Ryan v. Martin*, 18 Wis. 672.

TRUSTEES.

SECT. I. — *The Origin of Trusts.*

It can hardly be denied that Trusts in the English law had a fraudulent origin. It was sought, by the intervention of a trustee, to evade the feudal law of tenures and the prohibitions of the statutes of Mortmain, and to place property where a creditor could not reach it. The practice became common; and as such trustee was not accountable at common law, the Chancellor, in the reign of Richard II., applied the writ of subpoena to call him before the Court of Chancery, where he might be compelled to do what equity and justice required. "A trust," said Sir Robert Atkins, (a) "had for its parents fraud and fear, and for its nurse a court of conscience." The obvious utility of trusts has made them very common; but almost the whole jurisdiction over trustees has always remained in the Courts of Equity. (b) So far as they come under the supervision and control of the common law, trustees are treated in most respects as agents, and most of the principles and rules of law in relation to them have been anticipated and stated under that head.

SECTION II.

CLASSIFICATION OF TRUSTS.

Trusts are *simple* when property is vested in one person *upon trust* for another, without any particular directions or provisions;

(a) Attorney-General *v.* Sands, Har-
dres, 491, *arguendo*, "A trust is altogether
the same that a use was before 27 Hen.
VIII., and they have the same parents,
fraud and fear; and the same nurse, a
court of conscience. By statute law a
use, trust, or confidence, are all one and
the same thing. What a use is, vide Pl.
Com. 352, and 1 Rep. in Chudleigh's case;
and they are collateral to the land; a
cestui que trust has neither *jus ad rem* nor
in re."

(b) Co. Lit. 272 b; Chudleigh's case,
1 Rep. 121. "So that, he who hath a use
hath not *jus*, *neque in re*, *neque ad rem*,

but only a confidence and trust, for which
he hath no remedy by the common law,
but his remedy was only by subpoena in
chancery. If the feoffees would not per-
form the order of the chancery, then their
persons for the breach of the confidence
were to be imprisoned till they did per-
form it." — *Foorde v. Hoskins*, 2 Bulst.
337. Per Coke, C. J.: "If *cestui que use*
desires the feoffees to make the estate over,
and they so to do refuse, for this refusal
an action upon the case lieth not, because
for this he hath his proper remedy by a
subpoena in the chancery."

and then the nature and operation of the trust are determined by legal construction. They are *special*, where the purposes of the trust, and the manner in which they are to be accomplished, are especially pointed out and prescribed; and then these express provisions must be the rule and measure of the trustee's rights and duties.

They may be merely *ministerial*, as where one receives money only to pay the debt of the giver, or an estate is vested in him merely that he may convey it to another. Or they may be *discretionary*, where much is left to the prudence and judgment of the trustee. (x) But in all cases, the trustee, by accepting the trust, engages that he possesses, and that he will exert, that degree of knowledge, intelligence, and care, reasonably requisite for the proper discharge of the duties which he undertakes to perform.

A trust, *with a power annexed*, is distinguished from a *mixture of trust and power*. (c) In the former case, as where lands are vested in trust, with a power in the trustees to make leases of a certain kind or length, the trustee may or may not exercise this power, and will not be compelled to do so, unless his neglect to exercise it be fraudulent and wrongful. But in the latter case, as where lands or funds are vested in trust for certain persons, to be "distributed among them according to the best judgment of the trustee," here the distribution is of the essence of the trust, and must be made; although in the manner of distribution, the courts will not interfere unless to prevent fraud or other wrong.

* Trustees are also *private* or *public*. The former hold * 121 property for the benefit of an individual (the *cestui que trust*) or more than one, but who are distinctly pointed out, per-

(c) *Gower v. Mainwaring*, 2 Ves. Sen. 89; *Cole v. Wade*, 16 Ves. Jr. 43.

(x) Whenever judgment or discretion is required so as to constitute an active administration, the relation is one of trust and not of agency; the powers cannot be delegated; and when one contracts as a trustee, he cannot afterwards be treated as a mere agent in the same transaction. *Hartley v. Phillips*, 198 Penn. St. 1, 47 Atl. 929; *Shepard v. Abbott*, 179 Mass. 300, 60 N. E. 782; *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104, 119; *McIntyre v. Williamson* (72 Vt. 183, 47 Atl. 786), 82 id. 929. A lessee, who for a named compensation is to manage the leased property, is accountable as an agent for profits made. *Williams v. McKinley*,

64 Fed. 4, 74 Fed. 94, 20 C. C. A. 312. But an agreement to "abandon" to a corporation the exclusive sale of certain mineral water in this country for certain prices, a specified number of bottles to be taken yearly, creates, it seems, the relation of buyer and seller, and not an agency. *Saxlehner v. Eisner & Mendelson Co.*, 88 Fed. 61, 91 Fed. 536, 33 C. C. A. 291, 179 U. S. 19. Money received by an agent for his principal to be accounted for in annual settlement is not held as a trust fund, but there is only an ordinary indebtedness. *Chappell v. Craig*, 96 Iowa, 273, 65 N. W. 146.

sonally or by other sufficient description. Public trustees are those who hold for the benefit of the whole public, or for a certain large part of the public, as a town or a parish; and they are usually treated as official persons, with official rights and responsibilities.

SECTION III.

PRIVATE TRUSTEES.

A private trustee is, as we have seen, one to whom property, either real or personal, has been given to be held in trust for the benefit of others; and the most common instances are trustees of property for the benefit of children, or other devisees or legatees, or for married women, or for the payment of the debts of an insolvent, or for the management and winding up of some business, and the like.

Where property is devised to executors in trust, their relation to the estate as trustees is as distinct from their relation to it as executors as if they were not executors. (*cc*)

The legal estate is in the trustee, and the equitable estate is in the *cestui que trust*; but as the trustee *holds the estate*, although only with the power and for the purpose of managing it, he is bound personally by the contracts he makes as trustee, although designating himself as such; and nothing will discharge him but an express provision, showing clearly that both parties agreed to act upon the responsibility of the funds alone, or of some other responsibility, exclusive of that of the trustee; or some other circumstance clearly indicating another party who is bound by the contract, and upon whose credit alone it is made. The mere use by the promisor of the name of Trustee, or of any other name of office or employment, will not discharge him. Some one must be bound by the contract and if he does not bind some
 * 122 other, he binds himself, (*d*) * and the official name is then regarded only as describing and designating him. (*dd*)

(*cc*) *Parsons v. Lyman*, 5 Blatchford, 170.

(*d*) *Thomas v. Bishop*, Cas. Temp. Hardw. 9, 2 Str. 955. In this case a cashier was held liable on a bill accepted by him generally, though it was drawn on account of the company. *Childs v. Monins*, 2 Br. & B. 460. A promissory note, by which the *makers*, as executors jointly and severally promise

to pay on demand with interest, renders them personally liable. — *Eaton v. Bell*, 5 B. & Ald. 34. Commissioners of a private inclosure act are personally liable on drafts drawn on bankers, requesting

(*dd*) *Fullam v. West Brookfield*, 9 Allen, 1. And see p. * 57 and note (1) *ante*.

A trustee is held not only to careful management of the trust property, so that it shall not be wasted or diminished, but he is bound to secure its reasonable productiveness and increase. (x) If one of joint trustees permit by his want of due care another trustee to waste the fund, he will be responsible for the loss. (de) (y) If a trustee mingles the trust money with his own, as by depositing it in a bank in his own name, he will be liable for any depreciation. (df) It has been said that a trustee, by reason of the confidence reposed in him, is bound to take more care of the trust property than of his own, for he may speculate with his own, but must not with what he holds in trust. (dg) He is bound not to make use of the trust property for his own benefit. (dh) If it lie idle in his hands, without cause, he will be charged interest. (e) In some instances he is charged compound interest; but there is some discrepancy in the cases in which the question of compounding interest occurs. On the whole, we think the rule may be stated thus: Interest will be compounded, or computed with annual rests, where the trustee is guilty of gross delinquency, or mingles the trust property with his own for his own benefit, or employs it in trade, or otherwise so uses the trust funds as to justify the belief that he has actually earned interest upon the interest; and the reason for charging compound interest is much stronger, when the trustee refuses to exhibit the accounts, which would show, precisely, what loss or advantage he has derived from the trust funds. (f) (z) But he * will not be charged * 123

them to pay the sums therein mentioned on account of public drainage, and to place the same to their account, as commissioners. — *Rew v. Pettet*, 1 A. & E. 196, 3 Nev. & M. 456. The makers of a note who sign it "as church-wardens and overseers," are personally liable, although the loan was for the use of the parish. — *Ex parte Buckley*, 14 M. & W. 469. It was held, in this case, that there was no separate right of action against "R. M.," a partner who signed a promissory note for himself and his copartners thus: "For J. C., R. M., J. P., and T. S.," "R. M." See *Packard v. Nye*, 2 Met. 47; *ante*, p. * 55.

(de) *Schenck v. Schenck*, 1 C. E. Green, 174.

(x) A trustee is not responsible for mere errors of judgment in investing the trust fund. *Pine v. White*, 175 Mass. 585, 56 N. E. 967.

(y) See *supra*, p. * 29, and note, (x) and *infra*, p. * 131, and note (x). A trustee, like any prudent man of business, may properly

(df) *Mason v. Whitome*, 2 Cow. 242.

(dg) *King v. Talbot*, 50 Barb. 453.

(dh) *Flagg v. Ely*, 1 Edm. 206.

(e) *Green v. Winter*, 1 Johns. Ch. 26; *Manning v. Manning*, 1 Johns. Ch. 527; *Schieffelin v. Stewart*, 1 Johns. Ch. 620. In *Attorney-General v. Alford*, 4 De G., M. & G. 843, the rule upon this point is laid down thus. The measure by which the court ought to charge a trustee interest is, to ascertain what interest he has received, or ought to have received, or that he is estopped from saying he did not receive.

(f) *Jones v. Foxall*, 15 Beav. 392; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Evertson v. Tappen*, 5 Johns. Ch. 497; *Luken's Appeal*, 9 W. & S. 48; *Boynton*

employ an agent or broker of good repute to assist him, and temporarily entrust him with the trust money or securities in the ordinary course of doing business. *Speight v. Gaunt*, 9 A. C. 1, 25 English Ruling Cas. 297, 298, 334, 336.

(z) The sureties upon an executor's

even with simple interest until a reasonable time for investment has elapsed; and this has been held, in some cases, six months, a year, or even two years. (g)

A trustee must not himself purchase the property which it is his duty as trustee to sell; nor sell the property which, as trustee, he purchases. This rule applies, in its whole extent, to all agents, and the reasons, limitations, and authorities for it, were presented in treating of that subject. (gg) (x)

v. Dyer, 18 Pick. 1; Turney v. Williams, 7 Verg. 172; Wright v. Wright, 2 McCord Ch. 200; Bryant v. Craig, 12 Ala. 354; Karr's Adm'r v. Karr, 6 Dana, 3; Rowan v. Kirkpatrick, 14 Ill. 1; Barney v. Saunders, 16 How. 535. See also Raphael v. Boehm, 11 Ves. 92; s. c. 13 Ves. 407, 590; Ashburnham v. Thompson, 13 Ves. 402; Tebbs v. Carpenter, 1 Madd. 299; Swindall v. Swindall, 3 Ired. Eq. 285. — But mere neglect to invest the money, or an improper investment, without gross delinquency, Knott v. Cottee, 16 Beav. 77; Robinson v. Robinson, 1 De G., M. & G. 147; Schieffelin v. Stewart, 1 Johns. Ch. 620; McCall's case, 1 Ashm. 357; English v. Harvey, 2 Rawle, 305; Harland's case, 5 Rawle, 323; Findlay v. Smith, 7 S. & R. 264; Ackerman v. Emott, 4 Barb. 626. And see Dietterich v. Heft, 5 Barr, 87; Kerr v. Laird, 27 Miss. 544. See Penny-packer's App., 41 Penn. St. 494, where it is held that the principle of *rests* does not apply to guardians, executors, or administrators who omit or neglect to put trust funds out at interest.

(g) In Karr v. Karr, 6 Dana, 3, two years were allowed for periodical rests, at the end of which periods the interest should be made principal. In Duncomb v. Duncomb, 1 Johns. Ch. 508, six months after receipt of the moneys was thought a reasonable time, after which interest should be charged. In Merrick's Estate, 1 Ashm. 304, six months was allowed. And see Worrell's App. 23 Penn. St. 44. In De Peyster v. Clarkson, 2 Wend. 77, six months was allowed. In Fox v. Wilcocks, 1 Binn. 194, the administrator was held chargeable with interest after twelve months had elapsed from the death of the intestate. In Boynton v. Dyer, 18 Pick. 8, one year was considered the proper period. In Schieffelin v. Stewart, 1 Johns. Ch. 620, the plaintiff was administrator, and was allowed from the 8th September, 1803, when administration was granted, to the 6th July, 1805, when the last debt of any magnitude was paid to the estate; then interest began, and the account was computed afterwards with annual rests.

(gg) See also Morris v. Joseph, 1 W. Va. 256; Renew v. Butler, 30 Ga. 954;

bond are chargeable with compound interest only in case of gross delinquency; but they may be charged, when equitable, with the expenses of a new administration made necessary by his default. Forbes v. Allen, 166 Mass. 569, 44 N. E. 1065. So of a guardian or other trustee. Forbes v. Ware, 172 Mass. 306, 52 N. E. 447.

Executors, who are also made trustees by the testator's will, are not usually entitled to double commissions so long as their chief work and duty relate to the settlement of the estate. *In re Slocum*, 169 N. Y. 153, 62 N. E. 130.

(x) A trustee's sale to himself is voidable though it is free from fraud and the

A purchaser from a trustee with knowledge that a trust attaches to the property, holds it subject to the trust. (*gh*)

SECTION IV.

PUBLIC TRUSTEES.

There is an important difference between these trustees and private trustees, in respect to their personal responsibility for their contracts. Where one acts distinctly for the public, and in an official or *quasi* official capacity, although he engages that * certain things should be done, he is nevertheless * 124 not liable on this engagement, unless there is something in the contract, or some admissible evidence respecting it, which shows that the parties understood and intended the promisor to make his promise personally, and to be bound himself, instead of the State, or in addition to the State for the due performance of the promise. (*h*)

But trustees and other officers are sometimes held personally upon their contracts, as for payment of wages, materials supplied, etc., where they have charge of public works, and have funds which they may use for these purposes, and especially where the nature of the transaction shows that the party dealing with them may well have supposed that he was dealing with them on their own account, or that they intended, although acting for the

Sypher v. McHenry, 18 Ia. 232. But see *contra*, *Birdwell v. Cain*, 1 Cold. 301.

(*gh*) *Jones's Adm'r v. Shaddock*, 41 Ala. 262.

(*h*) *Macbeath v. Haldimand*, 1 T. R. 172. This was an action on promises against a defendant (who was Governor of Quebec), for work, labor, &c. *Buller*, J., said: "It is true that he [the defendant] gave the orders to Sinclair, and that every thing which the plaintiff did was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defendant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case where a man acts as agent for

the public, and treats in that capacity, there is no pretence to say that he is personally liable." *Unwin v. Wolseley*, 1 T. R. 674. *Ashhurst*, J., said: "It would be extremely dangerous to hold that governors and commanders-in-chief should make themselves personally liable by contracts which they enter into on the part of the government. It would be detrimental to the king's service, for no private person would accept of any command on such terms. The case of *Macbeath v. Haldimand* seems to govern the present." See also *Hodgson v. Dexter*, 1 Cranch, 345; *Tucker v. Justices*, 13 Ired. L. 434; *Stephenson v. Weeks*, 2 Foster (N. H.), 257.

price obtained is adequate. *Goodell v. Goodell*, 173 Mass. 140, 146, 53 N. E. 275. But a trustee, by taking possession of all the trust property with the full knowledge of the *cestui qui trust*, may become

merely his debtor therefor, and the trust may thus terminate even as to insolvency proceedings. *Treadwell v. Treadwell*, 176 Mass. 554, 58 N. E. 220; *Henchey v. Henchey*, 167 Mass. 77, 44 N. E. 1075.

public, to be responsible for the materials they bought or
 * 125 the labor they hired. (i) (x) Such trustees * know the state

(i) *Horsley v. Bell and others*, Ambler 769. An act of parliament was passed to make a certain brook navigable. The defendants, with many other persons, were named commissioners to put the act in execution. Certain tolls were to be paid by vessels which should navigate the brook, and the commissioners were empowered to borrow money on these tolls. The commissioners employed the plaintiff to do different parts of the works, and such of the commissioners as were present at the several meetings made orders relative thereto. Every one of them was present at some of the meet-

ings, but no one was present at all the meetings. The fund proving deficient, it was held that all the acting commissioners were personally liable to the plaintiff. The Lord Chancellor and the judges agreed in opinion. "The commissioners had power to borrow money, and ought to take care to be provided. That the workmen who engaged to do the work could not know the state of the fund, nor was it their business to inquire; they gave credit to the commissioners." *Cullen v. Duke of Queensberry*, 1 Bro. Ch. 101, and notes.

(x) In *Graham v. Public Works Com'rs*, [1901] 2 K. B. 781, the incorporated Commissioners of Public Works and Buildings were held liable for breach of their contract with builders for the erection of a public building either because they were parties to the contract, and not mere agents of the Crown, or because, if they contracted as such agents, a judgment might be rendered declaratory of the right of the subject who had contracted with them, although an execution could not go against them to reach Crown property. No implied stipulation exists against the government to give continued employment because of the acceptance of a contract for work. *Reg. v. Demers*, [1900] A. C. 103.

When actual war has been waged, even if it be a political revolt which fails of success, acts of legitimate warfare cannot be made the basis of individual liability; this applies to the refusal of a passport by a military commander, and assaults by his soldiers, where such commander represents the authority of the revolutionary party of a government which afterwards succeeds and is recognized by the United States. *Underhill v. Hernandez*, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456.

As the funds of a public charitable hospital, or other charitable institution, are held in trust for a particular charitable purpose, which does not include the payment of damages recovered for the negligence of the hospital servants, there is an implied agreement, arising from acceptance of the institution's bounty, by even a patient who pays in part, that it shall not be liable for the negligence of its nurses or physicians; see *e.g.* *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; although such institutions are held liable for certain torts, as where

it is clear that they have been negligent in selecting or retaining incompetent or careless nurses or physicians; where such an institution as the Trinity House, in repairing lights or beacons, negligently leaves iron stumps in the way of vessels (*Gilbert v. Trinity House*, 17 Q. B. D. 795); or a charity negligently permits its building to be so out of repair as to cause injury to travellers upon an adjoining highway, or unlawfully permits the escape of filth upon neighboring land. See *e.g.* *Powers v. Mass. Homeopathic Hospital*, 101 Fed. 896, and 109 Fed. 294, and cases cited; *Currier v. Trustees of Dartmouth College*, 105 Fed. 886; *Pierce v. Union Pacific R. Co.*, 66 Fed. 44, 13 C. C. A. 323; *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; *Collins v. New York Post-Graduate Medical School & Hospital*, 69 N. Y. Sup. 106. A private museum, or a library established and used only by subscribers, is not a public charity entitled to any such exemption as the above. *Drury v. Natick*, 10 Allen (Mass.), 169, 180; *Carne v. Long*, 2 DeGex, F. & J. 75. Nor is a Young Men's Christian Association whose work, though partly of a charitable nature, is also social, including lectures and entertainments for its members, the care of their health by means of a gymnasium and athletic sports, and the sale of food at a lunch counter. *Chapin v. Holyoke Young Men's Christian Ass'n*, 165 Mass. 280, 42 N. E. 1130. Nor an incorporated Protective Department established to diminish the cost of fire insurance. *Newcomb v. Boston Protective Department*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; *Bates v. Worcester Protective Department*, 177 Mass. 130, 58 N. E. 200.

of the means in their hands, and how far they may rely upon a public provision of funds, and may contract accordingly, while those who deal with them cannot know this at all, or certainly not so well. (*j*)

The true principle which runs through all of these cases, and applies alike to private and public trustees, is this. To whom did the promisee give credit, and to whom did the promisor understand him to give credit? If the promisee gave credit to the promisor personally, and was justified in so understanding the case, and the promisor as a rational person knew or should have known that the promisee trusted to him personally, and he did not guard the promisee from so trusting him, then he cannot afterwards turn him over to those whom he represents, because he must abide his responsibility. On the other hand, if the promisor supposed the promisee to trust only to those for whose benefit he acted, or rather to the funds and means possessed by him as trustee, and if he had a right to suppose so, and the promisee did not demand and receive the assurance of his personal liability, then no such liability exists, and he is bound only to act faithfully as a trustee in the discharge of his promise.

An agent who exceeds his authority and fails to bind his principal, becomes liable himself. On this familiar principle public trustees or officers, as town or parish officers, who enter into contracts in their official capacity, and on behalf of the corporations which they represent, if they so deviate from or exceed their authority as not to bind these corporations, are themselves liable. (*k*) But whether they are liable on the contract, * or * 126 in case, must depend on the character and circumstances of the transaction. (*l*)

(*j*) *Higgins v. Livingstone*, 4 Dow, 341, 355. Lord *Eldon*, in this case, said: "As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that when persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others, who do not know, act as if representing that they had a fund applicable to the object, and are then personally bound to provide funds to pay the contractors."

(*k*) *Sprott v. Powell*, 3 Bing. 478; *Leigh v. Taylor*, 7 B. & C. 491; *Heudebourck v. Langton*, 3 C. & P. 571; *Kirby v. Bannister*, 5 B. & Ad. 1069; s. c. 3

Nev. & M. 119; *Burton v. Griffiths*, 11 M. & W. 817; *Bay v. Cook*, 2 N. J. 343; *Husbands v. Smith's Adm'r*, 14 B. Mon. 211. — *Uthwatt v. Elkins*, 13 M. & W. 772. Church-wardens and overseers of a parish having taken a lease of land in their official capacity, which they were not authorized by the statute 59 Geo. III., c. 12, to hold in the nature of a corporation, it was held to be a personal undertaking of their own, on which they were individually responsible for the payment of rent. — "If an overseer of the poor contract with tradesmen upon account of the poor, and upon his own credit, as soon as he receives so much of the poor's money, it becomes his own debt." *Holt, C. J.*, *Anon.* 12 Mod. 559.

(*l*) See *ante*, p. * 68, note (*w*).

OF EXECUTORS AND ADMINISTRATORS.

THEY act as the personal representatives of the deceased, having in their hands his means, for the purpose of discharging his liabilities or executing his contracts, and of carrying into effect his will, if he have left one; and in general they are liable only so far as these means, or assets in their hands, are applicable to such purpose. But they may become personally liable (*x*); and a clause in the Statute of Frauds, hereafter to be spoken of, refers to this subject. In England it is regarded as the peculiar province of a court of equity to administer justice in cases of legacies. (*α*) (*γ*) The law and practice on this subject varies somewhat in different States in this country.¹

* 128 * It is said that the promise of an executor to pay a debt, “whenever sufficient effects are received from the estate of

(*α*) *Deeks v. Strutt*, 5 T. R. 690, and see *Jones v. Tanner*, 7 B. & C. 542; *Williams Ex'rs*, 2007. Upon the assent of the executor to a bequest of a specific chattel, whether personal or real, the interest in it vests in the legatee, and he may recover it by an action at law. *Doe v. Guy*, 3 East, 120; *Matthews v. Turner*, 64 Md. 121; *Eberstein v. Camp*, 37 Mich. 177; *Onondaga, &c. Co. v. Price*, 87 N. Y. 547. And see *Paramour v. Yardly*, Plowd. 539. Whether an executor has assented to a bequest is a question of fact for the jury, and not a matter of law to be determined by the court. *Mason v. Farnell*, 12 M. & W. 674. In Connecticut and New

Hampshire, it has been held that an action at law will lie against an executor upon a promise implied from the possession of assets. *Knapp v. Hanford*, 6 Conn. 170; *Pickering v. Pickering*, 6 N. H. 120. But it is believed that in jurisdictions where courts of chancery have existed, the doctrine of the English cases has been followed. See *Kent v. Somervell*, 7 G. & J. 265; *Sutton v. Crain*, 10 G. & J. 458; *Van Orden v. Van Orden*, 10 Johns. 30. — An action at law by a legatee for a legacy on an executor's promise, must be brought against the executor in his personal, not in his representative capacity. *Kayser v. Disher*, 9 Leigh, 357.

¹ By statute or practice, in many States in this country an action at law is allowed to obtain a pecuniary legacy, and even the assent of the executor is not always necessary. See *Colt v. Colt*, 32 Conn. 422, 451; *Precott v. Morse*, 62 Me. 447; *Blackler v. Booth*, 114 Mass. 24; *Cowell v. Oxford*, 1 Halsted, 432; *Clark v. Herring*, 5 Binn. 33.

(*x*) As for the deceased's funeral expenses. *Hunting v. Ward*, 175 Mass. 223, 55 N. E. 1042.

(*γ*) The question whether an administrator's appointment should be revoked will not be tried in equity; the remedy is by probate proceedings. *Bennett v. Kimball*, 175 Mass. 199, 55 N. E. 893. So the accounts of trustees, guardians, and ex-

ecutors are settled primarily in the Probate Court under its ordinary jurisdiction, and not in a court of equity, nor under the equity jurisdiction given to Probate Courts by statute. *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560.

A judgment for or against an administrator may bind the heir. *Forbes v. Douglass*, 175 Mass. 191, 55 N. E. 847.

the deceased," must be construed to mean sufficient effects received in the ordinary course of administration, according to law. (b) If an executor or administrator receives, as such, a promissory note or bill of the deceased, and indorses the same, he is liable upon it personally. (c) If he makes a note or bill, signing it "as executor," he is personally liable, unless he expressly limits his promise to pay, by the words, "out of the assets of my testator," or "if the assets be sufficient," or in some equivalent way; (d) but a note or bill so qualified would not be negotiable, because on condition. If an executor or administrator * submits * 129 a disputed question to arbitration in general terms, and without an express limitation of his liability, and the arbitrators award that he shall pay a certain sum, he is liable to pay it whether he assets or not. (e) But if the award be merely that a certain sum is due from the estate of the deceased, without saying that the executor or administrator is to pay it, he is not precluded from denying that he has assets. (f)

When there is a contract with an executor or administrator, by virtue of which money has become due, and the money if recovered will be assets in his hands, may, in general, sue for it in his representative capacity. (g) And so he may be sued as executor for money paid for his use in that capacity. (h)

Executors should pay the utmost respect to the directions in the will of their testator, but have nevertheless a certain discretion; thus where a will required the executor to invest certain funds in real estate securities, it was held that he might, in the exercise of a sound discretion, deposit the funds in a savings bank. (hh)

An administrator appointed to settle an estate which a former administrator or executor has left unsettled, is called an administrator *de bonis non*, and if there be a will it is annexed to his

(b) *Bowerbank v. Monteiro*, 4 Taunt. 844.

(c) *Buller, J.*, *King v. Thom*, 1 T. R. 489; *Curtis v. Bank of Somerset*, 7 Har. & J. 25.

(d) *Childs v. Monins*, 2 Br. & B. 460; *King v. Thom*, 1 T. R. 489; *Dunne v. Deery*, 40 Ia. 251; *Woods v. Ridley*, 27 Miss. 119; *Forster v. Fuller*, 6 Mass. 58, where the principle was applied to the case of a guardian. — As to covenants by executors or administrators, made professedly in their capacity as such, see *Sumner v. Williams*, 8 Mass. 162; *Thayer v. Wendell*, 1 Gallis. 37.

(e) *Riddel v. Sutton*, 5 Bing. 200.

(f) *Pearson v. Henry*, 5 T. R. 6.

(g) *Cowell v. Watts*, 6 East, 405; *King v. Thom*, 1 T. R. 487; *Marshall v. Broadhurst*, 1 Tyr. 348, 1 Cr. & J. 403; *Heath v. Chilton*, 12 M. & W. 632; *Kane v. Paul*, 14 Pet. 33; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

(h) *Ashby v. Ashby*, 7 B. & C. 444. — But he is only liable *personally* in an action for money lent to him as executor, or had and received by him as executor. *Rose v. Bowler*, 1 H. Bl. 108; *Powell v. Graham*, 7 Taunt. 586; *Jennings v. Newman*, 4 T. R. 347; and see observations of the judges in *Ashby v. Ashby*, 7 B. & C. 444; *Miles v. Durnford*, 2 De G., M. & G. 641.

(hh) *Lansing v. Lansing*, 45 Barb. 182.

appointment as administrator. Among his duties is that of requiring and enforcing a transfer to himself from his predecessor of choses in action belonging to the estate; and for a loss caused by negligence in this respect, he is liable. (*hi*)

With respect to covenants relating to the freehold, the rule of law is, that for the breach of a covenant *collateral or in gross*, whether such breach occur before or after the death of the covenantee, the personal representative must sue and not the heir; (*i*) for the breach of a covenant *which runs with the land*, the heir must sue if the breach occur *after* the covenantee's death, the personal representative if it occur *before*. (*j*) The doctrine of a continuing breach, for which the heir or assignee may recover if the ultimate and substantial damage is suffered by him, was estab-

lished in England by the case of *Kingdon v. Nottle*, (*k*) but * 130 it has not been adopted in this country. (*l*) * In general, every right *ex contractu* which the deceased possessed at the time of his death, passes to his executor or administrator; (*m*) ¹

(*hi*) *Wilkinson v. Hunter*, 37 Ala. 268.

(*i*) Lord *Abinger*, C. B., *Raymond v. Fitch*, 2 C., M. & R. 538, 599, 5 Tyr. 985; *Lucy v. Levington*, 2 Lev. 26, 1 Ventr. 175; Bacon's *Abr. Executors and Administrators*, N.

(*j*) Com. Dig. *Covenant*, B. 1, *Administration*, B. 13; *Morley v. Polhill*, 2 Ventr. 56, 3 Salk. 109; *Smith v. Simons*, Comb. 64.

(*k*) 1 M. & Sel. 355; 4 M. & Sel. 53; *King v. Jones*, 5 Taunt. 418. Along with the authority of this case seems to fall also the doctrine on which it was founded, and of which so much is made in the books (see *Williams on Executors*, 1st ed. 519; 1 Lomax on *Executors*, 292), that an action can in no case be maintained in the name of the executor, unless an injury to the personal estate appears. In England the Court of Exchequer have gone as far as they can without quite overthrowing *Kingdon v. Nottle*. See the opinion of Lord *Abinger* in *Raymond v. Fitch*, 2 C., M. & R. 596, 600, and the still later case of *Ricketts v. Weaver*, 12 M. & W. 718, where *Parker*, B., said: "The question, therefore, is reduced to this, whether an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage. On that point *Raymond v. Fitch*, in which all the cases were considered, is an authority directly in point, and ought not to be shaken. The result of that case is, that unless it be a covenant in which the heir

alone can sue (according to *Kingdon v. Nottle* and *King v. Jones*) for a breach of the covenant in the lifetime of the lessor, the executor can sue, unless it be a mere personal contract, in which the rule applies that *actio personalis moritur cum persona*. The breach of covenant is the damage; if the executor be not the proper person to sue, the action cannot be brought by any one." In this country, where the courts are free from the shackles which the authority of *Kingdon v. Nottle* and kindred cases imposes, it is reasonable to believe that the later doctrine (which is also the older doctrine) as to actions by executors, will be carried to its full extent. See *Clark v. Swift*, 3 Met. 390.

(*l*) *Greenby v. Wilcocks*, 2 Johns. 1; *Mitchell v. Warner*, 5 Conn. 497; *Beddoe v. Wadsworth*, 21 Wend. 120; *Clark v. Swift*, 3 Met. 390; *Hacker v. Storer*, 8 Greenl. 228, 232; 4 Kent, Com. 472. — The case of *Kingdon v. Nottle* has, however, been substantially followed in Ohio and Indiana. *Foot v. Burnett*, 10 Ohio, 317; *Martin v. Baker*, 5 Blackf. 232.

(*m*) *Coynyns's Digest, Administration*, B. 13; Bacon's *Abridgment, Executors and Administrators*, N.; *Morley v. Polhill*, 2 Ventr. 56, 3 Salk. 109; *Smith v. Simons*, Comb. 64; *Lucy v. Levington*, 1 Ventr. 176, 2 Lev. 26; *Raymond v. Fitch*, 2 C., M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718; *Carr v. Roberts*, 5 B. & Ad. 84, per *Parke*, J.

¹ The executrix of a railway passenger who, after an interval, dies in consequence of an accident, may recover, in an action for breach of contract against the railway

and so strong is this rule, that it prevails against special words of limitation in the contract itself. (*n*). But contracts may be extinguished and absolutely determined by the death of the party with whom they are made. (*o*) If money be payable by a bond to such person as the obligee may appoint by will, and the testator makes no appointment by his will, the debt dies, as the executor is not considered his appointee for that purpose. (*p*) Nor could an administrator, where there was no will, claim the money.

The law raises no implied promise to the personal representative, in respect to a promissory note held by the deceased. (*q*)

* Where the contract with the deceased is of an execu- * 131
tory nature, and the personal representative can fairly and
sufficiently execute all that the deceased could have done, he may
do so, and enforce the contract. (*r*)¹ (*x*) But where an executory

(*n*) *Devon v. Pawlett*, 11 Vin. Abr. 133, pl. 27. Somewhat analogous to this is the point stated in *Leonard Lovies'* case, 10 Rep. 87 b, that a chattel interest in land cannot be entailed.

(*o*) For example, the right to recover for the breach of a promise to marry does not pass to the executor. *Chamberlain v. Williamson*, 2 M. & Sel. 408; *Stebbins v. Palmer*, 1 Pick. 71. And so in other cases where the injury is personal, though accompanying a breach of contract. *Parke, B., Beckham v. Drake*, 8 M. & W. 854; *Lord Ellenborough, C. J., Chamberlain v. Williamson*, 2 M. & Sel. 415, 416; *Cook v. Newman*, 8 How. Pr. 523. But see *Knights v. Quarles*, 2 Br. & B. 104.

(*p*) *Pease v. Mead*, Hob. 9. And the reason given is that the payee in that case is evidently to take for his own use, for the word pay "carryeth property with it;" whereas the executor when he recovers as assignee in law of the testator, takes for the use of the testator.

(*q*) Therefore the executor in bringing an action upon such note, must declare

upon the promise to the testator; unless an express promise to the executor can be shown. *Timmis v. Platt*, 2 M. & W. 720.

(*r*) *Marshall v. Broadhurst*, 1 Tyr. 348, 1 Cr. & J. 403. See *Werner v. Humphreys*, 3 Scott, N. R. 226. — *E converso*, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets. *Wentworth v. Cock*, 10 A. & E. 42; *Siboni v. Kirkman*, 1 M. & W. 418, 423; *Smith v. Wilmington, &c. Co.*, 83 Ill. 498. — Where several persons jointly contract for a chattel, to be made or procured for the common benefit of all, and the executors of any party dying are, by agreement, to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor, that his executors shall pay his proportion of the price of the article to be furnished. *Prior v. Hembrow*, 8 M. & W. 873, 889.

company, the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. *Bradshaw v. Lancashire, &c. R. Co.*, L. R. 10 C. P. 189; but not in an action of tort. *Pulling v. Gt. Eastern R. Co.*, 9 Q. B. D. 110. See *Leggott v. Gt. Northern R. Co.*, 1 Q. B. D. 599. By statute the number of actions which survive has been much enlarged. Almost universally rights *ex delicto* in regard to property, and frequently rights for personal injuries, survive and pass to the executor or administrator. — W.

¹ It is a general rule that the executory contracts made by an executor or administrator, though made in good faith in regard to the business of the estate, bind him personally, and do not bind the estate directly. *Kingman v. Soule*, 132 Mass. 285, 288; *Austin v. Munro*, 47 N. Y. 360; *Willis v. Sharp*, 113 N. Y. 586, 591. — W.

(*x*) A contract to pay money after one's own death is valid. *Phillips v. Blatchford*, 137 Mass. 510, 514; *Krell v. Codman*, 154 Mass. 454, 28 N. E. 978; *Earle v. Angell*,

contract is of a strictly personal nature, — as, for example, with an author or indexer for a specified work, — his death before his work is completed absolutely determines the contract, unless what remains to be done can certainly be done, to the same purpose by another. (s)

One of joint executors is not generally liable for the wrong-doing of the other, without negligence or other default on his own part. (ss) ¹ (x)

If executors or administrators pay away money of the deceased by mistake, or enter into contracts for carrying on his business for the benefit of his personal estate, and to wind up his affairs, they may sue either in their individual or their representative capacities; (t) but they should sue in the latter capacity in order to avoid a set-off against them of their individual debts. (u)

The title of an administrator does not exist until the grant of administration, and then reverts back to the death of the deceased;

(s) Lord *Lyndhurst*, C. B., and *Bayley*, B., *Marshall v. Broadhurst*, 1 Tyr. 349. See *Siboni v. Kirkman*, 1 M. & W. 423. See also *White v. Commonwealth*, 39 Penn. St. 167.

(ss) *Wood v. Brown*, 34 N. Y. 337.

(t) *Clark v. Hougham*, 2 B. & C. 149;

Aspinwall v. Wake, 10 Bing. 51; *Webster v. Spencer*, 3 B. & Ald. 360; *Ord v. Fenwick*, 3 East, 104; *Merritt v. Seaman*, 2 Seld. 168.

(u) Per *Bayley*, *Holroyd*, and *Best*, JJ., *Clark v. Hougham*, 2 B. & C. 155, 156, 157.

¹ Unless they give a joint bond, *Newton v. Newton*, 53 N. H. 537. See further, as to the liability of one executor for the acts of his co-executors, *Adair v. Brimmer*, 74 N. Y. 539; *Bryan v. Stewart*, 83 N. Y. 270; *Shreve v. Joyce*, 7 Vroom, 44; *Kincade v. Conley*, 74 N. C. 387. — K.

157 Mass. 294, 32 N. E. 164, 26 Am. St. Rep. 260, 14 L. R. A. 860. And, under the Massachusetts statutes, a suit against an executor or administrator can be begun by trustee process. *Harmon v. Osgood*, 151 Mass. 501, 24 N. E. 401. Administrators or executors are bound by all their testator's contracts, which, properly construed, require a continuance of the obligation beyond his lifetime. *Day v. Worcester*, N. & R. R. Co., 151 Mass. 302, 308, 23 N. E. 824; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 38 Am. St. Rep. 460, 23 L. R. A. 707. Contracts of a personal nature are not usually determined by the contractor's death. *Chamberlain v. Dunlop* (126 N. Y. 45), 22 Am. St. Rep. 807, 812, 814. So a surety's liability on a bond given by him for the integrity of a person who, in consideration, is appointed to an office by the obligee of the bond, is not determined by the surety's death, unless expressly so stipulated in the bond. *In re Crace*, *Balfour v. Crace*, [1902] 1 Ch. 733. But a promised gift or gratuity, not completed

at the promisor's death, cannot be enforced against his executors. *Coleman v. North*, 47 W. R. 57. See *In re Fickus*, *Farina v. Fickus*, [1900] 1 Ch. 331. Such contracts do not include agreements for personal services, as to create and manage a business, these being discharged by death or a disability which renders performance impossible. *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Nixon v. Zuricalday*, 144 N. Y. 300, 39 N. E. 340; *Dolan v. Rodgers*, 149 N. Y. 489, 493, 44 N. E. 167; *Eliot Nat. Bank v. Beal*, 141 Mass. 566, 570, 6 N. E. 742; *Marvel v. Phillips*, 162 Mass. 399, 401, 38 N. E. 1117, 44 Am. St. Rep. 370, 26 L. R. A. 416.

(c) In England the rule is now settled, as to executors, that one of them who *unnecessarily*, and not in the regular course of business of administering the estate, does an act by which his co-executor obtains sole possession of a part of the testator's estate, is liable for the latter's misapplication thereof. *In re Gasquoigne*, *Gasquoigne v. Gasquoigne*, [1894] 1 Ch. 470; *Lowe v. Shields*, [1902] 1 Ir. 320.

but only in order to protect the estate, and not for any other purpose. (v) And if an agent sells goods of the deceased, after his death, and in ignorance of his decease, the administrator may adopt the contract and sue upon it. (w)

On the death of one of several executors, either before or * after probate, the entire right of representation survives to * 132 the others. (x) But if an administrator dies, (xx) or a sole executor dies intestate, no interest and no right of representation is transmitted to his personal representative. (y)

Executors and administrators are regarded as Trustees, and are bound by the rules of the law of Trust, and of Agency, so far as the same are applicable to them. Thus, neither can buy what he sells; (yy) and either is held responsible for loss to the estate, caused by his negligence or default; as of a debt which might have been collected with due diligence. (yz)

An executor *de son tort* is one who without right disposes of or interferes with the assets of the deceased, or otherwise assumes to act as executor. He is liable for the property taken by him, and for all damage caused by his acts, and not only to an action by the rightful executor or administrator, but may be sued by a creditor of the deceased. (z) But mere acts of kindness and charity touching the property of one deceased, as taking care of it, providing for the family and the like, do not make one executor *de son tort*. (zz) It is held in England, that an executor *de son tort* of a rightful executor is liable in the same manner as a rightful executor of the original testator, for his debts. (a) ¹ But the rightful executor or administrator cannot be prejudiced by an act or contract of an executor *de son tort*. (b) And it would seem, that if an executor *de son*

(v) *Morgan v. Thomas*, 8 Exch. 302; *Foster v. Bates*, 12 M. & W. 22; *Lawrence v. Wright*, 23 Pick. 128; *Rattoon v. Overacker*, 8 Johns. 126; *Winchester v. Union Bank*, 2 G. & J. 79, 80; *Welchman v. Sturgis*, 13 Q. B. 552; *Bell v. Speight*, 11 Humph. 451.

(w) *Foster v. Bates*, 12 M. & W. 226.

(x) *Flanders v. Clark*, 3 Atk. 509. So in the case of the death of one of two administrators, the administration survives to the other. *Hudson v. Hudson*, Cas. Temp. Talb. 127. — That joint executors are one person in law, *Shaw v. Berry*, 35 Me. 279. But see *Smith v. Whiting*, 9 Mass. 334.

(xx) *Young v. Duhme*, 4 Met. (Ky.) 239.

(y) Com. Dig. Administrator, B. 6; *Tingrey v. Brown*, 1 B. & P. 310.

(yy) *Howell v. Selving*, 1 McCarter, 84; *Boyd v. Blankman*, 29 Cal. 19.

(yz) *Cooley v. Vansycle*, 1 McCarter, 496; *Shaffer's Appeal*, 46 Penn. St. 131; *Tuggle v. Gilbert*, 1 Duvall, 340; *Tompkins v. Weeks*, 26 Cal. 50.

(z) *Curtis v. Vernon*, 3 T. R. 587; *Elder v. Littler*, 15 Ia. 65.

(zz) *Brown v. Sullivan*, 22 Ind. 264.

(a) *Meyrick v. Anderson*, 14 Q. B. 719.

(b) *Buckley v. Barber*, 6 Exch. 164; *Mountford v. Gibson*, 4 East, 441; *Dick-*

¹ But the executor of an executrix *de son tort* is not liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled. *Wilson v. Hodson*, L. R. 7 Ex. 84. — K.

tort be afterwards made administrator he is not bound by a contract made by himself as executor before the grant of administration. (c)

enson *v.* Naule, 1 Nev. & M. 721; where A having proved a will, in which she supposed herself to be appointed executrix, employed the plaintiff, an auctioneer, to sell the goods of the testator; and they were sold to the defendant, who, as an inducement to the plaintiff to let him remove the goods without payment, expressly promised to pay the plaintiff as soon as the bill was made out. Probate was afterwards granted to B, the real executrix, who gave notice to the defendant to pay the price to her. *Held*, that the plaintiff could not maintain an action

against the defendant for the price. — But where the act of the executor *de son tort* was done in the due course of administration, and is one which the rightful executor would have been compellable to do, such act shall stand good. *Graysbrook v. Fox*, 1 Plowd. 282; *Thompson v. Harding*, 20 E. L. & E. 145.

(c) *Doe v. Glenn*, 1 A. & E. 49; s. c. 3 Nev. & M. 837; *Wilson v. Hudson*, 4 Harring. 169. But see *contra*, *Walworth, C., Vroom v. Van Horne*, 10 Paige, 558; *Walker v. May*, 2 Hill, Ch. (S. C.) 23.

* CHAPTER IX.

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GUARDIANS.

SECT. I. — *Of the Kinds of Guardians.*

GUARDIANSHIP at common law has fallen into comparative disuse in this country, although many of the principles which determined the rights and duties of that relation are adopted, with various qualifications, in the guardianships by testamentary appointment of the father, or by the appointment of courts of probate or chancery, which prevail with us. We have also by statute provisions, guardians of the insane, and of spendthrifts. All of these rest upon the general principle, that it is the duty of society to provide adequate care and protection for the person and property of those who are wholly unable to take care of themselves. (x)

So far as relates to contracts to which guardians are parties, we can do little more than refer to the statutes of the several States, in which the obligations and duties of guardians, their powers, and the manner in which their powers may be exercised, are set forth, usually with much minuteness and precision.

One principle, however, should be stated; which is, that guardians of all descriptions are treated by courts as trustees; and, in almost all cases, they are required to give security for the faithful discharge of their duty, unless the guardian be appointed by will, and the testator has exercised the power given him by statute, of requiring that the guardian shall not be called upon to give bonds. But even in this case, such testamentary provision is wholly personal; and if the individual dies, refuses the appointment or resigns it, or is removed from it, and a substitute is appointed by court, this substitute must give bonds.

(x) At common law, and under the ordinary statutes, a person alleged to be incompetent cannot be placed under guardianship without due notice to him of the proceeding therefor. See *e. g.* Gibson, appellant, 154 Mass. 378, 380, 28 N. E. 296; Porter v. Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353; *Re* Blewitt, 131

N. Y. 541, 30 N. E. 587; *McGee v. Hayes*, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57. The Massachusetts statute of 1890, c. 345, providing for a temporary guardianship without notice, has, however, recently been held constitutional. *Bumpus v. French*, 179 Mass. 131, 60 N. E. 414.

It may be added, that it is better for a guardian who proposes to make any sale or contract not certainly within his general power, to go to the proper court, by petition, for authority or direction. And generally, it is only when the ward has no other means for his support and education, that the court will authorize the sale of his lands. The statutes regulating this matter sometimes provide expressly for this. (z)

OF THE DUTY AND POWER OF A GUARDIAN.

The guardian is held in this country to have only a naked authority, not coupled with an interest. (a) His possession of the property of his ward is not such as gives him a personal interest, being only for the purpose of agency. But for the benefit of his ward, he has a very general power over it. He manages and disposes of the personal property at his own discretion, (b) although, as we have already intimated, it is safer for him to obtain the authority of the court for any important measure; he may lease the real estate (the lease not to continue beyond the ward's majority), if appointed by will or by the court, but the

(z) *Morris v. Morris*, 2 McCarter, 239.

(a) *Granby v. Amherst*, 7 Mass. 1, 6.

(b) "I apprehend that no doubt can be entertained as to the competency of the guardian's power over the disposition of the personal estate, including the choses in action, as between him and the *bonâ fide* purchaser. The guardian in socage of the real estate may lease it in his own name, and dispose of it during the guardianship (and the chancery guardian has equal authority), though he cannot convey it absolutely without the special authority of this court, because the nature of the trust does not require it." *Kent, C., Field v. Schieffelin*, 7 Johns. Ch. 154. This case decides that the purchaser of the ward's personal estate is not responsible for the faithful application of the purchase-money by the guardian, unless he knew or had sufficient information at the time that the guardian contemplated a breach of trust, and intended to misapply the money; or was in fact by the very transaction applying it to his own private purpose. — The guardian of a *non compos mentis* can sell her personal estate at his discretion, and

her real estate with license from the court.

"It is true the guardian ought not to sell the personal estate, unless the proceeds are wanted for the due execution of his trust, or unless he can by the sale produce some advantage to the estate, but having the power without obtaining any special license or authority, a title under him acquired *bonâ fide* by the purchaser will be good, for he cannot know whether the power has been executed with discretion or not." *Parker, C. J., Ellis v. Essex Merrimac Bridge*, 2 Pick. 243. — The Court of Chancery may authorize a sale of the ward's real estate. *Dorsey v. Gilbert*, 11 G. & J. 87. — Also, *In re Salisbury*, 3 Johns. Ch. 347; *Hedges v. Riker*, 5 id. 163. — "The Court may change the estate of infants from real into personal, and from personal into real, whenever it deems such a proceeding most beneficial to the infant. The proper inquiry in such cases will be, whether a sale of the whole, or only of a part and what part of the premises will be most beneficial." *Kent, C., Mills v. Dennis*, 3 Johns. Ch. 367.

guardian by nature cannot; (c)¹ he cannot however sell it without leave of the proper court. Nor should he, in general, convert the personal estate into real, without such leave. (d) And where a court of * equity authorizes a conversion of real * 135 estate into personal, or *vice versa*, it will, if justice requires it, provide that the acquired property shall retain the character and legal incidents of the original fund. (e)

But where a fictitious character is thus impressed upon the property of a ward, it ceases, as a general rule, and the property resumes its true character, on the majority of the ward. (f)

As trustee, a guardian is held to a strictly honest discharge of his duty, and cannot act in relation to the subject of his trust for his own personal benefit, in any contract whatever. And if a benefit arises thereby, as in the settlement of a debt due from the ward, this benefit belongs wholly to the ward. (g) And it has been held that if a guardian makes use of his own money to erect buildings on the land of his ward, without having an order of the court therefor, he cannot charge the same in account with his ward, or recover the amount from the ward. (h) But we believe a rule so severe would not be applied unless for special reasons. He must not only neither make nor suffer any waste of the inheritance, but is held very strictly to a careful management of all personal property. (i) (x) He is responsible * not only * 136

(c) *May v. Calder*, 2 Mass. 56. A lease of an infant's land by his father as natural guardian is void.

(d) The cases cited (3 Johns. Ch. 348, 370, 5 id. 163) affirm the power of a court to order the minor's real estate to be converted into personal, or his personal into real, but do not expressly deny the guardian's authority to do the latter. See *supra*, note (b). *Stanley's Appeal*, 8 Barr, 431; *Cooke's Appeal*, 9 id. 508; *Worrell's Appeal*, 23 Pa. 44.

(e) *Foster v. Hilliard*, 1 Story, 88; *Wheldale v. Patridge*, 5 Ves. Jr. 396; *Craig v. Leslie*, 3 Wheat. 563, 577; *Peter v. Beverly*, 10 Pet. 532; *Hawley v. James*, 5 Paige, 318, 489; *Kane v. Gott*, 24 Wend. 660; *Reading v. Blackwell*, 1 Baldw. 166; *Collins v. Champ*, 15 B. Mon. 118; *Slumway v. Cooper*, 15 Barb. 556; *Forman v. Marsh*, 1 Kern. 544; *Sweezy v. Thayer*, 1 Duer, 286; *March v. Berrier*, 6 Ired. Eq. 524. The above cases illustrate the gen-

eral principles of equitable conversion, although all of them are not applicable exclusively to conversions by a guardian with license from court.

(f) *Forman v. Marsh*, 1 Kern. 544.

(g) *Green v. Winter*, 1 Johns. Ch. 26; *Church v. The Marine Insurance Co.* 1 Mason, 345; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Davoue v. Fanning*, 2 Johns. Ch. 252; *White v. Parker*, 8 Barb. 48; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Rogers v. Rogers*, 1 Hopk. Ch. 515; *Lovell v. Briggs*, 2 N. H. 218; *Sparhawk v. Allen*, 1 Foster (N. H.), 9; *Hoyt v. Sprague*, 103 U. S. 613. — The guardian is not entitled to compensation for services rendered before his appointment. *Clowes v. Van Antwerp*, 4 Barb. 416.

(h) *Hassard v. Rowe*, 11 Barb. 24. See also *White v. Parker*, 8 Barb. 48; *Austin v. Lawar*, 23 Miss. 189, and *Brown v. Mullins*, 24 Miss. 204.

(i) *Deitterich v. Heft*, 5 Barr, 87. If

¹ A guardian cannot lease his ward's oil or mineral lands for working and consequent impoverishment. *Stoughton's Appeal*, 88 Penn. St. 198.—W.

(x) Until the guardian's accounts are settled in the Probate Court, the ward cannot maintain an action of *indebitatus assumpsit* against him; after such settle-

for any misuse of the ward's money or stock, but for letting it lie idle; and if he does so without sufficient cause, he must allow the ward interest or compound interest in his account; (*j*)¹ and if he lends it without security, and without the approval of the court, he is liable for its loss. (*jj*) This subject is more fully presented in treating of the responsibility of Trustees. (*k*)

To secure the proper execution of his trust, he is not only liable to an action by the ward, after the guardianship terminates, (*l*) but during its pendency the ward may call him to account by his next friend, or by a guardian *ad litem*. And the courts have gone so far as to set aside transactions which took place soon after the ward came of age, and which were beneficial only to the former guardian, on the presumption that undue influence was used, and on the ground of public utility and policy. (*m*)

A guardian cannot, by his own contract, bind the person or estate of his ward; (*n*)² but if he promise on a sufficient considera-

he lends money on the mere personal security of one whose circumstances are equivocal, he is responsible for the money lent. — *Stem's App.* 5 *Whart.* 472. "Whenever the guardian has the fund and disposes of it to another, he must do it with strict and proper caution, and is seldom safe unless he takes security." *Sergeant, J., Konigmacher v. Kimmel*, 1 Penn. 207; *Pim v. Downing*, 11 S. & R. 66; *Smith v. Smith*, 4 Johns. Ch. 281. — But he is bound in general only to the exercise of common prudence and skill. *Johnson's Appeal*, 12 S. & R. 317; *Konigmacher v. Kimmel*, 1 Penn. 207. He is liable for any negligence. *Glover v. Glover*, 1 McMul. Ch. 153. — Although expressly authorized to invest the ward's money in bank-stock, he is personally liable if he invests it in his own name. *Stanley's App.*, 8 Penn. St. 431. — He was held liable for the ward's money invested in the stock of a navigation company, in good credit at the time, and paying large

dividends for a long time afterwards. *Worrell's App.*, 9 Penn. St. 508. See also *Clark v. Garfield*, 8 Allen, 427; *Gilbert v. M'Eachen*, 38 Miss. 469; *Bond v. Lockwood*, 38 Ill. 212.

(*j*) In Pennsylvania it is held that there is a distinction as to funds in the hands of guardians as to making *rests* from the rule in case of other trustees who neglect to invest. *Pennypacker's Appeal*, 41 Penn. St. 494. See *Hughes' Appeal*, 53 Penn. St. 500.

(*jj*) *Gilbert v. Guptill*, 34 Ill. 112.

(*k*) See *ante*, p. * 122, note (*f*).

(*l*) See *Birch v. Funk*, 2 Met. (Ky.) 544, as to the effect of lapse of time in barring a petition in equity by wards against their guardians.

(*m*) *Archer v. Hudson*, 7 Beav. 551; *Gale v. Wells*, 12 Barb. 84; *Carter v. Tice*, 120 Ill. 277; *Powell v. Powell*, 52 Mich. 432.

(*n*) *Thacher v. Dinsmore*, 5 Mass. 299; *Jones v. Brewer*, 1 Pick. 314.

¹ A guardian who refuses to disclose what use he has made of a large surplus of his ward's income, for which he charges himself with interest, is not entitled to his commissions. *Blake v. Pegram*, 109 Mass. 541. — K.

² On contracts made by the guardian he is personally liable, although he contracts expressly as guardian. *St. Joseph's Acad. v. Augustini*, 55 Ala. 493; *Kingsbury v. Powers*, 131 Ill. 182; *Rollins v. Marsh*, 128 Mass. 116; *Dalton v. Jones*, 51 Miss. 585; *Reading v. Wilson*, 38 N. J. Eq. 446. — W.

And although the estate of the ward is insufficient to reimburse the guardian, he must nevertheless satisfy the obligation unless by the contract his liability was to be limited to the assets of the ward in his hands. *Sperry v. Fanning*, 80 Ill. 371. — W.

ment, if the guardian refuses to pay over the balance due, or if he fraudulently withholds the ward's property, an action at common law lies against him. *Cobb v. Kempton*, 154 Mass. 266, 28 N. E. 264; *Thorndike v. Hinckley*, 155 Mass. 263, 29 N. E. 579; *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924.

tion to pay the debt of his ward, he is personally bound by his promise, although he expressly promises as guardian. (*o*) (*x*) And it is a sufficient consideration if such promise discharge the debt of the ward. And a guardian who thus discharges the debt of his ward may lawfully indemnify himself out of the ward's estate, or if he be discharged from his guardianship, he may have an action against the ward for money paid for his use. (*p*) An action will not lie against a guardian on a contract made by the ward, but must be brought against the ward and may be defended by the guardian. (*q*)

* The guardianship is a trust so strictly personal, or attached * 137 to the individual, that it cannot be transferred from him, either by his own assignment or devise, or by inheritance or succession.

A married woman cannot become a guardian without the consent of her husband; but with that she may. (*r*) It would seem, but not certainly, that a single woman who is a guardian loses her guardianship by marriage, but she may be reappointed. (*s*) In some States she loses it by statute; in others, not.

If there be two guardians, and one has possession of the ward, and the other takes the ward out of his possession against his will, it is said in England that the guardian losing the possession may have his action against the other. (*t*)

(*o*) *Forster v. Fuller*, 6 Mass. 58.

(*r*) *Palmer v. Oakley*, 1 Doug. (Mich.)

(*p*) *Thacher v. Dinsmore*, 5 Mass. 299; 433.

Forster v. Fuller, 6 Mass. 58.

(*s*) 2 Kent, Com. 225, n. (*b*).

(*q*) *Brown v. Chase*, 4 Mass. 436;

(*t*) *Gilbert v. Schevenole*, 14 M. & W.

Thacher v. Dinsmore, 5 Mass. 299; *Ex parte*

488.

Leighton, 14 Mass. 207.

(*x*) A guardian is primarily liable upon his contracts; but, when his powers are not restricted by statute, he is authorized, by virtue of his office, and without any order of court, to sell his ward's personal property and reinvest the proceeds, and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest. *Maclay v. Equitable L. Ass. Society*, 152 U. S. 499, 14 S. Ct. 678, 38 L. Ed. 528; *Tyler v. Odd Fellows' Ass'n*, 145 Mass. 134, 13 N. E. 360; *Kingsbury v. Powers*, 131 Ill. 182, 20 N. E. 3; *Reading v. Wilson*, 38 N. J. Eq. 446; *Hines v. Potts*, 56 Miss. 346. He is not, like a trustee or executor, invested with a legal title, but has merely a naked power not coupled with an interest; and he can sue only in the ward's name. *Lombard v. Morse*, 155 Mass. 136, 25 N. E. 731; *Taylor v. Lovering*, 171 Mass. 303, 50 N. E. 612. His authority is limited to the State in which he is appointed, and he cannot sue in a court, even of the United

States, held in another State, except so far as authorized so to do by its laws. *Morgan v. Potter*, 157 U. S. 195, 15 S. Ct. 590, 39 L. Ed. 670; *Smith v. Madden*, 78 Fed. 833; *McCleary v. Menke*, 109 Ill. 294; *Brand v. Con'th* (Ky.), 24 S. W. 604; *In re Nickals*, 21 Nev. 462, 34 Pac. 250. The existence of a guardianship renders void the deed of an incompetent ward. *Cockrill v. Cockrill*, 92 Fed. 811, 818, 34 C. C. A. 254. A guardian in socage has an estate in his ward's lands and may himself sue for the rents and profits. *Foley v. Mutual L. Ins. Co.*, 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456. See *Easton v. Somerville*, 111 Iowa, 164, 82 N. W. 475, 82 Am. St. Rep. 502. A guardian will be allowed credit only for such expenditures, made at his ward's request, as are proper; and if he is the ward's parent, allowances will not be allowed him for the ward's support and education, out of moneys bequeathed to the ward, when the guardian is himself able to support him. *In re Tolifaro*, 113 Iowa, 747, 84 N. W. 936.

CORPORATIONS.

A CORPORATION aggregate is, in law, a person ; (a) ¹ (x) and it was an established principle of the common law, that corporations

(a) See *Louisville, &c. R. Co. v. Letson*, 2 How. (U. S.), 497, deciding that a corporation created by a State and doing business within its territory, though it have members who are citizens of other States, is to be treated in the United States courts as a citizen of that State. — By an act incorporating a railway company no action was to be brought

against any *person* for anything done in pursuance of the act, without twenty days' notice given to the intended defendant : *Held*, that the word *person* included the company, and that they were entitled to notice upon being sued for obstructing a way in carrying the act into effect. *Boyd v. Croydon R. Co.*, 4 Bing. N. C. 669.

¹ As under a statute permitting only "persons" who did not aid the rebellion, to bring suit, *U. S. v. Ins. Cos.*, 22 Wall. 99 ; but not for suing, as a common informer, for a penalty recoverable by the "person" informing. *Guardians, &c. v. Franklin*, 3 C. P. D. 377. See *Royal, &c. Co. v. Braham*, 2 A. C. 381. — W.

(v) The Federal statutes, wherein the word "person" is used, never apply to a State, 20 A. G. Op. (U. S.), 606 ; but may apply to a municipal corporation : 23 id. 428 ; or to a partnership : *Com'th v. Rozen*, 176 Mass. 129, 57 N. E. 223 ; and to corporations, within the 14th Amendment. *Gulf, C. & S. F. Ry. Co.*, 165 U. S. 150, 17 S. Ct. 253, 41 L. Ed. 666. An Act relating to embezzlements from corporations applies to a corporation *de facto*. *People v. Carter*, 122 Mich. 668, 81 N. W. 924. As to corporations *de facto*, see 2 Kent Com. (14th ed.), p. *277 and n. (x). A statute to secure the payment of wages by "railway, canal, steamboat, and other corporations," cannot be extended beyond corporations of the same general class. *Crowther v. Fidelity Ins. Co.*, 85 Fed. 41, 29 C. C. A. 1.

A corporation cannot be formed to accomplish a fraud or any illegal act by means of its appearing to be a legal entity ; in such case, the members, or persons acting under its name, will be directly responsible for their acts. *First Nat. Bank v. Trebain Co.*, 59 Ohio St. 316, 52 N. E. 834 ; see *Perkins v. Fish*, 121 Cal. 358, 53 Pac. 901. So contracts with persons intending to form a corporation, with refer-

ence to matters relating to it when formed, do not bind it, but are merely the personal contracts of such persons. *Carmody v. Powers*, 60 Mich. 26, 13 Am. & Eng. Corp. Cas. 4.

An individual's sole ownership of all a corporation's stock does not enable him to sue in his own name, but his succession to its interests must be averred and proved. *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729. A contract between two corporations is not necessarily void because the majority of the directors in one of them are also directors in the other. *San Diego, &c. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333, 3 Am. & Eng. Corp. Cas. (N. S.), 580, 33 L. R. A. 788 and note.

As to *ultra vires* contracts by private corporations, see the extended note to *In re Assignment Mutual Guaranty F. Ins. Co.* (107 Iowa, 143), 70 Am. St. Rep. 149 ; also *Best Brewing Co. v. Klassen* (185 Ill. 37), 50 L. R. A. 765 ; *St. Louis, &c. Ry. Co. v. Terre Haute & Ind. R. Co.*, 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, 32 Am. L. Reg. (N. S.) 36 and note ; *Doe v. Taniere* (12 Q. B. 998), 7 English Ruling Cas. 354, 371 n.

aggregate could act only under their common seal, (b) but to this principle there were always many exceptions. These exceptions arose at first from necessity, and were limited by necessity. As where cattle were to be distrained damage feasant, and they might escape before the seal could be affixed. (c) But it was held that the appointment of a bailiff to seize for the use of a corporation, goods forfeited to the corporation, must be by deed. (d) A corporation is liable for the tortious acts of his agent, though he were not appointed under seal. (e) The * exception was * 139 afterwards extended to all matters of daily or frequent exigency or convenience, and of no special importance. (f) In this country, the old rule has almost, if not entirely, disappeared. (g) But in England it seems to remain in some force. (h) A contract of a corporation, as of an individual, may be implied from the acts of the corporation, or of their authorized agents. (i) In gen-

(b) 1 Bl. Com. 475. — Yet a corporation might do an act *upon record* without seal. The Mayor of Thetford's case, 1 Salk. 192; Koehler v. Black Co., 2 Black (U. S.), 715; Richardson v. Scott River Co. 22 Cal. 150.

(c) Manby v. Long, 3 Lev. 107; Bro. Abr. Corporations, pl. 2, 47; Dean and Chapter of Windsor v. Gover, 2 Wms. Saund. 305, Plowd. 91. And so it seems the appointment of a bailiff to distrain for rent need not be by deed. Cary v. Matthews, 1 Salk. 191; Taunton, J., Smith v. Birmingham Gas Co., 1 A. & E. 530. — But a corporation cannot, except by their seal, empower one to enter on their behalf for condition broken; and this though the estate be only for years. Dumper v. Symms, 1 Rol. Abr. Corporations, (K).

(d) Horn v. Ivy, 1 Vent. 47, 1 Mod. 18, 2 Keb. 567.

(e) Eastern Co. R. Co. v. Broom, 6 Exch. 314; Watson v. Bennett, 12 Barb. 196; Burton v. Philadelphia, &c. Railroad, 4 Harring. 252; Johnson v. Municipality, 5 La. Ann. 100; Goodspeed v. East Haddam Bank, 22 Conn. 530. Especially if the act done was an ordinary service, such as would not be held under other circumstances to require an authority under seal. Smith v. Birmingham Gas Co., 1 A. & E. 526, 3 Nev. & M. 771; Yarborough v. Bank of England, 16 East, 6. — And a corporation, like any other principal, is liable for acts of its agent incidental to an authority duly delegated. Kennedy v. Baltimore Ins. Co., 3 Har. & J. 367.

(f) Gibson v. East India Co., 5 Bing. N. C. 262, 270; Lord Denman, C. J., Church v. Imperial Gas Co., 6 A. & E.

846; Wells v. Kingston-upon-Hull, L. R. 10 C. P. 402. See Bro. Abr. Corporations, pl. 49.

(g) The Bank of Columbia v. Patterson, 7 Cranch, 299; Bank of the United States v. Dandridge, 12 Wheat. 64; Danforth v. Schoharie Turnpike Co., 12 Johns. 227; Commercial Bank of Buffalo v. Kortright, 22 Wend. 348; American Ins. Co. v. Oakley, 9 Paige, 496; Parker, C. J., Fourth School District in Rumford v. Wood, 13 Mass. 199; Proprietors of Canal Bridge v. Gordon, 1 Pick. 297; Chestnut Hill Turnpike v. Rutter, 4 S. & R. 16; Union Bank of Maryland v. Ridgely, 1 Har. & G. 324; Legrand v. Hampden Sydney College, 5 Munf. 324; Elysville Manuf. Co. v. Okisko, 5 Md. 153.

(h) Rolfe, B., Mayor of Ludlow v. Charlton, 6 M. & W. 823; Gibson v. East India Company, 5 Bing. N. C. 275; Lord Denman, C. J., Church v. Imperial Gas Co., 6 A. & E. 861; Williams v. Chester, &c. R. Co., 5 E. L. & E. 497; Diggle v. London, &c. R. Co., 5 Exch. 442; Clark v. Guardians, &c., 11 E. L. & E. 442; Mayor, &c. of Kidderminster v. Hardwick, L. R. 9 Ex. 13; Austin v. Bethnal Green Guardians, L. R. 9 C. P. 91; Hunt v. Wimbledon Local Board, 4 C. P. D. 48. But see Denton v. East Anglian R. Co., 3 Car. & K. 17; Henderson v. Australian, &c. Co., 5 El. & Bl. 409; A. R. M. S. N. Co. v. Marzetti, 11 Exch. 228.

(i) Smith v. Proprietors, &c., 8 Pick. 178; Kennedy v. Baltimore Ins. Co., 3 Har. & J. 367; Trundy v. Farrar, 32 Me. 225; Ross v. Madison, 1 Cart. (Ind.) 281; N. C. R. Co. v. Bastian, 15 Md. 494; Seagraves v. City of Alton, 13 Ill. 366. — Beverly v. Lincoln Gas. Co., 6 A. & E.

eral, if a person not duly authorized make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent. *(j)*¹ *(x)* All duties imposed upon a corporation by law, raise an implied promise of performance. *(jj)* A corporation is a citizen of the State which creates it, as to its right to sue or be sued in the courts of the United States. *(jk)* But it has no *status* as a citizen in any other State, and if it goes there to do business, the State into which it goes may lawfully discriminate against it as between it and domestic corporations of that State; even so far as to compel it to cease business in that State. *(jl)*

The question of execution appears to stand upon somewhat different ground from that of authority; for while a corporation is generally estopped from denying that a contract or an instrument was made by its authority, if it receive and hold the beneficial result of the contract or the instrument, as the price for property sold, or the like, it may, or its creditors may, deny that the * 140 instrument was legally executed, even if the * authority

829; where the judgment of the Court of 421; *Allen v. Citizens, &c. Co.*, 22 Cal. Queen's Bench was delivered by *Patteson*, 28.

(j) *Episcopal Charitable Society v. Episcopal Church*, 1 Pick. 372; *Hayward v. The Pilgrim Society*, 21 Pick. 270; *Randall v. Van Vechten*, 19 Johns. 60. And see *Foster v. Essex Bank*, 17 Mass. 479; *Brown v. Donnell*, 49 Me. 28. *(jj)* *New York R. Co. v. Schuyler*, 34 N. Y. 30. *(jk)* *Ducat v. Chicago, &c. R. Co.*, 48 Ill. 172. *(jl)* *Hatch v. Chicago, &c. R. Co.*, 6 Blatchford, 105; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149.

¹ As where an agent leased land in his own name, but the corporation occupied it, *Clark v. Gordon*, 121 Mass. 330; or the secretary of a company pledged its bonds with the directors' knowledge and acquiescence. *Darst v. Gale*, 83 Ill. 136; *Durham v. Carbon Coal Co.*, 22 Kan. 232. And see *Taylor v. Agricultural, &c. Assoc.*, 68 Ala. 229; *Holmes v. Board of Trade*, 81 Mo. 137; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621; *Manhattan Hardware Co. v. Roland*, 128 Pa. 119. But, in analogy with other cases of ratification, it is necessary that the benefit should be retained after knowledge of the facts has been acquired by officers of the corporation having power to authorize and hence to ratify such transactions. *Gilman, &c. R. Co. v. Kelly*, 77 Ill. 426; *Murray v. Nelson Lumber Co.*, 143 Mass. 250; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495. But it is not necessary that the exact terms of an unauthorized contract should be known, if enough is known to put the corporation on inquiry. *Scott v. Middletown, &c. R. R. Co.*, 86 N. Y. 200. — W.

(x) The president of a corporation, though a leading or sole stockholder, cannot be treated as the whole corporation for the purpose of making a contract or of ratifying his own act. *Bi-Spool Sewing Machine Co. v. Acme Manuf. Co.*, 153 Mass. 404, 408, 26 N. E. 991. As to contracts of employment, the general manager or president of a corporation may, it seems, make binding contracts of this kind for a year, but not for life. *Carney v. New York L. Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471 and note; *Hand v. Clearfield Coal Co.*, 143 Penn. St. 408, 22 Atl. 709; *Trawick v. Peoria, &c. St. Ry. Co.*, 68 Ill. App. 156.

The acceptance by a town of one of its committee's reports does not ratify expenses incurred by the committee, if the report does not disclose that the committee incurred such expenses. *Brown v. Melrose*, 155 Mass. 587, 30 N. E. 87.

were certainly possessed.¹ Thus, if a conveyance purporting to be the conveyance of a corporation, made by one authorized to make it for them, be in fact executed by the attorney as his own deed, it is not the deed of the corporation, although it was intended to be so, and the attorney had full authority to make it so. And if the deed be written throughout as the deed of the corporation, and the attorney when executing it declares that he executes it on behalf of the company, but says, "in witness whereof I set *my hand and seal*," this is, in law, his deed only and does not pass the land of the corporation. (*k*)² And a

(*k*) *Brinley v. Mann*, 2 Cush. 337. See also *Combe's case*, 9 Rep. 76 b; *Frontin v. Small*, 2 Stra. 705. No abler exposition of the doctrine of deeds by attorney is to be found in the books than that of Lord Chief Baron *Gilbert*, Bac. Abr. *Leases*, J. 10: "If one hath power, by virtue of a letter of attorney, to make leases for years generally by indenture, the attorney ought to make them in the name and style of his master, and not in his own name: for the letter of attorney gives him no interest or estate in the lands, but only an authority to supply the absence of his master by standing in his stead, which he can no otherwise do than by using his name, and making them just in the same manner and style as his master would do if he were present: for if he should make them in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose, yet such leases seem to be void, because the indenture being made in his name must pass the interest and lease from him, or it can pass it from nobody: it cannot pass it from the master immediately, because he is no party; and it cannot pass it from the attorney at all, because he has nothing in the lands; and then his adding *by virtue of the letter of attorney* will not help it, because that letter of attorney made over no estate or interest in the land to him, and consequently, he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the master immediately, or through the attorney; for then the same

indenture must have this strange effect at one and the same instant to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do; and therefore all such leases made in that manner seem to be absolutely void, and not good, even by estoppel, against the attorney, because they pretend to be made not in his own name absolutely, but in the name of another, by virtue of an authority which is not pursued. This case, therefore, of making leases by a letter of attorney seems to differ from that of a surrender of a copyhold, or of livery of seizin of a freehold, by letter of attorney; for in those cases when they say, *We A and B as attorneys of C, or by virtue of a letter of attorney from C, of such a date, &c., do surrender, &c., or deliver to you seizin of such lands*; these are good in this manner, because they are only ministerial ceremonies or transitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig; and when they do them as attorneys, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly; but in a lease for years it is quite otherwise, for the indenture, or deed, alone conveys the interest, and is the very essence of the lease, both as to the passing it out of the lessor at first, and its subsistence in the lessee afterwards; the very indenture, or deed itself, is the conveyance, without any subsequent construction, or

¹ A deed to a corporation after the granting of its charter, but before organization, and duly recorded, will be presumed to have been accepted as soon as the corporation was capable of contracting. *Rotch's Wharf Co. v. Judd*, 108 Mass. 224. A corporation cannot, however, ratify an act made for its benefit before it had an existence as such. *Melhado v. Porto Alegre, &c R. Co.*, L. R. 9 C. P. 503. — K.

² A corporation contract, sealed with a private seal of an officer instead of the corporate seal, is binding if he had authority so to do, or his act is ratified. *Eureka Co. v. Bailey Co.*, 11 Wall. 488. — K.

* 141 corporation must execute its deed under its * corporate seal, otherwise the deed is void. (*l*) If, however, it was only a simple contract which was executed in this way, it might be inferred from the general principles of the law of agency, that it would be valid as the contract of the corporation; for it would be a contract made by one as the agent of another, and containing the express declaration that it was so made. (*x*)

It must be remembered that a corporation, as a legal person, is entirely distinct from the individuals who compose it, and therefore a resolution adopted by them is not a corporate act, nor is a deed by trustees of the members the deed of the corporation. (*ll*) Corporations to hold property are generally limited as to the amount they may hold. It has been held in New York, that they could not take in excess of their charter, (*lm*) reversing the decision of the Supreme Court that they could take and hold until the State interfered with them.

A corporation may employ one of its members as its agent, and the same person, while such agent, may also be an agent for the other contracting party, and sign for him the memorandum required by the Statute of Frauds. (*m*) And the officers and directors of a corporate body are trustees of the stockholders, and cannot without fraud secure to themselves advantages not common to the latter. (*n*)¹ (*y*) But a director may make a contract

operation of law thereupon; and therefore it must be made in the name and style of him who has such interest to convey, and not in the name of the attorney, who has nothing therein. But in the conclusion of such lease, it is proper to say *In witness whereof A B, of such a place, &c., in pursuance of a letter of attorney hereunto annexed, bearing date such a day, hath put the hand and seal of the master, and so write the master's name, and deliver it as the act and deed of the master, in which last ceremony of delivering it in the name of the master by such*

attorney, this exactly agrees with the ceremony of surrendering by the rod, or making livery by a turf or twig, by the attorney, in the name or as attorney of his master." And see *Porter v. Androscoggin, &c. R. Co.*, 37 Me. 349; *Richardson v. Scott River Co.*, 22 Cal. 150.

(*l*) *Koehler v. Iron Co.*, 2 Black, 715.

(*ll*) *Gashwiler v. Willis*, 33 Cal. 11.

(*lm*) *Chamberlain v. Chamberlain*, 43 N. Y. 424; *In re McGraw*, 111 N. Y. 66.

(*m*) *Stoddert v. Vestry of Port Tobacco Parish*, 2 G. & J. 227.

(*n*) *Koehler v. Iron Co.*, 2 Black, 715.

¹ Thus the directors of a railroad cannot secure, at its expense, undue advantages to themselves, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it by the railroad, in the profits of which they are to share as stockholders of the new company. *Wardell v. Railroad Co.*, 103 U. S. 651. Nor can an officer of a corporation, which he knows to be insolvent, discharge a debt which he owes it with stock of the corporation. *Quein v. Smith*, 108 Pa. 325. Nor buy at a discount claims against the corporation and enforce their face value. *Ex parte Larking*, 4 Ch. D. 566; *Thomas v. Sweet*, 37 Kan. 183. See Ham-

(*x*) See *Speirs v. Union Drop Forge Co.*, 174 Mass. 175, 54 N. E. 497; 2 Kent Com. (14th ed.) p. *291 n.

(*y*) The directors of a corporation, though not technically trustees thereof, and though merely its agents as to third persons, are

with a corporation, and then, as to his contract, he stands as a stranger to it. (*nn*)

A corporation is the creature of the law, and is only what the act of incorporation has made it, and derives all its powers from that act. (*no*) Nevertheless, corporations authorized by their charter to act in a prescribed manner may to some extent by practice and usage make themselves liable on contracts entered into in a different way. (*o*) But it has been decided that corporations cannot exceed the powers given in their charters and make contracts not incidental or ancillary to the exercise of those powers, and that they are not estopped from setting up their own want of authority to make such contracts by the fact that they have been in the habit of entering into and fulfilling similar engagements, for a long period. (*p*)¹ This question may be regarded, however,

(*nn*) *Stratton v. Allen*, 1 Green, 229. See *Hill v. Nisbet*, 100 Ind. 341; *Baker v. Harpster*, 42 Kan. 511; *Battelle v. Northwestern, &c. Co.*, 37 Minn. 89.

(*no*) *Baltimore v. Baltimore, &c. R. Co.*, 21 Md. 50.

(*o*) *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Bulkley v. Same*, 2 id. 252; *Le Conteulx v. Buffalo*, 33 N. Y. 333.

(*p*) *Governor, &c. of Miners v. Fox*, 16 Q. B. 229; *Hood v. New York, &c. R. Co.*, 22 Conn. 502.

mond's Appeal, 123 Pa. 503. Nor make any kind of secret profit. Liquidators of *Imperial, &c. Assoc.*, L. R. 6 H. L. 189; *European, &c. Ry. Co. v. Poor*, 59 Me. 277; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Keokuk, &c. Co. v. Davidson*, 95 Mo. 467; *Duncomb v. N. Y., &c. R. Co.*, 84 N. Y. 190. See *Gamble v. Queen's County Water Co.*, 123 N. Y. 91. As to the validity of a contract between two corporations, when some of the directors of one corporation are also directors in the other, see *Metropolitan Telephone Co. v. Domestic Telegraph Co.*, 44 N. J. Eq. 568. — W.

¹ A railroad corporation, authorized to build between certain points and pay interest on instalments on stock until its completion, cannot, on the extension of the road to other points, continue to pay such interest until the extension is completed, *Pittsburg, &c. R. Co. v. Allegheny*, 63 Penn. St. 126; equally a lease by a railroad of its road, rolling-stock, and franchises, for which no authority is given in its charter, is *ultra vires* and void. *Thomas v. Railroad Co.*, 101 U. S. 71; *Troy, &c. R. Co. v. Boston, &c. R. Co.*, 86 N. Y. 107. On the same principle, neither a railroad corporation, nor one to make and sell musical instruments, can guarantee the expenses of a musical festival in expectation of an increase of traffic or business, *Davis v. Old Colony R. Co.*, 131 Mass. 258; *Davis v. Smith Organ Co.*, 131 Mass. 258; but a glass manufacturing corporation may contract to buy glass ware for its trade while repairing its works, *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315; a water-power company, after the extinguishment of its water-power, may sell and agree to regrade its land, *Dupee v. Boston Water Power Co.*, 114 Mass. 37; and a tract society with the char-

liable, in equity, like ordinary trustees, for unlawful gain to themselves, or such mismanagement as results in a waste of its assets or injury to its property. *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751 and note; *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. 625, 630, 23 Blatch. 517; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Costa Rica Ry. Co. v. Forwood*, [1901] 1 Ch. 746. A lease to directors,

or a contract to pay for a director's services, is not necessarily fraudulent, if approved by or known to the stockholders. *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Fort Payne Rolling Mills v. Hill*, 175 Mass. 224, 55 N. E. 532. As to the liability and fiduciary relation of promoters, see *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656; *Pittsburg M. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 161 n.; 2 Kent Com. (14th ed.), p. *281 n. (*z*).

as not yet fully determined. The plea of *ultra vires* as defined by *Comstock, J.*, imports, not that the corporation could not, and did not in fact, make the authorized contract, but that it ought not to have been made.¹ (x) The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. (q)

A corporation expressly authorized to transact business in which it is customary to use negotiable paper, or receiving or using negotiable paper in the proper transaction of business of any kind, has, as a general rule, power to make, indorse, or otherwise dispose of negotiable paper in any way not in itself objectionable. (qq)

No stockholder has any claim to a dividend until it be declared. And when the distribution is ordered, it would seem that it should be distributed among those who were stockholders at the time of the order. (qr)² It is very common to create by will or otherwise a trust whereby the income and dividends of certain stock are payable to a person during his life, the principal going elsewhere at his death. If extra dividends are earned and declared, the general rule must be that they belong to the party entitled to

(q) *Bissell v. The M. R. Co.*, 22 N. Y. 258. *v. Watson*, id. 583; *Wood v. Wellington*, 30 N. Y. 218; *Brookman v. Metcalf*, 32 N. Y. 591.

(qq) *Farmers' Bank v. Maxwell*, 32 N. Y. 579; *Same v. Ellis*, id. 583; *Same (qr) Goodwin v. Hardy*, 57 Me. 143.

tered right to hold property for investment, may receive money on lawful conditions securing it the income, failing the performance of which it must return it. *Morville v. Am. Tract Soc.*, 123 Mass. 129. In New York a distinction is made between an executory and an executed contract of a corporation *ultra vires*, the latter of which only will be enforced. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. — K.

¹ "A contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." *Pittsburgh, &c. Ry. Co. v. Keokuk, &c. Bridge Co.*, 131 U. S. 371, 389; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24. — W.

² And such distribution should be made within a reasonable time after the dividend is declared. *Beers v. Bridgeport Spring Co.*, 42 Conn. 17. See *Brundage v. Brundage*, 60 N. Y. 544. A purchaser of shares at auction, by the terms of sale of which a deposit was to be made at once, and the remainder of the purchase-money paid at a future time, is entitled to a dividend meanwhile declared. *Black v. Homersham*, 4 Ex. D. 24. — K.

(x) 2 Kent Com. (14th ed.), p. 300 n. A person who claims title by adverse possession, and sustains no contractual relation with a corporation, is not estopped from attacking its deed; but one who contracts with an organization as a corporation in its corporate name is estopped from denying its corporate existence at

the time of making the contract, or from alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract. *Bradley v. Reppell*, 133 Mo. 545, 32 S. W. 645; 34 id. 841; *West Missouri Land Co. v. Kansas City S. B. R. Co.*, 161 Mo. 595, 604, 61 S. W. 847.

the dividends. (*qs*) But it has been held in Massachusetts, that if instead of paying out earnings as dividends in money, additional stock is created, absorbing those earnings, the shares thereof distributed to the trustee under such a trust, must be held by him as additions to the capital, and not paid over to the party entitled to the dividends. (*qt*) (*x*) The question is not without its difficulty. Municipal corporations created by acts of incorporation, are governed and limited by those acts quite as much as private corporations. In the older States there are towns which rest upon prescription; and in all our States there are general laws applicable to all municipal corporations. The questions which have arisen under the acts of incorporation, or the general laws relating to this subject, are, mainly, questions concerning the right or power of the town or city to make certain by-laws or enter into certain agreements; and the constitutional power of the legislature to confer certain powers upon these corporations. These questions are indefinitely diversified; but the principle which runs through all the cases may be stated thus. A town or city has not only the power of making by-laws or contracts expressly permitted by law, but all such as can be reasonably considered incident to the powers expressly given, or as necessary for the proper exercise of those powers; and in determining what powers are thus necessary much regard is paid to the nature of these corporations and the purposes for which they exist; and a liberal though not a lax construction is given to provisions intended to promote the interests of the public.

By way of illustration of this, it may be said, that in Illinois it

(*qs*) *Woodruff's Estate*, 1 Tuck. 58. The authorities are fully examined in this case.

(*qt*) *Minot v. Paine*, 99 Mass. 101.

(*x*) A stock dividend is now usually treated as capital, while cash dividends go to increase the income of each share of stock; although even stock dividends have been held to be income when such clearly appears to have been the intention of the corporation. See *Gibbons v. Mahon*, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525; *Slocum v. Ames*, 19 R. I. 401, 34 Atl. 152; *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461 and note; *Mills v. Britton*, 64 Conn. 4, 29 Atl. 231; *Law v. Alley*, 67 N. H. 93, 29 Atl. 636; *Davis v. Jackson*, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801; *D'Ooge v. Leeds*, 178 Mass. 558, 57 N. E. 1025; *Bouch v. Sproule*, 12 A. C. 385; *In re Northage*, 60 L. J. Ch. 488; *In re Alsbury*, 45 Ch. D. 237; *Howe v. Dartmouth*, (7 Ves. 137),

See also *Leland v. Hayden*, 102 Mass. 542; *Heard v. Eldredge*, 109 Mass. 258; *Rand v. Hubbell*, 115 Mass. 461; *Gifford v. Thompson*, 115 Mass. 478.

25 Eng. Ruling Cas. 28, 49, 50; 19 Am. L. Rev. 571, 737; 26 id. 1; 36 Cent. L. J. 452. In New York, however, the Court of Appeals has recently declared the intention of the corporation to be immaterial. *McLouth v. Hunt*, 154 N. Y. 179, 198, 48 N. E. 548, 39 L. R. A. 230; *New York L. Ins. Co. v. Baker*, 165 N. Y. 484, 59 N. E. 1127.

And the following recent decisions hold that stock dividends belong to the tenant for life as income. *Thomas v. Gregg*, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; *Quinn v. Safe Deposit Co.*, 93 Md. 285, 48 Atl. 835, 53 L. R. A. 169; *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

is held that the legislature may authorize municipal bodies to take stock in railroads, without a vote of the inhabitants. (*qu*) In Massachusetts, an ordinance of a city prohibiting projecting awnings was sustained; (*qv*) and another prohibiting any person from permitting swine under his care to go upon a sidewalk. (*qw*) In Georgia, it is held that a city cannot obstruct the streets by the erection of any building, however necessary. (*qx*) In Illinois, a city council having by charter a power to establish and regulate markets, has no authority to prohibit the sale of vegetables outside the market limits. (*qy*) In Iowa, a city may construct a bridge across a stream dividing streets, and issue its bonds to pay for the same, (*qz*) but has no power to erect a toll-bridge. (*qa*)

In the absence of special provisions in the charter, or of by-laws lawfully made, the corporate acts of a corporation are the acts of a majority at a regular meeting, whether those present were or were not a majority of the members of the corporation. (*r*) And these corporate acts are binding upon all the members. (*s*) It does not seem to have been positively decided whether this must be a majority of all the members present, or may be only a majority of all present and voting. But we hold that it may be the latter. Otherwise, persons not voting would be counted as voting against the measure. As a majority of all present binds all the members, because all the members might be present, and perhaps because it is their duty to be present, so a majority of those present and voting should have the same force, because it is within the right and power and perhaps the duty of all present to vote, and so to express their dissent from any measure which they do not approve. The individuality of members is merged in that of the corporation, and therefore at common law no member is liable personally for the debt of the corporation. But in some States the private

(*qu*) *Keithsburg v. Frick*, 34 Ill. 405.

(*qv*) *Pedrick v. Bailey*, 12 Gray, 161.

(*qw*) *Commonwealth v. Curtis*, 9 Allen, 266.

(*qx*) *Columbus v. Jaques*, 30 Ga. 506.

(*qy*) *Caldwell v. Alton*, 33 Ill. 416.

(*qz*) *Mullasky v. Cedar Falls*, 19 Ia. 21.

(*qa*) *Clark v. Des Moines*, 19 Ia. 199.

(*r*) *Attorney-General v. Davy*, 2 Atk. 212.

(*s*) *Rex v. Varlo*, Cowp. 248; *Field v. Field*, 9 Wend. 394. — But where the act is to be done by a body within the corporation, and consisting of a definite number, a majority of that *body* must attend, and then a majority of those thus assembled will bind the rest. *Rex v.*

Bellringer, 4 T. R. 810; *Rex v. Miller*, 6 id. 268; *Rex v. Bower*, 1 B. & C. 492; *Ex parte Willcocks*, 7 Cowen, 402. — The rule is perhaps the same where the act is to be done by the *corporation*, when that consists of a definite number. *Lord Kenyon*, *Rex v. Bellringer*, 4 T. R. 822. At common law, the corporation may delegate to a select body in itself, its power of electing members or officers. *Rex v. Westwood*, 7 Bing. 1. — In a corporation composed of different classes, a majority of each class must consent before the charter can be altered, if there be no provision in the charter respecting alterations. *Case of St. Mary's Church*, 7 S. & R. 517.

property of any member of a city or town or school district, or a territorial (not a poll) parish, may be taken on execution against the corporation, and he has his remedy over against the corporation: (t) and in many of our States it is now provided by law that members of Banking Corporations, of Manufacturing Corporations, and, in a few instances, of some other corporations, are responsible for the debts of the corporations in * whole or in * 143 part. (tt) The various statutory provisions on this subject are usually precise and definite. It has been held that as this personal liability depends wholly on the provisions of positive law, it is to be construed strictly, (u) and where the certificate of the officers of a corporation in due form was sworn to and recorded as the law required, it exempted the stockholders from personal liability without reference to the truth of the statements in the certificate. (v) And in a later case it was held that the officers of a manufacturing company were not made liable by their false statement that the capital stock was paid in, unless the statement was wilfully false. (w)

Negotiable paper may be made, indorsed, or otherwise disposed of by corporations generally, by the presidents or cashiers writing their names with their titles of office; especially if making or dealing with such paper is within the scope of the proper business of the corporation. (x)

(t) Gatehill's case, 5 Dane, Abr. 158; *Parsons*, C. J., in 7 Mass. 187; *Gaskill v. Dudley*, 6 Met. 546.

(tt) The following cases relate to this subject: *Utley v. Union Tool Co.*, 11 Gray, 139; *Medill v. Collier*, 16 Ohio, 599; *McHose v. Wheeler*, 45 Penn. St. 32; *French v. Teschemaker*, 24 Cal. 518; *Allibone v. Hager*, 46 Penn. St. 48; *Baker v. Backus*, 32 Ill. 79. As to who is a stockholder, see *Lathrop v. Kneeland*, 46 Barb. 432. That stockholders are not liable in another jurisdiction, unless by force of some positive law, see *Merrick*

v. Santvord, 34 N. Y. 208. A corporation carrying on a prohibited business cannot interpose their corporate privileges to prevent the liabilities of stockholders. *Richmondville Seminary v. McDonald*, 34 N. Y. 379.

(u) *Gray v. Coffin*, 9 Cush. 199.

(v) *Stedman v. Eveleth*, 6 Met. 114.

(w) *Stebbins v. Edmunds*, 12 Gray, 203.

(x) *State Bank v. Fox*, 3 Blatchford, 431; *Patten v. Moses*, 49 Me. 255; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; s. c. 40 Barb. 179; *Goodrich v. Reynolds*, 31 Ill. 490.

JOINT-STOCK COMPANIES.

IN England the statute of 7 & 8 Victoria, ch. 110, has the effect of making joint-stock companies, formed and registered in a certain way, quasi-corporations.¹ (x) In this country, wherever there are no similar statutory provisions, joint-stock companies are rather to be regarded as partnerships. The English statute above referred to defines a joint-stock company as "a partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners." (a) And this definition may be considered as applicable to such companies in this country. Although a joint-stock company is certainly not a corporation, yet it differs in some respects from a common partnership. A member of a partnership may assign his interest in the property of the firm; but the assignee does not become a partner unless the other copartners choose to admit him; and the interest so assigned being subject to all the debts of the partnership, it may be withheld by the partners for the purpose of settling the affairs of the firm, and until it is certain that there is a balance belonging to the partners, and until the share belonging to the assigning partner may, in whole or in part, be paid over to his assignee without injury to the creditors of the firm. (b) But in a joint-stock company

(a) 7 & 8 Vict. c. 110, § 2. The same section proceeds to include also within the term Joint-Stock Company, all Life, Fire and Marine Insurance Companies, and every partnership consisting of more than twenty-five members.

(b) See *Pratt v. Hutchinson*, 15 East, 511; *Rex v. Webb*, 14 East, 406; *Josephs v. Pebrer*, 3 B. & C. 639; *Fox v. Clifton*, 9 Bing. 115; s. c. 6 id. 776. The Bubble

Act (6 Geo. I. c. 18), made during the excitement produced by the South Sea Company, having been repealed by the statute 6 Geo. IV. c. 91, it was held in *Garrard v. Hardey*, 5 Man. & G. 471, that the formation of a company, the stock in which should be transferable, was not an offence at common law. And the doctrine was reaffirmed in *Harrison v. Heathorn*, 6 Man. & G. 81.

¹ The statutes of 25 & 26 Vict. c. 89; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19, commonly called the Companies Acts, with minor additions and amendments, now express the English law as to Joint-Stock Companies. — W.

(x) The statutes referred to in note 1, in 2 Chitty's Statutes (5th ed.), title "Companies" (annotated).

provision is made beforehand for such transfer, *and this is * 145 a principal object and effect of the division into shares.

In other respects the differences between the law of joint-stock companies and that of partnership (which is our next topic), are not very many nor very important. (c) (x)

Some question has arisen as to the power of a managing committee to pledge the credit of the members of a society; and it is held that this must depend upon the rules and by-laws of the society. (d) Such a case is not likened to that of a partnership, but is governed by the law of principal and agent. (e) Nor has a member of a joint-stock company any implied authority to accept bills in the name of the directors or of the company. (f) The effect of becoming a subscriber to an intended company, in regard to the creation of a partnership between the members as well among themselves as in reference to the public, has been before the courts; and it has been held that an application for shares and payment of the first deposit did not suffice to constitute one a partner, where he had not otherwise interfered in the concern; (g) and that the insertion of his name by the secretary of the company in a book containing a list of the members was not a holding of himself out to the public as a partner. (h) And this on the ground that such person does not thereby acquire a right to share in the profits.

But though there be some want of the necessary formalities or acts of a party to make himself legally a member, yet if he interpose and act as a member or director, (i) attend meetings, accept office, or otherwise give himself out to the public as such, either expressly or by sufficient implication, then he will make himself liable as a partner. (j) And this even if the company * originated in fraud, to which he is not a party, nor * 146 privy; (k) or if a deed expressly required by the printed prospectus to make him a partner has not been signed by him; (l)

(c) See the remarks of Lord *Campbell*, in *Burnes v. Pennell*, 2 H. L. Cas. 497.

(d) *Fleming v. Hector*, 2 M. & W. 172. And see *Reynell v. Lewis*, 15 M. & W. 517.

(e) *Id.*

(f) *Bramah v. Roberts*, 3 Bing. N. C. 963; *Dickinson v. Valpy*, 10 B. & C. 128; *Steele v. Harmer*, 14 M. & W. 831.

(g) *Pitchford v. Davis*, 5 M. & W. 2; *Fox v. Clifton*, 4 Mo. & P. 676, 6 Bing. 776. Same case sent down for a third trial, 9 Bing. 115. And see *Bourne v. Freeth*, 9 B. & C. 632.

(h) *Fox v. Clifton*, 4 Mo. & P. 676.

(i) *Lord Denman*, *Bell v. Francis*, 9 C. & P. 66.

(j) *Doubleday v. Muskett*, 7 Bing. 110; *Tredwen v. Bourne*, 6 M. & W. 461; *Maudslay v. Le Blanc*, 2 C. & P. 409, note; *Braithwaite v. Skofield*, 9 B. & C. 401; *Peel v. Thomas*, 15 C. B. 714. And see *Harrison v. Heathorn*, 6 Scott, N. R. 735.

(k) *Ellis v. Schmoeck*, 5 Bing. 521; s. c. 3 Mo. & P. 220.

(l) *Maudslay v. Le Blanc*, 2 C. & P.

(x) See *infra*, p. 168 n. (y); 3 Kent Com. (14th ed.) p. * 27 and notes.

or even if the company has never been regularly and finally formed; (*m*) or has been abandoned; (*n*) or is insolvent. (*o*)

It seems that a member of such a company may sue the company for work and labor done, and money expended by him in their behalf. (*p*)

409, n. And see *Ellis v. Schmoeck*, 5 Bing. 521.

(*m*) *Abbott, C. J., Keasley v. Codd*, 2 C. & P. 408, n.

(*n*) *Doubleday v. Muskett*, 7 Bing. 110.

(*o*) *Keasley v. Codd*, 2 C. & P. 408.

(*p*) *Carden v. General Cemetery Co.*, 5 Bing. N. C. 253. But it is to be observed that this was so held with reference to an *incorporated* joint-stock company; and some stress was laid in the decision upon the particular provisions of the act of incorporation. And see *Peering v. Hone*,

4 Bing. 28. — A member of a joint-stock company, like a member of an ordinary partnership, may recover compensation for service rendered to the company previous to his having become a member of it. *Lucas v. Beach*, 1 Man. & G. 417. In general, however, an action cannot be maintained by a member against the company, or by the company against a member, on a contract between him and the company. *Neale v. Turton*, 4 Bing. 149; *Wilson v. Curzon*, 15 M. & W. 532; *Holmes v. Higgins*, 1 B. & C. 74.

* CHAPTER XII.

* 147

PARTNERSHIP.

SECT. 1. — *What Constitutes a Partnership.*

A PARTNERSHIP exists when two or more persons combine their property, labor, and skill, or one or more of them, in the transaction of business, for their common profit. (a) A copartnership is not a corporation, nor a joint-tenancy, nor a co-tenancy. Some of its qualities and characteristics are similar to those of these other modes of joint-interest. But it has its own system of rules and principles of law which must govern all the questions arising under it; and mistakes have arisen from attempting to bring rules from these other modes of joint-interest, to control questions of partnership.

A partnership is presumed to be general when there are no stipulations, or no evidence from the course of business, to the contrary. (b) But it may be created for a specific purpose, or be confined by the parties to a particular line of business, or even a single transaction. When the partnership is formed by written articles, it is considered as beginning at the date of the articles, unless they contain a stipulation to the contrary. (c)

(a) *Noyes v. Cushman*, 25 Vt. 390. For a discussion of the principles of law applicable to partnerships between attorneys at law, and the responsibilities growing out of them, and as to the effect of the dissolution of the firm by the death of one of its members, see *McGill v. McGill*, 2 Met. (Ky.) 258; *Denver v. Roane*, 99 U. S. 355; *Osment v. McElrath*, 68 Cal. 466; *Williams v. More*, 63 Cal. 50; *Egleston v. Boardman*, 37 Mich. 17; *Warner v. Griswold*, 8 Wend. 665; *Jackson v. Bohrmann*, 59 Wis. 422.

(b) There is nothing in the law to prevent its being a universal partnership, however rare and difficult such cases must be in fact. See *Goesele v. Bimeler*, 14 How. 589; *Bates, Partnership*, § 13. On the other hand a partnership may be limited to one particular subject. *Ripley v. Colby*, 3 Foster (N. H.), 438.

(c) *Williams v. Jones*, 5 B. & C. 108.

An attorney entered into a written contract, whereby he agreed to take into partnership in his business a person who had not then been admitted as attorney, and therefore could not be lawfully received. No time being expressly fixed for the commencement of the partnership, the court held that it was an agreement for a present partnership, and that parol evidence was not admissible to show that it was a conditional agreement, which was not to take effect till the person to be received was admitted as an attorney, and that it was therefore void. See *Dix v. Otis*, 5 Pick. 38. — But parties may agree to form a partnership at some future time, and until it arrives they will not be liable as partners, unless they have held themselves out as such. *Dickinson v. Valpy*, 10 B. & C. 128; *Avery v. Lauve*, 1 La. An. 457.

In general, persons competent to transact business on their own account may enter into partnership; the disabilities of coverture, infancy, and the like, applying equally in both cases.¹(x) But

interesting questions have been raised as to the rights and
 * 148 * liabilities of those who represent infants. The personal liability of such a party would seem to depend upon the question whether he has claimed and exercised the right of withdrawing any part of the capital, or of receiving a share of the profits.(y) Perhaps if he had by agreement the right to do this,

¹ In many jurisdictions married women may now, by statute, enter into partnership. See *Dupuy v. Sheak*, 57 Ia. 361; *Kutcher v. Williams*, 40 N. J. Eq. 436; *Bitter v. Rathman*, 61 N. Y. 512; *Silveus's Ex. v. Porter*, 74 Pa. 448; *Merchants Nat. Bank v. Raymond*, 27 Wis. 567. But a married woman still generally may not become a partner with her husband. *Haas v. Shaw*, 91 Ind. 384; *Bowker v. Bradford*, 140 Mass. 521; *Payne v. Thompson*, 44 Ohio St. 192.

Where the rule of the common law is not changed by statute, a married woman cannot enter into partnership, her contracts being void. *Haas v. Shaw*, 91 Ind. 384; *Todd v. Clapp*, 118 Mass. 495; *Newman v. Morris*, 52 Miss. 239; *Swasey v. Antram*, 24 Ohio St. 87; *Miller v. Marx*, 65 Tex. 131. In *Swasey v. Antram*, it was held that where the husband assented to her acting as a partner, she became his agent and he was liable accordingly.

The contracts of infants are only voidable, not void. Hence infants may enter into partnership. And so far as an infant has actually put his property into the business, he cannot by rescission withdraw it from liability for partnership debts. *Bush v. Linthicum*, 59 Md. 344. See also *Yates v. Lyon*, 61 N. Y. 344. Nor can he withdraw it as against his adult partner when there are unpaid debts. *Page v. Morse*, 128 Mass. 99; *Dunton v. Brown*, 31 Mich. 182. See *Sparman v. Keim*, 83 N. Y. 245.

A corporation, unless specially authorized, cannot become a partner, as that would subject it to liabilities for the acts of others besides its officers. *Pearce v. Madison, &c. R. R. Co.*, 21 How. 441; *Gunn v. Central Railroad*, 74 Ga. 509; *Whittenton Mills v. Upton*, 10 Gray, 582; *Hackett v. Multnomah Ry. Co.*, 12 Oregon, 124.

A corporation may, however, by its charter be empowered to enter into partnership. *Butler v. American Toy Co.*, 46 Conn. 136. See also *Aigen v. Boston, &c. R. R. Co.* 132 Mass. 423; *Allen v. Woonsocket Co.*, 11 R. I. 288. — W.

(x) A corporation cannot become a partner, without express or implied authority therefor. *Bissell v. Michigan So. R. Co.*, 22 N. Y. 258; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *Butler v. American Toy Co.*, 46 Conn. 136; *Geurinck v. Alcott* (Ohio), 63 N. E. 714. But a corporation, by sharing in the business management of a partnership, may become a partner *de facto*, and be estopped to claim as a general creditor of the firm in bankruptcy. *Wallerstein v. Ervin*, 112 Fed. 124, 50 C. C. A. 129.

A partnership may, as an entity, become a member of another partnership. *In re Hamilton*, 1 Fed. 800; *Newman v. Eldridge*, 107 La. 315, 31 So. 688; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *In re Gilbert*, 94 Wis. 108, 68 N. W. 863; *post*, p.* 157.

(y) See *Craig v. Van Bebber* (100 Mo. 584), 18 Am. St. Rep. 569, 601 n. An infant partner, on rescission, cannot, in the

absence of fraud, recover money paid by him for admission as a member of the firm. *Adams v. Beall*, 67 Md. 53. But an infant partner may, after majority, ratify a firm mortgage. *Salinas v. Bennett*, 33 S. C. 285. Infancy of one member of a partnership may be pleaded by him to a suit in contract for goods sold to the firm. *Folds v. Allardt*, 35 Minn. 488; see *Pelletier v. Couture*, 148 Mass. 269 (19 N. E. 400); 1 L. R. A. 863, n. One partner's assignment of the firm's assets does not bind his infant partner. *Foot v. Goldman*, 68 Miss. 529. A statute authorizing persons to form a co-operative relation, such as a mutual assessment company, or a corporation, applies *prima facie* only to persons of full age. *In re Globe Mutual Benefit Ass'n*, 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547; *Warwick v. Bruce*, (6 Taunt. 118), 6 English Ruling Cas. 43, 51 n. In New York and Pennsylvania joint-stock companies, though possessing

and more certainly if he had actually withdrawn capital or profits, he would be held personally responsible for the debts of the partnership. (*d*) It is often said that whether persons who engage in joint transactions are partners, depends upon their intentions; but it must be remembered that by this is meant their intentions as legally expressed or ascertained. (*dd*)

Usually, the partners own together both the property and the profits; but there may be a partnership in the profits only. For as between themselves the property may belong wholly to one member of the partnership, although it is bound to third parties for the debts of the firm; as when it is bought wholly by funds of one partner, and the other is to use only his skill and labor in disposing of it, for a share of the profits. (*e*)

SECTION II.

OF THE REAL ESTATE OF A PARTNERSHIP.

All kinds of property may be held in partnership; and there may be a partnership to trade in land, (*f*)¹ (*x*) or to cultivate land * for the common profit; (*g*) but real estate is still * 149 subject, to a certain extent, to the rules which govern that

(*d*) *Barklie v. Scott*, 1 Hud. & B. 83; *Owens v. Mackall*, 53 Md. 382; *Miles v. Wann*, 27 Minn. 56; *Williams v. Rogers*, 14 Bush, 776.

(*dd*) *Salter v. Ham*, 31 N. Y. 321.

(*e*) *Pierce v. Shippee*, 90 Ill. 371; *Kuhn v. Newman*, 49 Ia. 424; *Getchell v. Foster*, 106 Mass. 42. A broker was held to be interested as a partner in the goods, and pledge the whole of them. *Reid v. Hollinshead*, 4 B. & C. 867. *Abbott, C. J.*: "Such a partnership may well exist, although the whole price is in the first instance advanced by one partner, the other contributing his time and skill and security in the selection and purchase of the commodities." But a broker who merely acts

as agent, and in lieu of commissions is to receive profits arising from the sale, and bear the losses, has no property in the subject of the sale as a partner, although he may be liable as such to third persons. *Smith v. Watson*, 2 B. & C. 401. So where one partner furnishes capital, and the other labor, mutual interest in the profits alone will not render the latter liable to the former for contribution for loss of capital. *Heran v. Hall*, 1 B. Mon. 159. See also *Berthold v. Goldsmith*, 24 How. 536.

(*f*) *Campbell v. Colhoun*, 1 Penn. 140; *Fall River Wharf Co. v. Borden*, 10 Cush. 458; *Clagett v. Kilbourne*, 1 Black, 346.

(*g*) *Allen v. Davis*, 13 Ark. 28.

¹ Such a partnership may be created orally, *Causler v. Wharton*, 62 Ala. 358; *Chester v. Dickerson*, 54 N. Y. 1; *Holmes v. McCray*, 51 Ind. 358; *Hirbour v. Reed*, 3 Montana, 15; *McCully v. McCully*, 78 Va. 159; *contra* is *Parker v. Bowles*, 57 N. H. 491. See *Williams v. Gillies*, 75 N. Y. 197. — W.

essential attributes of corporations and also of common-law partnerships, are not legal entitles, but, having no legal existence apart from their members, are in fact and in law partnerships. *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96,

16 L. R. A. 183; *State v. U. S. Express Co.*, 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667; *Edwards v. Warren Linoline Works*, 168 Mass. 564, 47 N. E. 502.

(*x*) *Goldthwaite v. Janney* (102 Ala. 431), 48 Am. St. Rep. 56, 65 n.

kind of property.¹ There has been much conflict and uncertainty as to some of the rights and remedies of partners and creditors in respect to real property belonging to the partnership, both in England and in this country. But we consider the established and the just rule to be, that when real estate is purchased with partnership funds, for partnership purposes, it will be treated as partnership property, and held like personal property, chargeable with the debts of the firm, and with any balance which may be due from one partner to the other, upon the winding up of the affairs of the firm. (x) But it seems to be the prevailing * 150 rule in this country, * that as between the personal representative and the heirs of a deceased partner, his share of the surplus of the real estate of the partnership, after all its debts are paid, and the equitable claims of its members are adjusted, will be considered and treated as real estate.² It has been held, that

¹ If purchased by partnership funds for partnership purposes, such real estate is firm property, whether one or all the partners hold the legal title, *Davies v. Games*, 12 Ch. D. 813; *Offutt v. Scott*, 47 Ala. 104; *Bopp v. Fox*, 63 Ill. 54; *Johnson v. Clark*, 18 Kan. 157; *Whitmore v. Shiverick*, 3 Nev. 288; *Collins v. Decker*, 70 Me. 23; *Ross v. Henderson*, 77 N. C. 170; *Knott v. Knott*, 6 Oreg. 112; *West Hickory Ass. v. Reed*, 80 Penn. St. 38; *Lime Rock Bank v. Phetteplace*, 8 R. I. 56; *Fairchild v. Fairchild*, 64 N. Y. 471; if not so purchased, it belongs to the partners individually, *Homer v. Homer*, 107 Mass. 82; *Price v. Hicks*, 14 Fla. 565; *Morgan v. Olvey*, 53 Ind. 6. Such real estate must satisfy firm in preference to individual creditors. *Hiscock v. Phelps*, 49 N. Y. 97; *Rose v. Izard*, 7 S. C. 442. A surviving partner can sell the firm real estate, and equity will compel the heir holding the legal title to convey it, *Murphy v. Abrams*, 50 Ala. 293; *Keith v. Keith*, 143 Mass. 262; *Mathews v. Hunter*, 67 Mo. 293; whether necessary to pay debts or not, *Soloman v. Fitzgerald*, 7 Heisk. (Tenn.), 552. — K.

² *Epsy v. Comer*, 76 Ala. 501; *Lenow v. Fones*, 48 Ark. 557; *Robertson v. Baker*, 11 Fla. 192; *Strong v. Lord*, 107 Ill. 25; *Grissom v. Moore*, 106 Ind. 296; *Lowe v. Lowe*, 13 Bush, 688; *Buffum v. Buffum*, 49 Me. 108; *Goodburn v. Stevens*, 5 Gill, 1; *Shearer v. Shearer*, 98 Mass. 107; *Harris v. Harris*, 153 Mass. 439, 443; *Scruggs v. Blair*, 44 Miss. 406; *Holmes v. McGee*, 27 Mo. 597; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Fairchild v. Fairchild*, 64 N. Y. 471; *Rammelsberg v. Mitchell*, 29 Ohio St. 22, 53; *Leaf's Appeal*, 105 Pa. St. 505; *Bowman v. Bailey*, 20 S. C. 550; *Griffey v. Northcutt*, 5 Heisk. 746; *Dewey v. Dewey*, 35 Vt. 555; *Diggs' Adm. v. Brown*, 78 Va. 292; *Martin v. Morris*, 62 Wis. 418.

In England and Ireland, however, real estate belonging to a partnership is treated in equity as personality for all purposes, — not only so far as it is needed for the pay-

(x) Lands bought with partnership funds are *prima facie*, in equity, converted into personality for the purpose of settling the firm's affairs, according to the parties' real or presumed intention in buying them, though the title may have been taken in the name of one partner. *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299; *Bernheimer v. Schmid*, 73 N. Y. S. 767, 36 Misc. Rep. 456; *Lindsay v. Race*, 103 Mich. 28, 61 N. W. 271; *Hake v. Coach*, 107 Mich. 197, 65 N. W. 209; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449 and note;

National Union Bank v. National Mechanics' Bank (Md.), id. 476; *In re Groetzing*, 110 Fed. 366; *Harris v. Harris*, 153 Mass. 439, 26 N. E. 1117; *Yorks v. Tozer*, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, and note; *Goldthwaite v. Janney* (102 Ala. 431), 48 Am. St. Rep. 56, 62, 70 n.; *Cox v. Hickman* (8 H. L. Cas. 268), 19 English Ruling Cas. 323, 405 n.; *Crawshay v. Maule* (1 Swanst. 495), id. 467, 482, 483 n. After its debts are paid, the real estate of a partnership is realty. *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 579; *Coolidge v. Burke* (Ark.), 62 S. W. 583; *Moore v. Wood*, 171 Penn. St. 365, 33 Atl. 63.

the real estate of a partnership does not acquire the incidents or liabilities of personal estate, unless there be an agreement of the partners to that effect; and that then this change in the legal nature of the property results from this agreement; (*j*)

but we doubt the *accuracy of this ruling; unless it is * 151 admitted that such agreement may be inferred from the purchase of the property by partnership funds, and the use of it for partnership purposes.¹ It seems that improvements made with partnership funds on real estate belonging to one of the partners, will be treated as the personal property of the partnership. (*k*) (*y*)

The widow has her dower in the estate after the debts are paid, but not until then. (*l*)² Although the legal title is protected, the

(*j*) In *Coles v. Coles*, 15 Johns. 159; *Thornton v. Dixon*, 3 Bro. Ch. 199; *Bell v. Phynn*, 7 Ves. 453; *Balmain v. Shore*, 9 id. 500; *Smith v. Jackson*, 2 Edw. Ch. 28, language is used which might have this interpretation. But see *Collumb v. Read*, 24 N. Y. 505; *Ripley v. Waterworth*, 7 Ves. 425; *Collyer*, Part. § 142; *Selkrig v. Davies*, 2 Dow, 242; *Crawshay v. Maule*, 1 Swanst. 521; *Townsend v. Devaynes*, 1 Montague on Partnership, App. n. (2 A); *Jarvis v. Brooks*, 7 Foster (N. H.), 37; *North Penn. Coal Co.'s Appeal*, 45 Pa. 181.

(*k*) *Burdon v. Barkus*, 3 Giff. 412; 4 De G. F. & J. 42; *Chittenden v. Witbeck*, 50 Mich. 401; *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Buckley v. Buckley*, 11 Barb. 43.

(*l*) *Goodburn v. Stevens*, 5 Gill, 1; *Greene v. Greene*, 1 Hamm. 244; *Richardson v. Wyatt*, 2 Desaus. 471; *Woolbridge v. Wilkins*, 3 How. (Miss.) 360, 371; *Burnside v. Merrick*, 4 Met. 541; *Dyer v. Clark*, 5 Met. 562. Upon the death of one of the partners, the survivor has an equitable lien on such real estate for indemnity against the debts of the firm, and for securing the balance due him on settlement of the partnership accounts; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death. See *Simpson v. Leech*, 86 Ill. 286; *Howard v. Priest*, 5 Met. 582; *Peck v. Fisher*, 7 Cush. 386; *Arnold v. Wainwright*, 6 Minn. 358; *Smith v. Smith*, 5 Ves. 189.

ment of creditors and settlement of accounts between the partners, as in the United States, but also as between the heirs or widow of a deceased partner and his personal representatives. *Phillips v. Phillips*, 1 Myl. & K. 649, 663; *Broom v. Broom*, 3 Myl. & K. 443; *Murtagh v. Costello*, 7 Irish L. R. 428; *Atty. Gen. v. Hubbuck*, 10 Q. B. D. 488; 13 Q. B. D. 275. And the law in Canada seems to be the same as in England. *Sanborn v. Sanborn*, 11 Grant's Ch. 359. — W.

¹ The true rule seems to be that whenever real estate is partnership property, it will be treated as personalty to the extent indicated above. Whether real estate is or is not partnership property depends on the intention of the partners, which may be ascertained either from express agreements or from the way the property was acquired and dealt with, as shown by whether it was purchased with partnership funds, whether it was used in the business, who paid the taxes, who paid for insurance and repairs, who collected the rents, and other like circumstances. See *Phillips v. Phillips*, 1 Myl. & K. 649; *Hatchett v. Blanton*, 72 Ala. 423; *Tillotson v. Tillotson*, 34 Conn. 335; *Price v. Hicks*, 14 Fla. 565; *Morgan v. Olvey*, 53 Ind. 6; *Flanagan v. Shuck*, 82 Ky. 617; *Richards v. Manson*, 101 Mass. 482; *Messer v. Messer*, 59 N. H. 375; *Collumb v. Read*, 24 N. Y. 505; *Ross v. Henderson*, 77 N. C. 170; *Warriner v. Mitchell*, 128 Pa. St. 153; *Collner v. Greig*, 137 Pa. St. 606; *Providence v. Bullock*, 14 R. I. 353. — W.

² So of a right to a homestead exemption. *Robertshaw v. Hanway*, 52 Miss. 713.

(*y*) For use and occupation of real estate there is no liability to a partnership upon an agreement made with one of the partners. *Sage v. Lippincott*, 170 Mass. 278, 49 N. E. 434. But, upon a lease signed by two only of four partners, who

thereafter occupy the premises, though those not signing are not liable upon its covenants, there is an implied promise to pay rent according to its terms. *Burkhardt v. Yates*, 161 Mass. 591, 37 N. E. 759.

party having such title is held, if necessary, as trustee for partnership purposes, or for the surviving partner. And if a partner buys land out of partnership funds, and takes title

* 152 * to himself, he may be held as trustee for the partnership. (m) (v) It is to be remembered, however, as before stated, that this rule extends only so far as may be made necessary by the business or debts of the partnership, and as soon as this necessity ceases, any remaining real estate has all the incidents of real property, as to conveyance, inheritance, and dower.

* 153 And where the land * purchased with the partnership funds is afterwards sold by the partner who has the legal title to the whole, or to a part as tenant in common, neither the firm nor its creditors have any lien on the land for partnership purposes, against a purchaser without notice or knowledge, where the deed to the partners did not describe them as members of a firm, or partners, or otherwise indicate the fact that the land was purchased as partnership property.¹ But a purchaser with actual or constructive notice that the land is substantially, although not formally, partnership property, holds it chargeable with the debts of the partnership; and this is the case even if he had no knowledge what those debts were, or even of their existence. (o)

(m) *Pierce v. Trigg*, 10 Leigh, 406; *Pugh v. Currie*, 5 Ala. (N. S.) 446; *Burnside v. Merrick*, 4 Met. 541. See *Buchan v. Sumner*, 2 Barb. Ch. 165; *Smith v. Tarlton*, 2 Barb. Ch. 236; *McGuire v. Ramsey*, 2 Eng. (Ark.) 518; *Hoxie v. Carr*, 1 Sumner, 182; *Phillips v. Crammond*, 2 Wash. C. C. 445. A partner has no interest in the estate purchased in his

copartner's name, unless it was intended or used for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561.

(o) *Hoxie v. Carr*, 1 Sumner, 182; *Cavander v. Bulteel*, L. R. 9 Ch. 79; *Hiscock v. Phelps*, 49 N. Y. 97; *Hewitt v. Rankin*, 41 Ia. 35; *Lewis v. Anderson*, 20 Ohio St. 281. See *Reynolds v. Ruckman*, 35 Mich. 80.

Mowry v. Bradley, 11 R. I. 370, was to the effect that the wife of a partner whose interest in the firm real estate was simply equitable could claim dower in the surplus proceeds of its sale after payment of firm debts. In England and Canada, as it is now held that real estate belonging to a partnership is in equity regarded as personality for all purposes, a widow would never have dower in the surplus. See *ante*, p. * 150, note 1. — W.

¹ *Cavander v. Bulteel*, 9 Ch. 79; *McNeil v. Cong. Soc.* 66 Cal. 105; *Reeves v. Ayers*, 38 Ill. 418; *Divine v. Mitchum*, 4 B. Mon. 488; *Whitney v. Cotten*, 53 Miss. 689; *Priest v. Chouteau*, 85 Mo. 398; *Matlack v. James*, 13 N. J. Eq. 126; *Hiscock v. Phelps*, 49 N. Y. 97; *Ross v. Henderson*, 77 N. C. 170; *Norwalk Bank v. Sawyer*, 38 Ohio St. 339; *Bergeson v. Richardott*, 55 Wis. 129. In Pennsylvania lien creditors also are entitled to priority over the equities of partners or firm creditors in land not appearing on the records to be partnership property. *Shafer's Appeal*, 106 Pa. St. 49. — W.

(v) Though an agreement for the purchase and sale of real estate calls the parties' relation that of partnership, they are not partners if one is only interested in the profits of the venture as compensation for services rendered, or for money advanced, and though the one taking the title may

be required to account as a trustee, a partnership accounting is not a prerequisite to an action, as it is for real partners. *Wakeman v. Somarindyck*, 76 N. Y. S. 815; *Corotinsky v. Maimin*, id. 924; see *Evans v. White* (Miss.) 31 So. 833.

SECTION III.

OF THE GOOD-WILL.

The good-will of an establishment is considered, at least for some purposes, as partnership property.¹(x) Indeed, in case of insolvency, or for other sufficient reasons, a court will take cognizance of it, as a valuable property, and order it to be sold,

¹ The value of the good-will is the advantage secured in succeeding to the business without reference to excluding any other person from the same business. *McIlwaine, J.*, in *Rammelsberg v. Mitchell*, 29 Ohio St. 22, 54. And see *Harrison v. Gardner*, 2 Madd. 198. The good-will is considered a part of the partnership property, and will be included in its sale. *Sheppard v. Boggs*, 9 Neb. 257; *Boon v. Moss*, 70 N. Y. 465. It was indeed held in *Hammond v. Douglas*, 5 Ves. 539, that on the death of a partner, the survivors became entitled to the good-will to the exclusion of the estate of the deceased partner. And see *Lewis v. Langdon*, 7 Sim. 421. This was doubted in *Crawshay v. Collius*, 15 Ves. 218, 227, and cannot now be regarded as law. *Wedderburn v. Wedderburn*, 22 Beav. 84; *Smith v. Everett*, 27 Beav. 446; *Hall v. Barrows*, 4 De G. J. & S. 150; *Dougherty v. Van Nostrand*, Hoff. Ch. 68.

Where a retiring partner has sold his share of the business and good-will he may carry on the same business in the same place in the absence of an agreement to the contrary, and may deal with customers of the old business. *Leggott v. Barrett*, 15 Ch. D. 306; *Pearson v. Pearson*, 27 Ch. D. 145; *Vernon v. Hallam*, 34 Ch. D. 748; *Porter v. Gorman*, 65 Ga. 11; *Wiley v. Baumgardner*, 97 Ind. 66; *Hoxie v. Chaney*, 143 Mass. 592; *McCord v. Williams*, 96 Pa. 78. It was held in *Ginesi v. Cooper*, 14 Ch. D. 596, that it was not allowable to deal with such customers, but this case is overruled by the later English decisions cited above. A retiring partner who has sold his share of the business and good-will may not, however, solicit customers of the old business to deal with him. *Labouchere v. Dawson*, 13 Eq. 322; *Hookham v. Pottage*, 8 Ch. 91; *Leggott v. Barrett*, 15 Ch. D. 306; *Moreau v. Edwards*, 2 Tenn. Ch. 347. See also *Dwight v. Hamilton*, 113 Mass. 175. In *Pearson v. Pearson*, 27 Ch. D. 145; and in *Vernon v. Hallam*, 34 Ch. D. 748, it was held that even such solicitation would not be enjoined.

The assignment of the good-will carries the exclusive right to use the name of the old firm. *Levy v. Walker*, 10 Ch. D. 436; *Doake v. Dodsworth*, 4 Kan. 159; *Rogers v. Taintor*, 97 Mass. 291; *Carmichel v. Latimer*, 11 R. I. 395. But to give this right it is necessary that there should be an express assignment of the good-will. *Gray v. Smith*, 43 Ch. D. 208. — W.

(x) In a commercial, but not in a professional partnership, the good-will is an asset of the firm. *Cook v. Collingridge* (27 Beav. 456), 19 English Ruling Cas. 633, 663, 664, n.; *Gillingham v. Beddow*, [1900] 2 Ch. 242; *Bagby & Rivers Co. v. Rivers*, 87 Md. 400, 40 Atl. 171, 40 L. R. A. 632; *Tennant v. Dunlop*, 97 Va. 235, 33 S. E. 620; *Corwin v. Hawkins*, 59 N. Y. S. 603, 42 App. Div. 571; *Lobeck v. Lee-Clarke-Andreesen Hardware Co.*, 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795; *Rankin v. Newman*, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 63 Pac. 480, 53 L. R. A. 384. But it is not an

asset, when the partners have expressly or impliedly agreed that it shall not be treated as such. *Douthart v. Logan*, 190 Ill. 243, 60 N. E. 507. The good-will of a professional business, such as that of a firm of dentists, may be sold voluntarily, but the courts will not decree a forced sale thereof. *Slack v. Suddoth*, 102 Tenn. 375, 52 S. W. 180, 45 L. R. A. 589, 73 Am. St. Rep. 881.

The benefit of one partner's covenant not to carry on a business similar to that of the firm, for a certain time from its commencement, passes by an assignment of its good-will. *Townsend v. Jarman*, [1900] 2 Ch. 698.

*154 * and restrain partners from pursuing a course which would destroy its value. (p)

In one English case, a distinction was taken between professional partnerships, in which the pecuniary value of the good-will was recognized, and commercial partnerships, in which it was intimated that the rule might be otherwise. (q)¹ But we doubt the value of the distinction.

If the good-will could not be attached, it might still be assigned for the benefit of the creditors. Perhaps it would pass to the assignees of a bankrupt or insolvent, by operation of law; but not so as to carry with it any obligation of further labor or responsibility on the part of the insolvent, to make the good-will available. (r)

SECTION IV.

OF THE DELECTUS PERSONARUM.

The partnership must be voluntary; and therefore no partner and no majority of partners can introduce a new member without the consent of the others. The *delectus personarum* is always preserved, and if one partner sells out his interest in the firm, this works a dissolution of the partnership, which can only be renewed by the agreement of all. But such transfer may be made by a partner, and will give to a *bona fide* purchaser all the right of the partner selling out, to his share of the surplus upon a settlement. (s) *And he may have a suit in equity for his share of the profits. (t)

(p) Williams v. Wilson, 4 Sandf. Ch. 379.

(q) Farr v. Pearce, 3 Madd. 70.

(r) Dougherty v. Van Nostrand, Hoff. Ch. 68.

(s) Gilmore v. Black, 2 Fairf. 488; Griswold v. Waddington, 15 Johns. 82; Moddewell v. Keever, 8 W. & S. 63. The assignment of shares in the stock of an unincorporated company, the certificates of which contained a provision that they should not be assigned without the consent of the directors and treasurer, being made without their assent, does not make the assignee a partner, or

enable him to bring a bill in equity to compel the partners to account. Kingman v. Spurr, 7 Pick. 235.

(t) Mathewson v. Clarke, 6 How. 122, 141. See Alvord v. Smith, 5 Pick. 232; Murray v. Bogert, 14 Johns. 318; Marquand v. N. Y. Man. Co. 17 Johns. 535. That no partner can be introduced by mere sale and transfer to him of a partner's interest, see Mathewson v. Clarke, 6 How. 122; Mason v. Connel, 1 Whart. 381; Putnam v. Wise, 1 Hill (N. Y.), 234. See also Channel v. Fassitt, 16 Ohio, 166; Crawshaw v. Maule, 1 Swanst. 508; Treadwell v. Williams, 9 Bosw. 649.

¹ See also as to good-will in professional partnerships, Austen v. Boys, 2 De G. & J. 626; Arundell v. Bell, 52 L. J. Ch. 537; s. c. 49 L. T. 345; Morgan v. Schuyler, 79 N. Y. 490. — W.

An assignment to trustees for the benefit of the creditors does not make the creditors partners, and though the assignment proposes that the business shall be carried on by the assignees to make the profits for the benefit of the creditors, if they exercise no control or direction in the management of the business, it seems by the latest decisions that they will not be regarded as partners therein, as to third parties; the proper test in such a case being whether the person by whom the business is actually carried on, acts only in the capacity of agent for those to whose benefit the profits are to accrue. (*u*)

SECTION V.

HOW A PARTNERSHIP MAY BE FORMED.

A partnership may be formed by deed, or by parol; and with or without a written agreement. (*v*)¹ (*x*) And whatever be the arrange-

(*u*) *Janes v. Whitbread*, 11 C. B. 406; *Coates v. Williams*, 7 Exch. 205. *Wheatcroft v. Hickman*, *Cox v. Hickman*, 8 H. L. Cas. 268, in which cases it was held that a deed of assignment to trustees of a debtor's property for the purpose of carrying on his business, and after paying all costs and charges thereof, of dividing the residue of the net profits among his creditors in payment of their debts, made the creditors who executed the deed, partners in the business as to third parties. *Hickman v. Cox*, 18 C. B. 617; *Brundred v. Muzzy*, 1 Dutcher, 268.

(*v*) *Owen, Ex parte*, 4 De G. & S. 351; *Smith v. Tarlton*, 2 Barb. Ch. 336. — If the object be to speculate in land, the partnership agreement must be in writing, and a court of equity will not enforce a parol contract for such a purpose. *Smith v. Burnham*, 3 Sumner, 435; *Henderson v. Hudson*, 1 Munf. 510; *Ridgway's App.*, 15 Penn. 117. But this applies only to the contract between the parties, and

as to third persons the partnership may be proved like any other. *In re Warren*, Davies, 320. And see *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beav. 442; *Holmes v. McCray*, 51 Ind. 358; *Richards v. Grinnell*, 63 Ia. 44; *Carr v. Leavitt*, 54 Mich. 540; *Snyder v. Wolford*, 33 Minn. 175; *Hunter v. Whitehead*, 42 Mo. 524; *Williams v. Gillies*, 75 N. Y. 197. — If articles of partnership exist, a creditor of the firm may still prove the partnership by parol. *Griffin v. Doe*, 12 Ala. 783. But the evidence of a partnership must be submitted to the jury. *Drake v. Elwyn*, 1 Caines, 134. The existence of a partnership or joint connection is a question of fact. *Beecham v. Dodd*, 3 Haring, 485. Whether the terms of the agreement and the facts as found by the jury constitute a partnership, is a question of law. *Id.*; *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McC. 20; *Gilpin v. Temple*, 4 Haring, 190.

¹ As to whether a partnership is created, depends upon the meaning of the parties as expressed in the agreement. *Ross v. Parkyns*, L. R. 20 Eq. 331; *Ex parte Tennant*, 6 Ch. D. 303; *Ratzer v. Ratzer*, 1 Stewart, 136; *Chapman v. Eames*, 67 Me. 452. An executory agreement to form does not create a partnership. *Doyle v. Bailey*, 75 Ill. 418; *Lucas v. Cole*, 57 Mo. 143; *Haskins v. Burr*, 106 Mass. 48; *Irwin v. Bidwell*, 72 Penn. St. 244; *Baldwin v. Burrows*, 47 N. Y. 199. See *Beckford v. Hill*, 124 Mass. 588; *Cooley v. Broad*, 29 La. An. 345. — K.

(*x*) Even in the profits of trading in real estate, at least in equity. *Bates v. Babcock*, 95 Cal. 479, 16 L. R. A. 745 and

note, 29 Am. St. Rep. 133; *National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 27 L. R. 476 n. The rule

ment between the parties, one who holds himself out, or permits himself to be held out as a partner, is liable as such. (*vv*)

* 156 The law will *not give effect to an agreement to form a partnership for illegal transactions or purposes. (*w*)¹ (*xx*) An action cannot be maintained for the breach of an agreement to become a partner, unless the terms of the intended partnership were specific and are clearly proved. (*x*) But where a partner in an existing firm agreed that a certain person should be received as a partner in that firm, it was held that an action might be maintained for a breach of that agreement, and some uncertainty in the terms of the agreement was not a sufficient defence. (*y*)

A partnership, in general, is constituted between individuals, by an agreement to enter together into a general or a particular business, and share the profits and the losses thereof. (*z*) (*yy*)

(*vv*) *Moss v. Jerome*, 10 Bosw. 220.

(*w*) *Armstrong v. Lewis*, 2 Cr. & M. 274; *Ewing v. Osbaldiston*, 2 Myl. & C. 53.

(*x*) *Figes v. Cutler*, 3 Stark. 139. In an action for breach of agreement to enter

into a partnership, a plea of dishonest conduct by the plaintiff in his previous partnership relations, is no defence. *Andrews v. Carstin*, 100 Eng. C. L. 444.

(*y*) *McNeill v. Reid*, 9 Bing. 68.

(*z*) *Langdale, Ex parte*, 18 Ves. 300.

¹ A partner in an unlawful business is without remedy against his co-partners, *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, ib. 285; *Lane v. Thomas*, 37 Tex. 157; *Watson v. Murray*, 8 C. E. Green, 257; *In re South Wales, &c. Co.* 2 Ch. D. 763; although an account may be had of that portion of a firm's business that may be legal. *Anderson v. Powell*, 44 Iowa, 20. — K.

that the Statute of Frauds does not usually require an agreement for a partnership to be in writing, though creating an interest in land, has recently been applied in England to a special marriage contract under the French Code. *In re De Nichols, De Nichols v. Curlier*, [1900] 2 Ch. 410. A partnership for a longer period than a year, and not in writing, is, under the statute of frauds, a partnership at will. *Wahl v. Barnum*, 116 N. Y. 87, 5 L. R. A. 623; *Morris v. Peckham*, 51 Conn. 128.

(*xv*) See *Pennington v. Todd*, 47 N. J. Eq. 569; *Irwin v. Williar*, 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225. A partnership for betting on horse races is illegal under the English Gaming Act, 1892, and one party thereto cannot obtain contribution for losses from the other party. *Saffery v. Mayer*, [1901] 1 K. B. 11. See *Tatam v. Reeve*, [1893] 1 Q. B. 44; *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496. A partnership founded in illegality or fraud may in equity be declared void *ab initio*. *Oteri v. Scalzo*, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 824; *Breaux v. Le Blanc*, 50 La. An. 228, 69 Am. St. Rep. 403, 419.

A combination or "trust" formed by partnerships or corporations to control a certain kind of business or trade is illegal, at common law, as attempting to stifle competition. *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279; *Distilling Co. v. People*, 156 Ill. 448, 41 N. E. 188; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 655, 52 L. R. A. 262; *Ertz v. Produce Exchange Co.*, 82 Minn. 173, 84 N. W. 743, 83 Am. St. Rep. 419, 51 L. R. A. 825; *Oakdale Manuf. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, *State v. Simmons Hardware Co.*, 109 Mo. 118, 38 Am. & Eng. Corp. Cas. 330.

(*yy*) The existence of a partnership relation depends either upon the parties' intention to share both profits and losses, as shown in its articles and agreements, or upon estoppel because of a member holding himself out as a partner. *Davis v. Davis*, [1894] 1 Ch. 393; *Frowde v. Williams*, 56 L. J. Q. B. 62; *Green v. Beesley* (2 Bing. N. C. 108), 19 English Ruling Cas. 308.

But * the mere sharing of profits, without any connection * 157 whatever in the business, is not enough to constitute a partnership. (a) Thus, if one firm agrees with another, that each shall continue and carry on its own business independently, but that the profits and losses of each firm shall be divided between the two, the two firms do not enter into partnership, nor do the members of one of the firms become partners with the members of the other. (b) There need not, however, be a community of interest in the property, if there be in the profits, and some connection in the business. (c)¹ But the setting apart of a portion of the profits to pay the debt of a third person, does not make him a partner. (d) So, too, a joint purchase, but for the purpose of distinct and separate sales by each party on his own account, does not constitute the purchasers partners. (e) And this, however unequal the shares may be, and even if one of the parties has no direct interest or property in the capital of the firm. If one party furnishes material at a certain price, and another manufactures it

(a) *Merrick v. Gordon*, 20 N. Y. (6 Smith) 93; *Fawcett v. Osborn*, 32 Ill. 411; *Morgan v. Stearns*, 41 Vt. 397.

(b) *Smith v. Wright*, 5 Sandf. 113. And see *Pattison v. Blanchard*, 1 Seld. 186.

(c) *Briggs v. Vanderbilt*, 19 Barb. 222; *Ellsworth v. Tarrt*, 26 Ala. 133; *Miller v. Price*, 20 Wis. 117.

(d) *Drake v. Ramsay*, 3 Rich. L. 37.

(e) *Bauchor v. Cilley*, 38 Me. 553; *Stoallings v. Baker*, 15 Mo. 481.

¹ In the absence of agreement the presumption is that there is community of interest in both property and profit and loss. *Robinson v. Ashton*, L. R. 20 Eq. 25; *Whitcomb v. Converse*, 119 Mass. 38; *Citizens' Ins. Co. v. Doll*, 35 Md. 89; *Flagg v. Stowe*, 85 Ill. 154; *Knight v. Ogden*, 2 Tenn. Ch. 473; *Hankey v. Becht*, 25 Minn. 212. See *Syers v. Syers*, 1 A. C. 174. — K.

321, n.; *Cox v. Hickman*, (8 H. L. Cas. 268), id. 323, 399, 402 n.; *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335; *Canton Bridge Co. v. Eaton Rapids*, 107 Mich. 613, 65 N. W. 761; *Winter v. Pipher*, 96 Ia. 17, 64 N. W. 663; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469; *Roggenkamp v. Hargreaves*, 39 Neb. 540, 58 N. W. 162; *Chapin v. Brown*, 101 Cal. 500, 35 Pac. 1051; *Houston River Canal Co. v. Kopke*, 106 La. 609, 31 So. 156; *St. Louis Bank v. Altheimer*, 91 Mo. 190; *Jeter v. Burgwyn*, 113 N. C. 157, 18 S. E. 113; *Webster v. Clark*, 34 Fla. 637, 16 So. 601. Participation in profits is *prima facie*, but not conclusive evidence of a partnership. *Ibid.*; *Meehan v. Valentine*, 145 U. S. 611, 12 S. Ct. 972, 36 L. Ed. 835; *Waverly Nat. Bank v. Hall*, 150 Penn. St. 466, 30 Am. St. Rep. 823; *Chapin v. Brown*, 101 Cal. 500; *Winter v. Pipher*, 96 Iowa 17, 64 N. W. 663; *Spaulding v. Stubbings*, 86 Wis. 255; *Dawson v. Iron Range R. Co.*, 97 Mich. 33; *Smith*

Putnam, 107 Wis. 155, 82 N. W. 1077, 83 id. 288; *McDonald v. Matney*, 82 Mo. 358; *Tyler v. Waddingham*, 58 Conn. 375, 383. The parties' "intention" means an intention to make such stipulations as in law constitute a partnership; and if they in fact stipulate for all the rights of partners, their agreement not to be partners is without effect. 1 Lind. Partn. (5th ed.), 11; *Fleming v. Lay*, 109 Fed. 952, 48 C. C. A. 748.

Whenever a partnership exists only as to a particular adventure or transaction, the rules relating to partnership apply only with respect to such adventure or transaction. *Reid v. Hollinshead* (4 B. & C. 867), 19 English Ruling Cas. 411, 421, n. Ship-owners, who share profits, are usually *quasi* partners as to each voyage. *Ibid.*; *McLaughlin v. Smith*, 166 Mass. 131, 44 N. E. 125. When they do not share profits, they are tenants in common only. *French v. Price*, 24 Pick. (Mass.), 13. See 3 Kent Com. (14th ed.), 40, n. (x).

at a certain price and has charge of the selling of the articles, the two dividing the profits, this does not make them partners, as between themselves. (*ee*) The cases are quite numerous which turn upon the question what facts suffice to create a liability as a partner. They are determined by the special circumstances of each case, and it is difficult to draw general rules from them. (*ef*) (*x*) In the absence of specific stipulations or controlling evidence, the presumption of law is, that the partners share the profits equally. (*f*)

The articles may provide or omit a period for the continuance of the partnership. But if such a period be provided and the time expires, and then the partnership is renewed by agreement, it has been held that the new partnership is founded upon the same terms as the old one, in the absence of opposing testimony. (*g*)

* 158 * It is certain that persons may be copartners as to third parties, and brought within all the liabilities of partnership as to them, who are not partners between themselves. (*h*) For

(*ee*) *Hitchings v. Ellis*, 12 Gray, 449.

(*ef*) The following are recent interesting cases on this question: *Pratt v. Landon*, 12 Allen, 544; *Eumons v. Westfield Bank*, 97 Mass. 230; *Merwin v. Playford*, 3 Rob. 702; *Strong v. Place*, 4 Rob. 385.

(*f*) *Peacock v. Peacock*, 16 Ves. 49; *Farrar v. Beswick*, 1 Mo. & R. 527; *Gould v. Gould*, 6 Wend. 263. But see *Thompson v. Williamson*, 7 Bligh, 432. See Story, Part., § 24, *ad fin.* note.

(*g*) *Dickinson v. Survivors of Bolds & Rhodes*, 3 Desaus. 501.

(*h*) If parties are so associated in business as to make them partners with respect to third persons, but expressly agree that a partnership shall not exist, they are not partners as between themselves. *Gill v. Kuhn*, 6 S. & R. 333; *Heskith v. Blanchard*, 4 East, 144. If, however, parties by their conduct, have treated their contract as a partnership, and have so held themselves out to the world, it is

(*x*) As those only are partners who intend that relation, the members of a defectively organized corporation are not partners. The decisions are not in harmony upon this question, but such is clearly the rule where the creditor intended to contract with a corporation, which has carried on business for some time, and its defects are technical. See *Globe Pub. Co. v. State Bank*, 41 Neb. 175, 59 N. W. 683; *Owensboro Wagon Co. v. Bliss* (Ala.), 31 So. 81; *Stafford Bank v. Palmer*, 47 Conn. 443; *Cox v. Hickman* (8 H. L. Cas. 268), 19 English Ruling Cas. 323, 404, n.; *American Mirror Co. v. Bulkley*, 107 Mich. 447, 65 N. W. 291; *Guckert v. Hacke*, 159 Penn. St. 303, 28 Atl. Rep. 249; *Arnold v. Conkling*, 96 Ill. App. 373; *Drennen v. London Ass. Co.*, 113 U. S. 51, 5 S. Ct. 341, 28 L. Ed. 919; *Thompson v. Reno Sav. Bank* (19 Nev. 103), 3 Am. St. Rep. 797, 849 n.;

Teitig v. Boesman, 12 Mont. 404, 31 Pac. 371; *Rutherford v. Hill*, 22 Oregon, 218, 29 Pac. 546; *Ward v. Brigham*, 127 Mass. 24; *White v. New Bedford Cotton Waste Corp.*, 178 Mass. 20, 59 N. E. 642. Partnerships with transferrable shares are no longer held to be illegal, as was formerly the case in England. *Phillips v. Blatchford*, 137 Mass. 510. And when such property as a patent is conveyed by the inventor to a trustee, who issues scrip, the scrip-holders are *cestuis que trust*, and not partners, though entitled to share in the avails of the property when sold. *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083. As to such partnerships, see *Marsh v. Newark Heating Machine Co.*, 57 N. J. L. 36, 29 Atl. 481; *Morgan v. Furel*, 58 Conn. 413, 18 Am. St. Rep. 282; *Young v. Gilmour*, 69 N. Y. S. 191; *Dame v. Kempster*, 146 Mass. 454; *Darling v. Potts*, 118 Mo. 506.

whether they are partners as between themselves is determined chiefly by reference to their own intention; but whether they are partners in respect to third parties is determined by a consideration of this intention, and also of that actual participation of profits which is held to require of them to participate in the losses, because it diminishes the fund from which the losses are to be paid; (i) ¹ and also of the way and degree in which the person ought to be charged as partner has been held out to the world as such, so that the person seeking to charge him had good reason to believe a debt of the partnership carried with it his responsibility. (j) (x)

unnecessary to put a construction upon the written contract, as between themselves and others. *Stearns v. Haven*, 14 Vt. 540. See also *Drennen v. House*, 41 Penn. St. 30.

(i) As to what participation of profits makes one a partner, see *infra*, n. (m).

(j) *Cottrill v. Vanduzen*, 22 Vt. 511; *Gilpin v. Temple*, 4 Harring. 90; *Furber v. Carter*, 11 Humph. 271; *Grieff v. Bondousquie*, 18 La. An. 631; *Sherrod v. Langdon*, 21 Iowa, 518.

¹ This statement accurately represents the law as it stood a few decades ago. From a *dictum* in *Grace v. Smith*, 2 W. Bl. 998, the doctrine arose that one who took a share of the profits of a business, though not necessarily a partner in fact, might be treated as such by creditors though he had not held himself out as a partner, and though his credit had not been relied on. *De Grey, J.*, said: "Every man who has a share of the profits of a trade ought also to bear his share of the loss. If any one takes part of the profits, he takes a part of the fund which the creditor relies on for payment." *Waugh v. Carver*, 2 H. Bl. 235, is the leading case; other cases are *Cheap v. Cramond*, 4 B. & Ald. 663; *Gilpin v. Enderbey*, 5 B. & Ald. 954; *Barry v. Nesham*, 3 C. B. 641; *Heyhoe v. Burge*, 9 C. B. 431. In 1860 the House of Lords in effect overruled these cases in *Cox v. Hickman*, 8 H. L. C. 268. And now it is clearly established in England that no one who is not actually a partner can be treated as such by third persons unless, by holding himself out as a partner, or consenting to others doing so, he has subjected himself to an estoppel. *Kelshaw v. Jukes*, 3 B. & S. 847; *Bullen v. Sharp*, L. R. 1 C. P. 86; *Mollwo v. The Court of Wards*, L. R. 4 P. C. 419; *Ex parte Tennant*, 6 Ch. D. 303; *Dean v. Harris*, 33 L. T. Rep. 639; *Meyer v. Shacher*, 38 L. T. Rep. 97; *Kelly v. Scotto*, 42 L. T. Rep. 827; *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

In this country in recent cases the courts have very generally approved and followed this doctrine. *Meehan v. Valentine*, 145 U. S. 611; *Culley v. Edwards*, 44 Ark. 423; *La Fevre v. Castagnio*, 5 Col. 564; *Vinson v. Beveridge*, 3 MacA. (D. C.) 597; *Smith v. Knight*, 71 Ill. 148; *Chaffraix v. Lafitte*, 30 La. An. 631; *Beecher v. Bush*, 45 Mich. 188; *Colwell v. Britton*, 59 Mich. 350; *Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Parchen v. Anderson*, 5 Mont. 438; *Eastman v. Clark*, 53 N. H. 276; *Wild v. Davenport*, 48 N. J. L. 129; *Central City Bank v. Walker*, 66 N. Y. 424; *Richardson v. Hughitt*, 76 N. Y. 55; *Eager v. Crawford*, 76 N. Y. 97; *Curry v. Fowler*, 87 N. Y. 33; *Cassidy v. Hall*, 97 N. Y. 159; *First Bank v. Gallaudet*, 122 N. Y. 655, 657; *Harvey v. Childs*, 28 Ohio St. 319; *Hart v. Kelley*, 83 Pa. 286; *Boston, & C. Smelting Co. v. Smith*, 13 R. I. 27; *Buzard v. First Bank*, 67 Tex. 83; *Chapline v. Conant*, 3 W. Va. 507; *Darling v. Bellhouse*, 19 U. Can. Q. B. 268; *McDonnell v. Battle House Co.*, 67 Ala. 90; *Parker v. Canfield*, 37 Conn. 250; *Morgan v. Farrel*, 58 Conn. 413, 422, seem *contra*. See also *Hackett v. Stanley*, 115 N. Y. 625. — W.

(x) See *Ex parte Central Bank*, [1892] 2 Q. B. 633. This applies although one was fraudulently induced to become a partner. *Van Cleeck v. McCabe*, 87 Mich. 591. Such liability, being by estoppel, begins, it seems, only from the time when a

creditor, such as a seller of goods to the firm, knows of the holding out, as a partner, of the person sought to be charged. *Carey v. Marshall*, (N. J. L.), 51 Atl. 698. See *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 7 S. Ct. 1278, 30 L. Ed.

If one lends money to be used by the borrower in his business, the lender to receive interest, and in addition thereto a share of the profits of the business, a question may arise whether he is a lender on usury or a partner. He would seem indeed to be both; only a usurer as between the lender and borrower, but a partner as to third persons; and it may depend upon the manner in which the question is presented, whether the character of a usurer is to be fixed upon him. If he sues the borrower for repayment

* 159 of the money, it seems to be competent * for the borrower to allege in his defence the usurious character of the loan. (*k*)

But if a third party who is a creditor of the borrower, upon a debt which has arisen in the business in which the money was lent to be used, sues the lender as a partner, on the ground that he took away profits to which the creditor might look for his debt, the lender will be held as such partner, and it is not competent for him to set up his contract as usurious, for he may not rest his defence upon his own wrong. (*l*)¹

A question has frequently arisen, where a clerk, agent, or salesman has been taken into partnership, to render in fact the same services as before, or a person received to render such services who had not been previously employed, upon an agreement that the services shall be compensated not by a salary, but by a share of the profits. Is such person a partner as to third parties? From many of the cases it would seem that a rule of this kind was adopted; namely, that where the bargain was that A should receive for his services one-tenth of the profits, this made him a partner; but if he was to receive a salary, equal in amount to the one-tenth part of the profits, this did not make him

(*k*) *Morse v. Wilson*, 4 T. R. 353. See *Morse v. Wilson*, 4 T. R. 353; *Case of also Gilpin v. Enderby*, 5 B. & Ald. 954; *Lane, Fraser & Boylston*, cited in 17 s. c. 5 Moore, 571. *Vesey*, 405, Sumner's edition. See *Gib-*

(*l*) *Grace v. Smith*, 2 W. Bl. 998; *son v. Stone*, 43 Barb. 285.

¹ This is not now generally law. See p. *158, note 1, and cases cited. If a transaction on the face of it a loan is colorably made for the purpose of constituting a partnership in effect while evading its liabilities the parties will be held as partners. *Pooley v. Driver*, 5 Ch. D. 458; *Ex parte Mills*, 8 Ch. D. 569; *Badeley v. Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238; *Adam v. Newbigging*, 13 A. C. 316; *Rosenfield v. Haight*, 53 Wis. 260. — W.

1137; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 27 L. R. A. 126; *Vanderhurst v. De Witt*, 95 Cal. 57, 20 L. R. A. 595; *Seabury v. Crowell*, 51 N. J. L. 103; 52 id. 413, 11 L. R. A. 136; *Hahlo v. Mayer*, 102 Mo. 93; *Marble v. Lypes*, 82 Ala. 322; *Morgan v. Farrel*, 58 Conn. 413, 426, 18 Am. St. Rep. 282.

The declarations of one partner made in the absence of the other cannot be used to establish a partnership against the latter for the benefit of a third person. *Parker v. Paine*, 76 N. Y. S. 942; *Owensboro Wagon Co. v. Bliss* (Ala.), 31 So. 81; 3 Kent Com. (14th ed.), 33 n. (2).

a partner. This somewhat technical rule would doubtless be applied to such a contract now, if the words used were not accompanied by other language, or by facts which required, or at least justified a different interpretation. Whether a person were a partner with others, should be determined in this as in other cases by a consideration of their intention, and of the way in which the alleged partner was held forth to the public, and the interest and power he had in or over the fund to which the creditors of the partnership could look for their security. (x) Where A employs B, and agrees to give him, in lieu of wages, or by way of wages, a certain proportion of A's profits, this need not give B any right to control the business or interfere therein in any way. They are not * then necessarily part- * 160 ners, because there is no reciprocity between them: unless some other sufficient reason exists for so treating them. But the reason usually alleged as that for which he who shares in the profits is held liable as a partner for the debts, namely, that he has diminished the fund from which the debts are to be paid seems to be regarded as not applicable to one who takes wages, though they may be measured by the profits; and if this is the bargain in fact, the manner of its expression would seem not to be material. It is certain that while the salesman took a thousand dollars a year as wages for his services, this did not make him a partner, as the fund to pay debts grew up in some measure from his services, and he was entitled to be paid out of it for them. Lord Eldon's reason for the rule seems to be, "that where the salesman has an amount of money equal to one-tenth of the profits, this gives him no action of account, and therefore he is not a partner; but where he is to receive one-tenth of the profits, this gives him an action of account, and therefore makes him a partner;" but this seems open to the objection that the question of partnership is prior,

(x) The question whether an unambiguous written contract creates a partnership *inter sese* is matter of law. *Rider v. Hammell* (Kan.), 66 Pac. 1026; *Nevills v. Moore Mining Co.* (Cal.), 67 Pac. 1054; *Garrett v. Republican Pub. Co.* (Neb.), 85 N. W. 537. But the existence of a partnership relation is often a question of fact, and a jury may find that an alleged partner was an employee of the firm, and not a partner. *Adamson v. Guild*, 177 Mass. 331, 58 N. E. 1081; *Willis v. Crawford* (Oregon), 53 L. R. A. 904. The partners' risks or interests need not be equal or agree in kind. *Stevens v. McKibbin*, 68 Fed. 406, 411.

An agreement to pay an employee a stated salary, and a certain percentage of the profits

of a business, does not as a matter of law, make him and the employer co-partners. *Stockman v. Michell*, 109 Mich. 348, 79 N. W. 480. See *Fertilizing Co. v. Reames*, 105 N. C. 283, 11 S. E. 467. Partners who contribute only labor as well as those contributing capital are *prima facie* presumed to bear losses equally. *Woelfel v. Thompson*, 173 Mass. 301, 53 N. E. 819; *Lewis v. Loper*, 54 Fed. 237.

When a salary is to be paid to one partner whether there are profits or not, it is an expense of the business, and no payment is to be made to him if no services are rendered. *Kinney v. Maher*, 156 Mass. 252, 30 N. E. 818; and see *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728.

and should determine the right of account; whereas this reason would regard the right of account as prior, and determining the question of partnership.^(m) Lord Eldon says, "the cases * 161 * have gone to this nicety," and speaks of the rule above mentioned as settled; but we have not succeeded in find-
 * 162 ing in the *English reports, previous cases or authorities which can be regarded as establishing this rule. And we regard it as now an established rule that if a party is paid for his services as an employee of the firm, whether by a salary or a share in the profits, he is not a partner. And if a partner has a right to elect a salary for his services instead of a share of the profits, and in good faith elects a salary, he ceases to be a partner. ^(mm)

The test as to the liability of one sought to be charged as a partner, is said to be whether the trade is carried on in his behalf, and the participation of profits such as to establish the relation of principal and agent, between the person taking the profits and those who carry on the business. ^(mn)¹ But if two or more per-

^(m) It seems well settled, that a salary equal in amount to a certain proportion of the profits, will not make such a person a partner, as the profits only determine the amount of salary. Neither will a certain salary, together with a commission of a certain per cent upon the profits, make the receiver a partner. *Miller v. Bartlett*, 15 S. & R. 137; *Stocker v. Brockelbank*, 5 E. L. & E. 67; *Dunham v. Rogers*, 1 Barr, 255; *Denny v. Cabot*, 6 Met. 82; *Hodgman v. Smith*, 13 Barb. 302; *Brockway v. Burnap*, 16 id. 309; *Atherton v. Tilton*, 44 N. H. 452. The better opinion seems to be, that an agreement by which a person is to receive a certain portion of the profits for his salary, does not constitute a partnership, such person having no specific interest in the profits themselves, as profits. See *Loomis v. Marshall*, 12 Conn. 69; *Burcle v. Eckart*, 1 Denio, 337; s. c. 3 Comst. 132; *Vanderburgh v. Hull*, 20 Wend. 70; *Ogden v. Astor*, 4 Sandf. 311; *Newman v. Bean*, 1 Foster (N. H.), 93; *Reed v. Murphy*, 2 Greene (Iowa), 574; *Goode v. McCartney*, 10 Tex. 193; *Glenn v. Gill*, 2 Md. 1; *Drake v. Ramey*, 3 Rich. L. 37; *Bartlett v.*

Jones, 2 Strob. 471; *Hodges v. Dawes*, 6 Ala. 215; *Wilkinson v. Jett*, 7 Leigh, 115. But see *Heyhoe v. Burge*, 9 C. B. 431; *Taylor v. Terme*, 3 Har. & J. 505; *Everitt v. Chapman*, 6 Conn. 351; *Bradley v. White*, 10 Met. 303. See also *Ambler v. Bradley*, 6 Vt. 119; *Blanchard v. Coolidge*, 22 Pick. 151; *Denny v. Cabot*, 6 Met. 82; *Champion v. Bostick*, 18 Wend. 184. Where a broker bought wheat for E. & H. with their funds, and an agreement is made between the three that the broker shall dispose of the wheat, and that the profits shall be equally divided, the broker is neither partner nor joint owner of the wheat. *Hanna v. Flint*, 14 Cal. 73. See also *Holmes v. Porter*, 39 Me. 157; *Chase v. Stevens*, 19 N. H. 465; *Matthews v. Felch*, 25 Vt. 536; *Pott v. Eyton*, 3 M. G. & S. 32, and *Heimstreet v. Howland*, 5 Denio, 68. See also *Lafou v. Chinn*, 6 B. Mon. 305; *Barry v. Nesham*, 3 M. G. & S. 641; *Conklin v. Barton*, 43 Barb. 435.

^(mm) *Bidwell v. Madison*, 10 Minn. 13; *Parker v. Fergus*, 43 Ill. 437.

^(mn) *Bullen v. Sharp*, L. R. 1; C. P. 86.

¹ It being stated that participation in profits is merely cogent evidence of partnership, *Holme v. Hammond*, L. R. 7 Ex. 218; *Mollwo, &c. Co. v. Court of Wards*, L. R. 4 P. C. 419; *Pooley v. Driver*, 5 Ch. D. 458; *Ex parte Tennant*, 6 Ch. D. 303; *Harvey v. Childs*, 28 Ohio St. 319; *Eastman v. Clark*, 53 N. H. 276.

Where both profits and losses are to be shared it is almost conclusive evidence of partnership, especially if there is a capital or stock which is owned jointly and used in

sons carry on a business, sharing the profits, and one who is the most active partner, as salesman or the like, calls, in the articles, his share of the profits a salary, he is nevertheless a partner as to third persons; the rule as to wages or salary applying only to those who are strictly only employed by the firm. (*mo*)

It is sometimes difficult to distinguish between partnership and tenancy in common; and this question is often important, as determining between the adverse rights of the creditors of the individual owners, and those of persons who claim as partnership creditors. In general, if the property owned jointly is so * owned for the purpose of a joint business, and is so used, * 163 and the profits resulting form a common fund, it is partnership property; otherwise not. (*n*)¹ (*x*)

(*mo*) *Brigham v. Clark*, 100 Mass. 430.

(*n*) *Post v. Kimberly*, 9 Johns. 470; *Murray v. Bogert*, 14 id. 318; *Hawes v. Tillinghast*, 1 Gray, 289. Where the owners of land let it, agreeing with the occupiers to receive one half of the grain, &c., in consideration of the occupancy, the owners and occupiers, together with other persons whom the occupiers admitted to a share in the grain in consideration of their doing a portion of the farm work, were held to be tenants in common of the grain. *Putnam v. Wise*, 1 Hill (N. Y.),

234; *Caswell v. Districh*, 15 Wend. 379; *Walker v. Fitts*, 24 Pick. 191; *Frost v. Kellogg*, 23 Vt. 308; *Case v. Hart*, 11 Ohio, 364; *Smyth v. Tankersly*, 20 Ala. 212; *Jackson v. Robinson*, 3 Mason, 138. See *Harding v. Foxcroft*, 6 Greenl. 76; *Thorndike v. DeWolf*, 6 Pick. 124. Where one party furnishes a boat and the other sails it, an agreement to divide the gross earnings does not constitute a partnership. *Bowman v. Bailey*, 10 Vt. 170; *Duryea v. Whitcomb*, 31 Vt. 395.

the business. *Beauregard v. Case*, 91 U. S. 134; *Autrey v. Frieze*, 59 Ala. 587; *McGill v. Dowdle*, 33 Ark. 311; *Harris v. Hillegass*, 54 Cal. 463; *Morse v. Richmond*, 97 Ill. 303; *Kuhn v. Newman*, 49 Iowa, 424; *Aultman v. Fuller*, 53 Iowa, 60; *Marsh v. Russell*, 66 N. Y. 288; *Falkner v. Hunt*, 73 N. C. 571; *Jones v. Call*, 93 N. C. 170; *Duryea v. Whitcomb*, 31 Vt. 395. And it is immaterial that the parties expressly agree that there shall be no partnership. *Ex parte Delhasse*, 7 Ch. D. 511; *Moore v. Davis*, 11 Ch. D. 261.

But it is possible that there should be community of profit and loss and yet no partnership. *Walker v. Hirsch*, 27 Ch. D. 460; *Snell v. DeLand*, 43 Ill. 323; *Chaffraix v. Lafitte*, 30 La. An. 631; *Dwinel v. Stone*, 30 Me. 384; *Monroe v. Greenhoe*, 54 Mich. 9; *McDonald v. Matney*, 82 Mo. 358; *Clifton v. Howard*, 89 Mo. 192; *Osbreys v. Reimer*, 51 N. Y. 630; *Edwards v. Tracy*, 62 Pa. 374; *Farrand v. Gleason*, 56 Vt. 623. See also *Nelms v. McGraw*, 93 Ala. 245; *Damarest v. Koch*, 129 N. Y. 218.—W.

¹ See as to a joint ownership of land, *Letorey v. Korstall*, 27 La. An. 83; *Steward v. Blakeway*, L. R. 6 Eq. 479; L. R. 4 Ch. 603; as to a joint ownership of a steamboat, *Adams v. Carroll*, 85 Penn. St. 209; *Ward v. Bodeman*, 1 Mo. App. 272. See also *Quackenbush v. Sawyer*, 54 Cal. 439; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429.

Farming on shares does not constitute a partnership. *Tayloe v. Bush*, 75 Ala. 432; *Gardenhire v. Smith*, 39 Ark. 280; *Robinson v. Haas*, 40 Cal. 474; *Gurr v. Martin*, 73 Ga. 528; *Jeter v. Penn*, 28 La. An. 230. See also *Frout v. Hardin*, 56 Ind. 165.

Nor fishing on shares, *Hurley v. Walton*, 63 Ill. 260; *Holden v. French*, 68 Me. 241. Nor leasing property for a share of the receipts. *McDonnell v. Battle House Co.* 67 Ala. 90; *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58; *Beecher v. Bush*, 45 Mich. 188; *Farrand v. Gleason*, 56 Vt. 633.

And for other cases of working or leasing property on shares, see *Barber v. Cazalis*,

(*x*) As to personal property, one co-tenant may be liable in trover for its conversion. *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261. When

SECTION VI.

OF THE RIGHT OF ACTION BETWEEN PARTNERS.

It is generally true that one partner cannot sue a copartner *at law* in respect to any matter growing out of the transactions of

30 Cal. 92; *Moore v. Curry*, 106 Mass. 409; *Bridges v. Sprague*, 57 Me. 543; *Eastman v. Clark*, 53 N. H. 276.

Members of a defunct corporation are not liable as partners, *Central Bank v. Walker*, 66 N. Y. 424; nor are members of an incipient or defective corporation, *Blanchard v. Kaull*, 44 Cal. 440; *Stafford Bank v. Palmer*, 47 Conn. 443; *Planters' &c. Bank v. Pudgett*, 69 Ga. 159; *First Nat. Bank v. Almy*, 117 Mass. 476; *Ward v. Brigham*, 127 Mass. 24; *N. Y. Iron Mine v. Negannee*, 39 Mich. 644; *Central, &c. Bank v. Walker*, 66 N. Y. 424; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269. And see *Beeson v. Lang*, 85 Pa. 197. Contrary decisions, however, are *Bigelow v. Gregory*, 73 Ill. 197; *Coleman v. Coleman*, 78 Ind. 344; *Kaiser v. Lawrence Bank*, 56 Iowa, 104; *Chaffe v. Ludeling*, 27 La. An. 607; *Martin v. Fewell*, 79 Mo. 401; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416. It has been held that if the officers or members of such an imperfect corporation incur obligations in the name of the corporation, knowing them to be invalid, they are themselves liable as partners. *Stafford Bank v. Palmer*, 47 Conn. 443; *Nat. Bank of Watertown v. Landon*, 45 N. Y. 410; *Ridenour v. Mayo*, 40 Ohio St. 9. But this form of remedy seems hardly proper. *Trowbridge v. Scudder*, 11 Cush. 83, 86.

The members of clubs or associations which have not for their object pecuniary profit are not partners. (x) *In re St. James Club*, 2 De G. M. & G. 383; *In re London*

the legal title to chattels is held by one partner as a part of the assets of the firm, the other partner cannot convey to another an undivided share of his equitable interest. *Pratt v. McGuinness*, 173 Mass. 170, 53 N. E. 380.

A deed by one tenant in common of the common land by metes and bounds, even when it is composed of separate parcels, may be treated as valid, or be avoided, by the co-tenants. *Marks v. Sewall*, 120 Mass. 174, 177; *Barnes v. Lynch*, 151 Mass. 510, 24 N. E. 783; *Kimball v. Com'th Ave. St. Ry. Co.*, 173 Mass. 152, 53 N. E. 274; *Graves v. Goldthwait*, 153 Mass. 268, 26 N. E. 860, 10 L. R. A. 763. One co-tenant cannot, without authority, sell the right to cut logs on the common land, so as to enable the purchaser to convey a good title to them; the latter's only right is to enforce his claim against the individual estate of such co-tenant after partition, or to assert his claim in equity. *Benedict v. Torrent*, 83 Mich. 181, 47 N. W. 129, 21 Am. St. Rep. 589, 11 L. R. A. 278; *Nevels v. Kentucky Lumber Co. (Ky.)*, 56 S. W. 969, 49 L. R. A. 416; *Burt & Brabb Lumber Co. v. Clay City Lumber Co. (Ky.)*, 64 S. W. 652.

(z) Clubs formed for social or political purposes, lodges, and religious brotherhoods, when formed for devotion and com-

panionship, are not partnerships, as these are now mostly limited to commercial relations intending gain. *Reg. v. Robson*, 16 Q. B. D. 137; *McCabe v. Goodfellow*, 133, N. Y. 89, 30 N. E. 728; *Cohn v. Borst*, 36 Hun (N. Y.), 562; *Karst v. McCutchen*, 11 Reporter, 749; *Richmond v. Judy*, 6 Mo. App. 465; *Cox v. Hickman*, (8 H. L. Cas. 268), 19 English Ruling Cas. 323, 403 n. A member of an officer's mess or club, who has not personally pledged its credit, is not liable for goods supplied to it upon the wine caterer's orders. *Hawke v. Cole*, 62 L. T. 658.

A partnership is not created by a mere agreement to form it: *Arnold v. Conklin*, 96 Ill. App. 373; *In re Hoagland's Estate*, 64 N. Y. S. 920, 51 App. Div. 347; *Meagher v. Reed*, 14 Col. 335, 24 Pac. 681, 9 L. R. A. 455; nor by receiving profits instead of interest on a loan; *Meehan v. Valentine*, 145 U. S. 611, 12 S. Ct. 972, 36 L. Ed. 835; *The J. P. Donaldson*, 167 U. S. 599, 605, 17 S. Ct. 951, 42 L. Ed. 292; *Scott v. Kennedy*, 201 Penn. St. 462; *American Surety Co. v. Lawrenceville Cement Co.* 110 Fed. 717, 723; *Culley v. Edwards*, 44 Ark. 423; *Hazell v. Clark*, 89 Mo. App. 78; *Gille Hardware Co. v. McCleverty*, id. 154; nor by the lease of a farm on shares: *Williams v. Rogers*, 110 Mich. 418, 68 N. W. 240; *Shrum v.*

the partnership, and involving the examination of the partnership accounts; (o) because courts of law cannot do effectual * 164 justice to such questions and interests, and resort must be had to courts of equity. (p) But it is clear that a partner may sue a copartner on an *express* agreement, and perhaps on an *implied* agreement, to do any act not involving a consideration of the partnership accounts; (q) or on an express promise made

(o) *Bovill v. Hammond*, 6 B. & C. 149; *Brown v. Tapscott*, 6 M. & W. 119; *Lawrence v. Clark*, 9 Dana, 257; *Stone v. Fouse*, 3 Cal. 292; *Fisher v. Sweet*, 67 Cal. 228; *Bennett v. Woolfolk*, 15 Geo. 213; *Burns v. Nottingham*, 60 Ill. 531; *Lang v. Oppenheim*, 96 Ind. 47; *Seelye v. Taylor*, 32 La. An. 1115; *Miner v. Lorman*, 56 Mich. 212; *Ivy v. Walker*, 58 Miss. 253; *Arnold v. Arnold*, 90 N. Y. 580; *Dowling v. Clarke*, 13 R. I. 134. This question is considered in *Lane v. Tyler*, 49 Me. 252, and in *Shattuck v. Lawson*, 10 Gray, 405. It is held otherwise under the code of Indiana, in *Heavilow v. Heavilow*, 29 Ind. 509.

(p) One partner has no right of action against a co-partner for money or laborexpended for the benefit of the concern. See *Goddard v. Hodges*, 1 Cr. & M. 37; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 id. 419; *Fromont v. Coupland*, 2 Bing. 170; *Sadler v. Nixon*, 5 B. & Ad. 936; *Pearson v. Skelton*, 1 M. & W. 504; *Bevans v. Sullivan*, 4 Gill, 383. But one partner may maintain an action for money had and received against the other partner, for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow*, 2 T. R. 476. And one partner may have an action against his co-partner for not contributing his proportion toward the common stock. *Gale v. Leckie*, 2 Stark. 107; *Ellison v. Chapman*, 7 Blackf. 224. See also *Vance v. Blair*, 18 Ohio, 532. —

Marine Ins. Assoc., L. R. 8 Eq. 176; *Burt v. Lathrop*, 52 Mich. 106; *Brown v. Stoerckel*, 74 Mich. 268; *Lafond v. Deems*, 81 N. Y. 507; *Devoss v. Gray*, 22 Ohio St. 159; *Ash v. Guie*, 97 Pa. 493. See *Danbury Cornet Band v. Bean*, 54 N. H. 524. — W.

Simpson, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792; *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. Rep. 251; *Reynolds v. Pool*, 84 N. C. 37, 37 Am. Rep. 607; by an agreement between lessor and lessee for sharing profits: *Randle v. Barnard*, 81 Fed. 682; *Walker v. Tupper*, 152 Penn. St. 1; *Augusta Bank v. Bones*, 75 Ga. 246; *Z. C. Miles Co. v. Gordon*, 8 Wash. 442; *Musser v. Brink*, 80 Mo. 350; see *Leavitt v. Windsor Land Co.*,

The American courts fully recognize the doctrine that during the existence of a partnership, or even after its dissolution, but before the business is wound up, and the final balance ascertained, no action at law will lie between partners. *Haskell v. Adams*, 7 Pick. 59; *Williams v. Henshaw*, 12 id. 378; *Fanning v. Chadwick*, 3 id. 420; *Capen v. Barrows*, 1 Gray, 376; *Causten v. Burke*, 2 Harr. & G. 295; *Chase v. Garvin*, 19 Me. 211; *Kennedy v. McFaden*, 3 Harr. & J. 194; *Murray v. Bogert*, 14 Johns. 318; *Davenport v. Gear*, 2 Scam. 495; *Roberts v. Fitler*, 13 Pa. St. 265; *Gridley v. Dole*, 4 Comst. 486. After such final balance is determined, and a promise by one partner to pay over, the other partner may sustain an action at law. *Gulick v. Gulick*, 2 Green (N. J.) 578; *Byrd v. Fox*, 8 Mo. 574. The promise may be only implied. *Wray v. Milestone*, 5 M. & W. 21; *Ross v. Cornell*, 45 Cal. 133; *Mickle v. Peet*, 43 Conn. 65; *McSherry v. Brooks*, 46 Md. 103; *Blakely v. Graham*, 111 Mass. 8; *Scott v. Caruth*, 50 Mo. 120; *Nims v. Bigelow*, 44 N. H. 376; *Wicks v. Lippman*, 13 Nev. 499; *Knew v. Hoffman*, 65 Pa. St. 126.

(q) *Van Ness v. Forrest*, 8 Cranch, 30; *Gibson v. Moore*, 6 N. H. 547; *Casey v. Brush*, 2 Caines, 293; *Fromont v. Coupland*, 2 Bing. 170; *Fanning v. Chadwick*, 3 Pick. 423; *Rackstraw v. Imber*, Holt, 368. So where the judgment will be an entire termination of the partnership

54 Fed. 439; *Bailey v. Ferguson*, 39 Ill. App. 91; *Dake v. Butler*, 28 N. Y. S. 134; *Galveston, &c. Ry. Co. v. Arispe*, 5 Tex. Civ. App. 611; or between contractors and sub-contractors to divide the profits of the work. *Sohns v. Sloteman*, 85 Wis. 113. A co-operative store, not incorporated but with transferable shares, the members sharing profits, is a partnership. *Carter v. McClure*, 98 Tenn. 109, 38 S. W. 585, 36 L. R. A. 282.

before the partnership began, in relation to advances to constitute the capital of the firm; (*qq*) (*e*) or on his partner's note for advances made to him; (*qr*) or for damage done to his private property which was used by the firm. (*qs*) And if partners finally

* 165 balance all * their accounts, or a distinct part thereof is entirely severed by them from the rest, a suit at law is maintainable for the balance. (*r*) (*y*)

If one of a partnership who are plaintiffs be also one of a partnership who are defendants, the action cannot be maintained; for the same party cannot be plaintiff and defendant of record, in the

transactions, although there has been no settlement of the accounts by the partners, nor an express promise to pay, an action may be sustained. And if the partners by an express agreement separate a distinct matter from the partnership dealing, and one party expressly agrees to pay the other a specific sum for that matter at a given time, an action of assumpsit will lie on that contract, though the matter arose from the partnership dealing. *Collumer v. Foster*, 26 Vt. 754; *Williams v. Henshaw*, 11 Pick. 82. Probably an action may be maintained by one partner against the other, for a balance due him out of the partnership transactions, if there be but a single item to liquidate. *Musier v. Trumpbour*, 5 Wend. 274, 1 Stark. 78; *Meason v. Kaine*, 63 Pa. 335; but see *Bovill v. Hammond*, 6 B. & C. 149. The proposition that no action can be maintained at law, by one partner against the other, except to recover a final balance, must be taken with reference to the facts and questions arising in those cases in which such language is used. See *Smith v. Barrow*, 2 T. R. 478; *Ozeas v. Johnston*, 1 Binn. 191; *Beach v. Hotchkiss*, 2 Conn. 425; *Murray v. Bo-*

ger, 14 Johns. 318; *Westerlo v. Evertson*, 1 Wend. 532; *Moravia v. Levy*, 2 T. R. 483, n. See also *Clark v. Dibble*, 16 Wend. 601; *Grisby v. Nance*, 3 Ala. 347. — And after a dissolution, an action will lie between partners to recover a balance due, on an implied promise. *Wilby v. Phinney*, 15 Mass. 116; *Pope v. Randolph*, 13 Ala. 214. — So to recover back money paid by mistake on an adjustment of the partnership concerns. *Bond v. Hays*, 12 Mass. 34; *Chase v. Garvin*, 19 Me. 211.

(*qq*) *Truitt v. Baird*, 12 Kan. 420; *Morgan v. Nunes*, 54 Miss. 308; *Currier v. Webster*, 45 N. H. 226; *Currier v. Rowe*, 46 N. H. 72.

(*qr*) *Chamberlain v. Walker*, 10 Allen, 429.

(*qs*) *Haller v. Williamowitz*, 23 Ark. 566.

(*r*) *Clark v. Dibble*, 16 Wend. 601; *Gibson v. Moore*, 6 N. H. 547; *McColl v. Oliver*, 1 Stew. (Ala.) 510; *Fanning v. Chadwick*, 3 Pick. 420; *Gulick v. Gulick*, 2 Green (N. J.), 578; *French v. Styring*, 2 C. B. (N. s.) 357. And see note (*p*), *supra*.

(*r*) Partners may sue for the price of partnership goods sold by one partner in his own name, or upon a guaranty made in terms to one partner, but intended for the benefit of the firm, or to enforce a mechanic's lien under a contract for work made by one member; but, as one member cannot be an agent of a firm before it exists, a contract then made by a member individually cannot be enforced by the firm. *Holmes v. Small*, 157 Mass. 221, 32 N. E. 3; *Wahlstrom v. Thulson*, 165 Mass. 429, 43 N. E. 183. An action for personal injuries sustained by an employee of a firm lies against one partner. *Brady v. Norcross*, 172 Mass. 331, 52 N. E. 528. As between the partners, as the advances of one,

other than contributions to capital, are commonly classed as debts, though postponed to the claims of other creditors, a retiring partner's surrender of all his interest in the assets may be interpreted as relating only to capital in the strict sense, and as not including the advances. *Hamer v. Giles*, 11 Ch. D. 942; *Abercrombie v. Spalding*, 158 Mass. 32, 32 N. E. 911. A partner is *prima facie* entitled to interest on his advances to the firm. *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342; *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

(*y*) Especially when there are only two partners. *Currier v. Hallowell*, 158 Mass. 254, 33 N. E. 497.

same action. (s)(x) The rule may be different in those States where by statute a copartnership may be sued by their firm name, and a garnishee may be proceeded against in the same way. (ss)

One partner cannot without express agreement charge the firm for the extra value or amount of his services. (st) (y)

* Partners are bound, each to all the others, to act with * 166 entire good faith, and apply themselves with due diligence to the business of the concern, and in general to do nothing for their own advantage which shall sacrifice the interests of the partnership. (t)¹ And an action in equity, or in some cases, at law, is maintainable by the injured partners for any loss sustained by a breach of this obligation. (u)

SECTION VII.

OF THE SHARING OF LOSSES.

Though partnerships are usually formed by a participation of both profits and losses, it may be agreed that a partner shall have

(s) *Portland Bank v. Hyde*, 2 Fairf. 196; *Tindal v. Bright*, Minor (Ala.), 103; *Mainwaring v. Newman*, 2 B. & P. 120; *Neale v. Turton*, 4 Bing. 149; *Teague v. Hubbard*, 8 B. & C. 345; *Bosanquet v. Wray*, 6 Taunt. 597; *Blaisdell v. Pray*, 68 Me. 269; *Calhoun v. Albin*, 48 Mo. 304; *Beacannon v. Liebe*, 11 Ore. 443. — But see *Rose v. Poulton*, 2 B. & Ad. 822; *Kingsland v. Braisted*, 2 Lansing, 17; *Douglas v. Neil*, 37 Tex. 528. — And where one who is a member of two firms makes a note in the name of one of the firms, payable to a member of the other firm, the payee may sue and recover upon such note. *Moore v. Gano*, 12 Ohio, 300. See *Baring v. Lyman*, 1 Story, 396; *Herrriott v. Kersey*, 69 Ia. 111; *Banks v. Mitchell*, 8 Yerg. 111. See *post*, p. * 253.

(ss) *United States Express Co. v. Bedbury*, 34 Ill. 459.

(st) *Bennett v. Russell*, 34 Miss. 524; *Haller v. Williamowitz*, 23 Ark. 566; *Boardman v. Close*, 44 Ia. 428; *Coddington v. Idell*, 2 Stewart, 204; *Forrer v. Forrer*, 29 Gratt. 134; *Mills v. Fellows*, 30 La. An. 824; *Heath v. Waters*, 40 Mich. 457; *Lee v. Davis*, 70 Ind. 464.

(t) *Long v. Majestre*, 1 Johns. Ch. 305; *Stoughton v. Lynch*, id. 470; *Fawcett v. Whitehouse*, 1 Rus. & M. 132. See *Lefever v. Underwood*, 41 Penn. St. 505, as to duty of partner to keep partnership funds unmixd with his own, and within the reach of all the partners.

(u) *Maddeford v. Austwick*, 1 Sim. 89; *Terry v. Carter*, 25 Miss. 168.

¹ Thus a partner cannot secretly stipulate for his private advantage. *Dunne v. English*, L. R. 18 Eq. 524; *Densmore Oil Co. v. Densmore*, 64 Penn. St. 43; *McMahon v. McClellan*, 10 W. Va. 419. — And a partner secretly renewing a firm lease in his own name holds it as a trustee for the firm, *Mitchell v. Reed*, 61 N. Y. 123; as well as real estate and life insurance policies bought with firm funds, *Shaler v. Trowbridge*, 1 Stewart, 595. And so if one partner acquires an outstanding title or encumbrance on firm property without the consent of his partners, the firm is entitled to the benefit. *Kinsman v. Parkhurst*, 18 How. 289; *Gillett v. Gaffney*, 3 Col. 351. — W.

(x) *Cutting v. Daigneau*, 151 Mass. 297, 23 N. E. 839.

(y) *Major v. Todd*, 84 Mich. 85; *Winchester v. Glazier* (152 Mass. 316), 9

L. R. A. 424 and note; *Burgess v. Badger*, 124 Ill. 288; *Adams v. Warren*, 99 Ala. 100, 11 So. 754.

his share of the profits and not be liable for losses, and this agreement is valid as between the parties. And this agreement will be equally efficacious whether stated in articles, or proved by circumstances or otherwise. (xx) For the partners *inter se* may make what bargain they will. But no such agreement will prevent such partner from being liable for the debts of the partnership, unless the creditor knew of this bargain between the partners, and with this knowledge gave the credit to the other partners only. (v)

OF SECRET AND DORMANT PARTNERS.

A secret partner is one not openly and generally declared to be a partner, (w) and a dormant partner is strictly one who takes no share in the transaction or control of the partnership business; (y) but it is often held to mean one whose name is not publicly mentioned; and the phrases secret partner and dormant partner are sometimes, but inaccurately, used as synonymous. (x) A

(v) See *Gilpin v. Enderbey*, 5 B. & Ald. 954; *Bond v. Pittard*, 3 M. & W. 357; *Perry v. Randolph*, 6 Sm. & M. 385; *Hazard v. Hazard*, 1 Story, 374; *Barrett v. Swann*, 17 Me. 180; *Pollard v. Stanton*, 7 Ala. 761; *Alderson v. Pope*, 1 Camp. 484 n.; *Minnit v. Whinery*, 5 Bro. P. C. 489. See also *Brown v. Leonard*, 2 Chitt. 120.

(w) In *United States Bank v. Binney*, 5 Mason, 186, a secret partnership was defined "to be a partnership where the existence of certain persons as partners is

not avowed or made known to the public by any of the partners. Where all the partners are publicly made known, whether it be by one or all the partners, it is no longer a secret partnership." See s. c. 5 Pet. 529.

(x) In *Mitchell v. Dall*, 2 Harr. & G. 159, it is said that every partner is considered dormant unless his name is mentioned in the firm, or embraced under general terms in the name of the firm or company. See to the same effect *Kelley v. Hurlburt*, 5 Cowen, 534; *Desha v. Hol-*

(xx) Some authorities hold it not essential that there be a liability to share losses; such liability may be implied, and *prima facie* an agreement to share profits amounts to an agreement to share losses also, and constitutes a partnership even when there is no firm name. *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994; *Fleming v. Lay*, 109 Feb. 952, 48 C. C. A. 748; *May v. International Loan & Trust Co.*, 92 Fed. 445, 34 C. C. A. 448; *Baker v. Safe Deposit Co.*, 90 Md. 744, 45 Atl. 1028; 78 Am. St. Rep. 463; *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823; *Gulf City Shingle Manuf. Co. v. Boyles*, 129 Ala. 192, 29 So. 800; *Wheeler v. Lack*, 37 Oregon, 238, 61 Pac. 849.

(y) A dormant partner may, but need

not, join as a plaintiff, 3 Kent Com. (14th ed.), p. *31, n. 1. See *Tynburg v. Cohen*, 67 Tex. 220. General, and not dormant, partners, are included in the words "& Co." *Podrasnik v. R. T. Martin Co.*, 25 Ill. App. 300. One who is active in obtaining contracts for the benefit of the firm is not a dormant partner. *Bouker Contracting Co. v. Scribner*, 65 N. Y. S. 444, 52 App. Div. 505.

In some States, as, *e. g.*, by the Cal. Civil Code, § 2466, persons transacting business under a fictitious name, or a designation which does not show the partners' names, must disclose such names by a certificate filed with the county clerk, and by publication. See *North v. Moore*, 135 Cal. 621, 67 Pac. 1037.

dormant partner is liable when discovered. (y) But not for a debt contracted after he has retired, provided the creditor never knew that he was a partner, or did know that he had retired before credit was given to the partnership. (z)

If there be a dormant and unknown partner, and credit is given to the ostensible partner in the business of the firm and for their benefit, all the partners whether known or unknown, are liable. (zz)

* It is said that a dormant partner cannot join as plain- * 168
tiff in an action, because there is no sufficient privity of contract between him and the party who contracted with the firm. (a)¹ (x) But he may be sued and joined as defendant. (b)

A secret partner, who conceals his interest in the firm to protect it from attachment, may have his bill in equity for an account against partners privy to the concealment. (bb)

land, 12 Ala. 513; *Hill v. Voorhies*, 22 Penn. St. 68. — The law relative to dormant partners seems not to extend to speculations in the sale and purchase of land. *Pitts v. Waugh*, 4 Mass. 424; *Smith v. Burnham*, 3 Sumner, 470. But see *Brooke v. Washington*, 8 Gratt. 248, *contra*.

(y) *Robinson v. Wilkinson*, 3 Price, 538; *Winship v. Bank of U. S.*, 5 Pet. 529; *Parker v. Canfield*, 37 Conn. 250; *Holland v. Long*, 57 Ga. 36; *Gilmore v. Merritt*, 62 Ind. 525; *Lindsey v. Edmiston*, 25 Ill. 359; *Richardson v. Farmer*, 36 Mo. 35; *Bromley v. Elliot*, 38 N. H. 287; *Griffith v. Buffum*, 22 Vt. 181. See also *Lea v. Guire*, 13 Sm. & M. 656; *Bigelow v. Elliott*, 1 Clifford, 28. — The liability of a dormant partner to creditors may be avoided, by proof of fraud in the formation of the partnership, if such dormant partner has received no share of the funds. *Mason v. Connell*, 1 Whart. 381.

(z) *Grosvenor v. Lloyd*, 1 Met. 19. See

also *Kelley v. Hurlburt*, 5 Cowen, 534; *Evans v. Drummond*, 4 Esp. 89; *Armstrong v. Hussey*, 12 S. & R. 315; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Benton v. Chamberlain*, 23 Vt. 711; *Edwards v. McFall*, 5 La. An. 167; *Brooke v. Enderby*, 2 Br. & B. 71; *Carter v. Whalley*, 1 B. & Ad. 11. — It is a question for the jury whether a person was a dormant partner, and his interest not in fact generally known, so as to excuse notice of his retirement from the firm. *Shaw, C. J.*, in *Goddard v. Pratt*, 16 Pick. 429. See *Deford v. Reynolds*, 36 Penn. St. 325, holding that one who is a member of a firm known as R. M. & Co. does not become a dormant partner by reason of the creditor's ignorance of the name of R. M.'s co-partner.

(zz) *Richardson v. Farmer*, 36 Mo. 35.

(a) *Wood v. O'Kelley*, 8 Cush. 406; *Jackson v. Alexander*, 8 Tex. 109.

(b) *Boardman v. Keeler*, 2 Vt. 65; *Lloyd v. Archbottle*, 2 Taunt. 324.

(bb) *Harvey v. Varney*, 98 Mass. 118.

¹ A dormant partner may be joined as plaintiff, but he need not be. *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Wright v. Herrick*, 125 Mass. 154; *Leslie v. Wiley*, 47 N. Y. 648; *Garrett v. Muller*, 37 Tex. 589; *Waite v. Dodge*, 34 Vt. 181. — W.

(x) Cf. *Brown v. Foster*, 41 S. C. 118; *Harbeck v. Pupin*, 123 N. Y. 115, 73 Hun, 1.

SECTION IX.

OF RETIRING PARTNERS.

* 169 * When a partner retires from a firm, notice is usually given by public advertisement, or by letters to the customers of the firm, or both; and generally, in the case of a retiring partner as in that of a dissolution, actual notice should be given to all customers of the firm, and also customary notice by advertisement; (*cd*) but sufficient lapse of time may supply the want of notice, as in one case where eleven years had passed since the retirement. (*ce*) A party having such notice cannot hold the retiring partner to a responsibility for a credit given to the firm after such retirement and notice. (*d*) It also seems to be * 170 settled that * such retiring partner is not held to a creditor who has no knowledge of such retirement, provided the retirement was actual and in good faith, and the retiring partner did all that was usual or proper to give the public and customers notice of his retirement. But if the retiring partner gives no such notice, then a customer of the firm accustomed to trade with the firm on the responsibility of all the partners, including him who has retired, and not knowing of his retirement, may hold him for

(*cd*) This question is much considered in *Schefflin v. Stevens*, 1 Wins. 106. See also *Zollar v. Janvrin*, 47 N. H. 324.

(*ce*) *Farmers' Bank v. Green*, 1 Vroom, 316.

(*d*) Notice of the withdrawal of a *dormant* partner is not necessary. *Magill v. Merrie*, 5 B. Mon. 168; *Kennedy v. Bohannon*, 11 B. Mon. 120; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Little v. Clarke*, 36 Penn. St. 114 [except to those who knew of his connection with the firm. *Nussbaumer v. Becker*, 87 Ill. 231; *Vaccaro v. Toof*, 9 Heiskell, 194 (*r*)]. — But it is otherwise as to ostensible partners. To affect a creditor who has formerly traded with the firm, the notice of the retirement of an ostensible partner must be proved to have been actual. *Scarf v. Jardine*, 7 App. Cas. 345; *Nicholson v. Moog*, 65 Ala. 471; *Holtgreve v. Wintker*, 85 Ill. 470; *Strecker v. Conn*. 90 Ind. 469; *Pecker v. Hall*, 14 Allen, 532; *Austin v. Holland*, 69 N. Y. 571; *Haynes v. Carter*, 12 Heisk. 7; *Roakes v. Bailey*, 55 Vt. 542; *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482. But see *Jenkins v. Blizard*, 1 Stark. 418. A newspaper notice

accidentally reaching a bank director is not actual notice to the bank; but it may be, if the notice was actually served on him, with directions to communicate it to the board. *National Bank v. Norton*, 1 Hill (N. Y.), 572. — Publishing the dissolution in a newspaper will not *per se* be sufficient, although it is evidence of actual notice. See *Graham v. Hope*, 1 Peake, Cas. 154; *Lovejoy v. Spofford*, 93 U. S. 430; *White v. Murphy*, 3 Rich. L. 369; *Hutchins v. Bank of Tennessee*, 8 Humph. 418; *Shurlds v. Tilson*, 2 McLean, 458; *Grinnan v. Baton Rouge Mills Co.*, 7 La. An. 638. As to all persons who have had no dealings, and given no credit to the firm, publication of the dissolution is sufficient. *Lansing v. Gaine*, 2 Johns. 300; *Prentiss v. Sinclair*, 5 Vt. 149; *Shurlds v. Tilson*, 2 McLean, 458; *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482; *Mowatt v. Howland*, 3 Day, 353; *Ellis v. Bronson*, 40 Ill. 455; *Polk v. Oliver*, 56 Miss. 566; *Deering v. Flanders*, 49 N. H. 225. See also *City Bank of Brooklyn v. McChesney*, 20 N. Y. 240. As to notice generally, see *Uhl v. Harvey*, 12 Am. L. Reg. (N. S.) and note.

a debt contracted with the firm after his retirement. (e) Whether a *new* customer can so hold him is not so certain. Generally, he cannot; but if the new customer was brought to the firm by the responsibility of this partner, which responsibility he knew to have existed, and had a right to suppose existed still, which right grew out of the laches of the retiring partner, and no negligence or want of diligence was imputable to the creditor, it would seem on general principles that the creditor had a right to hold him responsible as a partner. It would be difficult to distinguish on principle such a case from that of a former customer creating a new debt.

If a creditor of a firm, knowing of the retirement of a partner, receives for his debt the negotiable paper of the remaining partner or partners, the presumption is that he intends to discharge the retiring partner. (f)

For the liability of an incoming partner, see *post*, Sect. XII.

* SECTION X.

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OF NOMINAL PARTNERS.

A nominal partner, or one held out to the world as such without actual participation of profit and loss, is of course held, generally, as responsible for the debts of the partnership.¹ But one who not being a partner holds himself out to certain persons as a partner, is liable as such only to those who give credit to the firm

(e) *Parkin v. Carruthers*, 3 Esp. 248; *Graham v. Hope*, 1 Peake, Cas. 154; *Bernard v. Torrance*, 5 G. & J. 383; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Stables v. Eley*, 1 C. & P. 614; *Taylor v. Young*, 3 Watts, 339; *Amidown v. Osgood*, 24 Vt. 278; *Simonds v. Strong*, 24 Vt. 642; *Burgan v. Lyell*, 2 Mich. 102; *Johnson v. Totten*, 3 Cal. 343. And a partner whose name is not used in a firm is still liable for debts contracted subsequently to his retirement, with persons who knew of his previous connection, but who had no notice of his retirement. *Davis v. Allen*, 3 Comst. 168. See 3 Kent, Com. 66; *Princeton v. Gulick*, 1 Harrison, 161. See *post*, note (y), p. *204, and *ante*, note (d), p. *169.

(f) *Thompson v. Percival*, 3 Nev. & M. 167; *Evans v. Drummond*, 4 Esp. 89; *Harris v. Farnell*, 15 E. L. & E. 70, s. c. 15 Beav. 31; *Yarnell v. Anderson*, 14 Mo. 619; *Crooker v. Crooker*, 52 Me. 267. See also *Ludington v. Bell*, 77 N. Y. 138.

¹ If he has taken part, consented, or acquiesced in such holding out. *Martyn v. Gray*, 14 C. B. n. s. 824; *Nicholson v. Moog*, 65 Ala. 471; *Holland v. Long*, 57 Ga. 36; *Wheeler v. McEldowney*, 60 Ill. 358; *Wood v. Pennell*, 51 Me. 52; *Rice v. Barrett*, 116 Mass. 312; *Kritzer v. Sweet*, 57 Mich. 617; *Wright v. Boynton*, 37 N. H. 9; *Poillon v. Secor*, 61 N. Y. 456. But not otherwise. *Fox v. Clifton*, 6 Bing. 776; *Bishop v. Georgeson*, 60 Ill. 484; *Rimel v. Hayes*, 83 Mo. 200; *Cassidy v. Hall*, 97 N. Y. 159; *Denithorne v. Hook*, 112 Pa. 240. — W.

in the belief that he is a partner;¹ (x) and it is said that this belief may be inferred as to any one dealing with the firm, from the general notoriety of his alleged partnership. (ff) It has been determined that where two or more persons appear to the public as partners, and there is a stipulation between them, that one of them shall not have any share of the profits, nor pay any portion of the losses, he is not liable to the creditor of the firm who before giving credit knew of this stipulation; because such creditor has no right to fix upon him a responsibility against his bargain and intention, which bargain and intention were known to the creditor. (g) An admission by a person that he is a partner in a firm is not conclusive against him, though made to the creditor, if made *after* the debt for which it is sought to make him liable, was contracted; otherwise, if made *before* the credit is given. (h)

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* SECTION XI.

WHEN A JOINT LIABILITY IS INCURRED.

Where there is no joint purchase or joint incurring of debt, but a purchase by one to whom alone credit is given, a subsequent joint interest in the property purchased, and in the business and profits depending upon it, carries no liability for the original debt. (i) And where many persons join in an adventure,

(ff) Wood v. Pennell, 51 Me. 52. See *supra*, p.* 158, n. (x).

(g) Anderson v. Pope, 1 Camp. 404 n., and Lord *Ellenborough* in that case held that notice to one member of a firm, of such a stipulation, was notice to the whole partnership. See *Burnes v. Pennell*, 2 House of L. Cas. 497; *Pratt v. Langdon*, 97 Mass. 97, 100.

(h) *Ridgway v. Philip*, 1 C. M. & R. 415. See *Gordon v. Bankard*, 37 Ill. 147; *Barcroft v. Snodgrass*, 1 Cold. 430.

(i) Persons are not jointly liable upon a contract as partners, unless they have a joint interest existing at its date. *Young v. Hunter*, 4 Taunt. 582; *Hutton v. Bulloch*, L. R. 8 Q. B. 331. — This principle is illustrated by many cases showing that

¹ *Pott v. Eyton*, 3 C. B. 32; *Dickinson v. Valpy*, 10 B. & C. 128; *Thompson v. First Nat. Bank*, 111 U. S. 529; *Heffner v. Palmer*, 67 Ill. 161; *Wood v. Pennell*, 51 Me. 52; *Hahlo v. Mayer*, 102 Mo. 93; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135; *Denithorne v. Hook*, 112 Pa. St. 240. — W.

(x) In order to obtain an interlocutory injunction against advertisements or statements implying that the plaintiff is interested in another's business, the representations must amount to a statement that the plaintiff is responsibly connected with the defendant's business or venture; mere annoyance or apprehension of liability is not sufficient, and there must be a tangible probability of injury. *Walter v. Ashton*, [1902] 2 Ch. 282. See

Stevens v. Walton (Col. App.), 68 Pac. 834; *Fisher v. A. Y. McDonald Co.*, 85 Ill. App. 653.

The New York Penal Code, § 363, which makes it a misdemeanour to use the designation "& Co." when one has no actual partner, being highly penal, is construed as not applying to an executed agreement. *Sinnott v. German-American Bank*, 164 N. Y. 386, 58 N. E. 286.

* each to contribute his share, each is liable alone for his * 173 share to the person from whom he bought it. No partnership arises until the several shares are brought together and mixed up in one common adventure. (*j*) But if the bargain was for a joint purchase and joint adventure, there is at once a joint liability for the original purchase, although it was made by one of the partners alone, and he alone was known to be interested, and credit was given to him alone. (*k*) And the same rule is * applied, where the creditor of a foreign firm, aware of the * 174 persons composing the firm, and that the goods are to be shipped for the firm, in dealing with a resident member makes out the invoices to him individually, and draws upon him alone. (*l*) Because the liability of a partner springs *either* from his holding himself out to the world as a partner, *or* from his participation in the business and its profit or loss. If these two causes meet, as is usually the case, they strengthen each other; but either of them alone is, in general, sufficient to create this liability. (*m*) Nor is it necessary that there should be an express stipulation if in fact they share the business and the profits as partners. (*mm*) And there is no liability as a partner where there is neither a participation of profits, nor any such use of the defendant's name permitted by him as justifies the plaintiff in selling to others on his credit, although there may be in some other way or measure a community of interest. (*n*)

where one, on his individual credit alone, borrows money for the use of the firm, the firm will not be liable merely because the money came to their use. See *Siffkin v. Walker*, 2 Camp. 308; *Graeff v. Hitchman*, 5 Watts, 454; *Emly v. Lye*, 15 East, 7; *Green v. Tanner*, 8 Met. 411; *Ripley v. Kingsbury*, 1 Day, 150 (*n*); *Evans v. Winston*, 74 Ala. 349; *Bank v. Sawyer*, 38 Ohio St. 339; *McNaughton's Appeal*, 101 Pa. 550; *Stebbins v. Willard*, 53 Vt. 665.

(*j*) *Saville v. Robertson*, 4 T. R. 720. See *Gouthwaite v. Duckworth*, 12 East, 421, where *Saville v. Robertson* is distinguished. See also *Post v. Kimberly*, 9 Johns. 470, in which it was held, that there was no partnership between A and B, and C and D, in the outward cargo, except, perhaps, so far as related to the transport and selling of it; for that, although the whole cargo was shipped on board the same vessel, yet it was clear that each house purchased and put on board its aliquot part, without the concern or responsibility of the other. *Brooke v. Evans*, 5 Watts, 196; *Sims v. Willing*, 8 S. & R. 103.

(*k*) Thus, where three persons were en-

gaged in a joint speculation, for the purchase and importation of corn, but no partnership fund was raised for the speculation, and the parties met the expenses in thirds, and two only of the three had the management of the speculation, one of these two being the consignee and the other the salesman of the corn; it was nevertheless very truly said, that, if there had been a claim in that case by the seller of the corn, no doubt he would have been entitled to proceed against all the parties, and might have called on them all for payment. *Smith v. Cragen*, 1 Cr. & J. 500. See also *Browne v. Gibbins*, 5 Bro. P. C. 491; *Gardiner v. Childs*, 8 C. & P. 345; *Coope v. Eyre*, 1 H. Bl. 37; *Barton v. Hanson*, 2 Taunt. 49; *Sims v. Willing*, 8 S. & R. 103.

(*l*) *Bottomly v. Nuttall*, 94 Eng. C. L. 122; s. c. 5 C. B. (N. S.) 122.

(*m*) See *Buckingham v. Burgess*, 3 McLean, 364; *Markham v. Jones*, 7 B. Mon. 456; *Benedict v. Davis*, 2 McLean, 347; *Cottrill v. Vanduzen*, 22 Vt. 511.

(*mm*) *Duryea v. Burt*, 28 Cal. 569.

(*n*) See *Osborne v. Brennan*, 2 Nott. & McC. 447, *Milburn v. Guyther*, 8 Gill, 92.

SECTION XII.

OF THE AUTHORITY OF EACH PARTNER.

It is a general rule, both throughout Europe and in this country, that the whole firm and all the members of a copartnership are bound by the acts and contracts of one partner with reference to the partnership business and affairs, (*nn*) — such act or contract being in law the act or contract of all. This power of each partner to represent and to bind the rest, and to dispose of the partnership property, is sometimes regarded as arising from * 175 * the agency which all confer on each; and sometimes from the community of interest whereby no partner owns any part of the partnership property exclusively of the rest, but each partner owns the whole, in common with all the others. We think it rests upon both of these foundations together. This law may often be illustrated by a reference to the principles of agency; but must still be regarded as consisting of a distinct system of rules and principles peculiar to itself.

So also, partnership is sometimes spoken of as like joint-tenancy, with important modifications, or like tenancy in common, with such modifications. In truth it is a distinct and independent relation; and though it has some of the attributes of joint tenancy, and some of tenancy in common, it is neither of these. Nor can it be much better illustrated by a reference to either of these modes of joint-ownership, than they would be by a reference to partnership.

If an action is brought against sundry persons as copartners, and the fact of copartnership is admitted, or otherwise proved, then the admission of one of the partners as to any matter between the firm and another party affects, as evidence, all the partners. But where the existence of the copartnership, or of the joint interest of liability, is in dispute, the admission of one person that he is copartner with the others, affects him alone, and is not evidence of the existence of the copartnership so as to bind the others. (*o*) And if two firms are partners in

— And a lay or share in the proceeds of a whaling voyage, does not create a partnership in the profits of the voyage, but is in the nature of seamen's wages, and governed by the same rules. *Coffin v. Jenkins*, 3 Story, 108.

(*nn*) *Stockwell v. Dillingham*, 50 Me. 442; *Welles v. March*, 30 N. Y. 344.

(*o*) *Taylor v. Henderson*, 17 S. & R. 453; *McPherson v. Rathbone*, 7 Wend. 216; *Jewett v. Stevens*, 6 N. H. 82; *Mitchell v. Roulstone*, 2 Hall, 351; *Nelson v. Lloyd*, 9 Watts, 22; *Cottrill v. Vanduzen*, 22 Vt. 511; *Gilpin v. Temple*, 4 Harring. 190; *Van Reimsdyk v. Kane*, 1 Gallis. 630; *Tuttle v. Cooper*, 5 Pick. 414; *Whit-*

* any transaction, the acknowledgment by one affects both. * 176
The effect of an acknowledgment by a partner, where a promise is barred by the Statute of Limitations, will be considered when we treat of that statute.

Where a joint business transaction consists in or refers to the purchase of goods, it is generally the rule that the partnership liability begins when the goods are ordered. But this may depend upon the question whether the person giving the order was, at that time, the agent of all who are sought to be charged. For if he was not, then they are not liable; and in that case a subsequent naked acknowledgment of the contract will not suffice to render them liable as partners. (*p*) For parties are * not jointly liable as partners upon any contract, unless * 177 they had a joint interest preceding or contemporary with the formation of the contract. But where two or more agree together to purchase goods, and agree also that one shall purchase them for the rest, here there is a partnership preceding the purchase, and he that buys is by the agreement of the others their agent, and all are liable as partners. (*q*)

We have seen that each partner is for many purposes the agent

ney *v.* Ferris, 10 Johns. 66; Bucknam *v.* Barnum, 15 Conn. 68; Phillips *v.* Purington, 15 Me. 425; Jennings *v.* Estes, 16 id. 323; Ruhe *v.* Burnell, 121 Mass. 450; Welsh *v.* Speakman, 8 W. & S. 257; Haughey *v.* Strickler, 2 id. 411; Porter *v.* Wilson, 13 Penn. 641.— But the existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, and conduct of the parties, the act of one, the declarations of another, and the acknowledgment or conduct of a third. Welsh *v.* Speakman, 8 W. & S. 257; Barcroft *v.* Haworth, 29 Iowa, 462. See also Haughey *v.* Strickler, 2 W. & S. 411. Where proof of the admissions of an alleged partner are offered at the trial, it is the province of the judge and not of the jury to pass upon the fact whether such person was a partner or not. Harris *v.* Wilson, 7 Wend. 57.— And where the terms of the agreement and the facts are admitted, it is a question of law, whether there was a partnership or not. Everitt *v.* Chapman, 6 Conn. 347; Terrill *v.* Richards, 1 Nott & McC. 20.— The fact that the defendants do business as *partners* is *prima facie* evidence of their copartnership, and no written articles need be shown. Bryer *v.* Weston, 16 Me. 261; Gilbert *v.* Whidden, 20 id. 367; Forbes *v.* Davidson, 11 Vt. 660. And the adverse party's acknowledgment that the plaintiffs were

partners is sufficient. Bisel *v.* Hobbs, 6 Blackf. 479. In Hogg *v.* Orgill, 34 Penn. St. 344, it is held that the admission of one partner that another was a member of the firm, made after dissolution, binds no one but himself.

(*p*) Gouthwaite *v.* Duckworth, 12 East, 421; Saville *v.* Robertson, 4 T. R. 720; Sims *v.* Willing, 8 S. & R. 103.— Post *v.* Kimberly, 9 Johns. 470, is a leading case on this subject. In Coope *v.* Eyre, 1 H. Bl. 37, A, B, C, and D agreed to buy jointly all the oil they could get, as their joint purchase, but A alone was to buy, and B, C, and D were to share equally in the oil he bought. A buys of E on credit. The oil falls in value, and A fails. E sues B, C, and D, as his partners. They were held not to be his partners, because it appeared that A was not to sell for the rest; but when he had bought, B, C, and D, were to receive from him each one-fourth; and there was no community in the disposition of the oil.— A firm cannot be charged with a debt contracted by one of the partners before the partnership was constituted, although the subject-matter which was the consideration of the debt, has been carried into the partnership as stock. Brooke *v.* Evans, 5 Watts, 196; Ketchum *v.* Durkee, 1 Hoff. Ch. 538.

(*q*) Felichy *v.* Hamilton, 1 Wash. C. C. 491.

of all the rest, by force of law, without any express authority. (r) ¹

Loans, purchases, sales, assignments, pledges, or mortgages, * 178 effected by one partner on the partnership account, * and with good faith on the part of the creditor or other third party, are binding on all the firm. And this agency, as it generally springs from a community of interest, so it is generally limited by this community.

A partner may transfer all his interest in the partnership, and it has even been held, contrary as we think to the prevailing rule, that such assignment by a partner to his individual creditors was valid against the partnership creditors. (s) ²

Among the questions which have arisen as to the limitations to the general power of a partner over the partnership property, one, not yet perhaps perfectly settled, is as to the power of one partner to make an assignment of the whole property, to pay the partnership debts. (t) We think the weight of authority and

(r) *Boswell v. Green*, 1 Dutcher, 390; *Western Stage Company v. Walker*, 2 Iowa, 504.

(s) *Wilson v. Bowden*, 8 Rich. L. 9, and *Norris v. Vernon*, id. 13.

(t) *Anderson v. Tompkins*, 1 Brock. 456, where it was held that the right of one partner to bind another by such assignment results from his general power to dispose of the partnership property, and, if made *bonâ fide*, is valid. The assignment was also held valid in *Harrison*

v. Sterry, 5 Cranch, 300, although under seal. *Robinson v. Crowder*, 4 McCord, 519. And see to the same effect *Mills v. Barber*, 4 Day, 428; *Deckard v. Case*, 5 Watts, 22; *Tapley v. Butterfield*, 1 Met. 515; *Gordon v. Cannon*, 18 Gratt, 387; *Scruggs v. Burruss*, 25 W. Va. 670; *Lasell v. Tucker*, 5 Sneed, 33; *Mabbett v. White*, 2 Kern. 442; *Kemp v. Carnley*, 3 Duer, 1. In *Egberts v. Wood*, 3 Paige, 517, Chancellor *Walworth* considered such assignments valid when not against the

¹ Thus one partner may buy and sell, *Tate v. Clements*, 16 Fla. 339, *Birks v. French*, 21 Kan. 238, *Corning v. Abbott*, 54 N. H. 469; *Johnson v. Barry*, 95 Ill. 483; notwithstanding notice to withhold credit from him, *Campbell v. Bowen*, 49 Ga. 417; or accept delivery, *Kenny v. Altwater*, 77 Penn. St. 34; *Crosswell v. Lehman*, 54 Ala. 363; or hire servants, *Carley v. Jenkins*, 46 Vt. 721; or assign a firm *chose in action*, *Clarke v. Hogeman*, 13 W. Va. 718; or receive security for money lent, *In re Land Credit Co.*, L. R. 8 Ch. 831; or mortgage firm goods for a firm debt, *Richardson v. Lester*, 83 Ill. 55; or settle an insurance loss, *Brown v. Hartford Ins. Co.*, 117 Mass. 479; or borrow money, *Howze v. Patterson*, 63 Ala. 205; *Leffler v. Rice*, 44 Ind. 103; *Smith v. Collins*, 115 Mass. 388; or indorse negotiable paper, *Porter v. White*, 39 Md. 613; *Moorehead v. Gilmore*, 77 Penn. St. 118; *Cottam v. Smith*, 27 La. An. 128; or sign the firm name to notes, *Wagner v. Simmons*, 61 Ala. 143; *Johnson v. Barry*, 95 Ill. 483; *Porter v. Barry*, 39 Md. 613; *Faler v. Jordan*, 44 Miss. 283; *Ditts v. Lonsdale*, 49 Ind. 521; *Shaw v. McGregor*, 105 Mass. 96; *Dow v. Moore*, 47 N. H. 419; but a partner cannot accept a bill drawn "to our order." *Hogarth v. Latham*, 3 Q. B. D. 643. — K.

² By a sale or mortgage by one partner of his interest in the partnership, the vendee or mortgagee acquires only a right to such partner's share in the surplus remaining after all creditors have been paid and accounts between the partners adjusted. *Smith v. Parkes*, 16 Beav. 115; *Warren v. Taylor*, 60 Ala. 218; *Sheehy v. Graves*, 58 Cal. 449; *Beecher v. Stevens*, 43 Conn. 587; *Smith v. Andrews*, 49 Ill. 28; *Deeter v. Sellers*, 102 Ind. 458; *Williams v. Lewis*, 115 Ind. 45, 47; *Tarbell v. West*, 86 N. Y. 280; *First Nat. Bank v. Wood*, 128 N. Y. 35, 44; *Burbank v. Wiley*, 79 N. C. 501; *Page v. Thomas*, 43 Ohio St. 38; *Stebbins v. Willard*, 53 Vt. 665; *Maxwell v. Wheeling*, 9 W. Va. 206. — W.

of * reason is in favor of this power, and that such assign- * 179
ment, being entirely in good faith, would be held valid;
especially if one of the partners had absconded, and the
other made the arrangement. (tt)¹(x) He may sell the whole
stock in trade by a single contract. (u) Nor is the sale avoided
by the fact that the partner making the sale applies the

known wishes of a copartner. The contrary was held in *Dickinson v. Legare*, 1 Desaus. 557 (overruled by *Robinson v. Crowder*, *supra*); *Dana v. Lull*, 17 Vt. 390, per *Redfield*, and *Bennett*, J. See *Moddewell v. Keever*, 8 W. & S. 63. In *Havens v. Hussey*, 5 Paige, 30, the power of one partner to make such an assignment against the known wishes of a copartner, or without his consent, was held invalid. In *Hitchcock v. St. John*, 1 Hoff. Ch. 511, it was held that one partner cannot on the eve of insolvency assign all the partnership property to a trustee, for the purpose of paying the debts of the firm with preferences. In *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477, the reasons for and against the validity of such assignments to trustees were elaborately considered by *Felch, J.*, delivering the opinion of the court, and *Whipple, J.*, dissenting; and it was held that there is no implied authority for one partner, without the assent of his copartners, and in the absence of special circumstances, such as absence in a foreign country, to make a general assignment of the partnership effects, to a trustee, for the benefit of creditors, giving preferences to some over others. The power of one partner to make such an assignment to trustees as would terminate the partnership, was left undecided in *Hayes v. Heyer*, 4 Sandf. Ch. 485, and *Pearpoint v. Graham*, 4 Wash. C. C. 232. In the latter case Judge *Washington* inclined to the opinion that it does not exist. This power is denied in *Dunklin v. Kimball*, 50 Ala. 251; *Wilcox v. Jackson*, 7 Col. 521; *Loeb v. Pierpont*, 58 Ia. 469; *Bull v. Harris*, 18 B. Mon. 195; *Maughlin v. Tyler*, 47 Md. 545; *Hook v. Stone*, 34 Mo. 329; *Steinhart v.*

Fyhrie, 5 Mont. 463; *Kimball v. Hamilton Ins. Co.*, 8 Bosw. 495, and *Hook v. Stone*, 34 Mis. 329; *Welles v. March*, 30 N. Y. 344; *Coope v. Bowles*, 42 Barb. 87; *Holland v. Drake*, 29 Ohio St. 441; *Pet. of Daniels*, 14 R. I. 500; *Williams v. Roberts*, 6 Cold. 493, 497; *Coleman v. Darling*, 66 Wis. 155. See *Collyer* on Part. § 395; *Story* on Part. §§ 101, 310; 3 Kent Com. 44, n. (7th ed.). But the assignment of real property to trustees will not bind the partners who do not join in it. *Anderson v. Tompkins*, 1 Brock. 463, *Collyer* on Part. (3d Am. ed.) § 394. See also *Wilson v. Soper*, 13 B. Mon. 411, and *Fisher v. Murray*, 1 E. D. Smith, 341.

(tt) *Palmer v. Myers*, 43 Barb. 509. See also *Stein v. La Dow*, 13 Minn. 412; *Hunter v. Waynick*, 67 Iowa, 555; *Newhall v. Buckingham*, 14 Ill. 405; *Welles v. March*, 30 N. Y. 344, *Rumery v. McCulloch*, 54 Wis. 565; *Pet. of Daniels*, 14 R. I. 500.

(u) *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson v. Tompkins*, 1 Brock. 456; *Pierson v. Hooker*, 3 Johns. 70; *Livingston v. Roosevelt*, 4 Johns. 277; *Mills v. Barber*, 4 Day, 430; *Pearpoint v. Graham*, 4 Wash. C. C. 234; *Kirby v. Ingersoll*, 1 Harring. Ch. (Mich.) 172; *Halstead v. Shepard*, 23 Ala. 558; *Whitton v. Smith*, 1 Freeman, Ch. (Miss.) 238; *Arnold v. Brown*, 24 Pick. 92. See also *Drake v. Thyng*, 37 Ark. 228; *Crites v. Wilkinson*, 65 Cal. 559; *Hunter v. Waynick*, 67 Ia. 555; *Blaker v. Sands*, 29 Kan. 551; *Cayton v. Hardy*, 27 Mo. 536; *Graser v. Stellwagen*, 25 N. Y. 315; *Sloan v. Moore*, 37 Pa. St. 217; *Forkner v. Stuart*, 6 Gratt. 197.

¹ The weight of recent authority is against this power. See cases cited in note (t). Unless the other partners have absconded or are absent and cannot be communicated with at once and immediate action is necessary. See cases cited in note (tt). — W.

(x) Such an assignment appears to be now valid only when the other partner is absent from the State. *Mayer v. Bernstein*, 69 Miss. 17, 12 So. 257; *Hill v. Postley*, 90 Va. 200, 17 S. E. 946; *Trumbull v. Union Trust Co.*, 33 Ill. App. 319. A

surviving partner may assign with preferences. *Emerson v. Senter*, 118 U. S. 1, 6 S. Ct. 981, 30 L. Ed. 49; *Riddle v. Whitehill*, 135 U. S. 621, 637, 10 S. Ct. 924, 34 L. Ed. 283.

* 180 *proceeds fraudulently to the payment of his private debt, (*v*) if the purchaser was wholly innocent of the fraud.

It seems to be settled that a partner may dissent from a future or incomplete contract, and that a third party having notice of such dissent could not hold the dissenting partner, without evidence of his subsequent assent or ratification. (*w*) And the mere fact that the goods purchased by the contract came into the possession of the firm is not sufficient evidence of such assent or ratification, without some evidence of a benefit received by the dissenting partner, from the delivery of the goods to the firm. (*x*)

* 181 *Money lent to one partner for his own expenses, incurred by him in prosecuting the business of the partnership, has been held to be a partnership debt. (*y*) But if a partner who has given his own security for money borrowed by himself, apply that money to partnership purposes, this does not make it a partnership debt. The partnership owes the borrowing partner, and he alone owes the lender. (*z*) And a person lending money to one partner, that he may contribute it to increase the capital of the concern, cannot hold the other partners liable, without some evidence of their assent or authority. (*a*) And one attorney, a member of a firm, has no general authority resulting

(*v*) *Arnold v. Brown*, 24 Pick. 93.

(*w*) In *Willis v. Dyson*, 1 Stark. 164, dissent by one partner, who sent a circular, was held to be sufficient. *Feigley v. Sponeberger*, 5 W. & S. 564; *Vice v. Fleming*, 1 Y. & Jer. 227; 3 Kent Com. 45; *Layfield's Case*, 1 Salk. 292; *Minnit v. Whinery*, 5 Bro. P. C. 489; *Rooth v. Quinn*, 7 Price, 193; *Yeager v. Wallace*, 57 Penn. St. 365; *Matthews v. Dare*, 20 Md. 248; *Tyler v. Scott*, 45 Vt. 261. The implied authority of one partner to draw bills and notes for the partnership is revoked by notice to the person who afterwards receives them that it does not exist. *Galway v. Matthew*, 1 Camp. 403; s. c. 10 East, 264; *Rooth v. Quinn*, 7 Price, 193. The refusal of a partner to give a joint note does not of itself amount to a revocation of the implied authority, but the question is to be submitted as one of *fact* for the jury. *Leavitt v. Peck*, 3 Conn. 124; *Vice v. Fleming*, 1 Y. & Jer. 227. — This dissent may not, perhaps, relieve a partner from liability, where the partnership consists of more than two, unless the majority dissent. 3 Kent Com. 45; *Story on Part. § 123*; *Coll. on Part. § 389*; n.; *Rooth v. Quinn*, 7 Price, 193; *Kirk v. Hodgson*, 3 Johns. Ch. 400. And it has

been held that each partner may bind his copartners by any contract within the scope of the partnership business, notwithstanding they object to the transaction. *Wilkins v. Pearce*, 5 Denio, 541. s. c. 2 Comst. 469; *Graser v. Stellwagen*, 25 N. Y. 315; *Campbell v. Bowen*, 49 Ga. 417. A firm cannot be charged with a debt contracted by one partner, before the partnership was constituted, although the subject-matter which was the consideration of the debt has been carried into the partnership as stock. Nor can the firm be charged with rent which accrued upon a lease to one of the partners. *Brooke v. Evans*, 5 Watts, 196; *Ketchum v. Durkee*, 1 Hoff. Ch. 538; *Le Roy v. Johnson*, 2 Pet. 198.

(*x*) *Monroe v. Conner*, 15 Me. 178.

(*y*) *Rothwell v. Humphreys*, 1 Esp. 406. And see *Ex parte Bonbonus*, 8 Ves. 540.

(*z*) *Graeff v. Hitchman*, 5 Watts, 454; *Bevan v. Lewis*, 1 Sim. 376; *Emly v. Lye*, 15 East, 6; *Salem Bank v. Thomas*, 47 N. Y. 15.

(*a*) *Fisher v. Taylor*, 2 Hare, 218. And see *Greenslade v. Dower*, 7 B. & C. 635; *Stewart v. Caldwell*, 9 La. Ann. 419; *King v. Faber*, 22 Penn. St. 21.

from the nature of their business to borrow money on the credit of the firm. (b) ¹(x) Nor can he bind his copartner by an indorsement of a writ in his own name. (c) A lender of money to a partner cannot, in general, recover of the firm, without showing that the money was applied to the use of the firm. (y) For the presumption would be that it was borrowed by the partner on his own account, and not lent to the firm. But although it be proved that the money was not applied to the use of the firm, yet the firm will be liable for it, if it were borrowed in their name by a partner whom they had apparently clothed with authority to borrow it for them. (d) If the partnership * be carried on in the * 182

(b) *Breckenridge v. Shrieve*, 4 Dana, 378. See also *Sims v. Brutton*, 5 Exch. 802; *Wilkinson v. Candlish*, 5 Exch. 91; *Harman v. Johnson*, 3 Car. & K. 272; *Plumer v. Gregory*, L. R. 18 Eq. 621.

(c) *Davis v. Gowen*, 17 Me. 387.

(d) In *Etheridge v. Binney*, 9 Pick. 272, it was held that in case of a limited and dormant partnership carried on by one of the partners in his individual name, if he borrow money *representing it to be for the use of the partnership*, the dormant

¹ Neither can a partner in a law firm bind his copartner by giving a note in the firm name, even for a partnership debt, unless he has special authority, or it was necessary for carrying on the business, *Smith v. Sloan*, 37 Wis. 285; nor bind his firm by a post-dated check drawn in the name of the firm. *Forster v. Mackreth*, L. R. 2 Ex. 163. See *Garland v. Jacob*, L. R. 8 Ex. 216. — K.

(x) *Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 592; *Worster v. Forbush*, 171 Mass. 423, 50 N. E. 936; *Fornes v. Wright*, 91 Iowa, 392, 59 N. W. 51; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98; *Davis v. Dodson*, 95 Ga. 718, 22 S. E. 645, 29 L. R. A. 496. The firm is not entitled to share in one partner's profits from individual transactions beyond the scope of its business, though he uses in such transactions the knowledge and skill acquired in its business, and though his engaging therein violates the partnership articles. *Aas v. Benham*, [1891] 2 Ch. 244; *Latta v. Kilbourn*, 150 U. S. 524, 14 S. Ct. 201, 37 L. Ed. 1169. Thus the compensation of one member of a law partnership as an executor is not part of the firm's profits. *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478. If one such partner employs the other to assist him, the latter may sue the former personally for compensation. *Parker v. Day*, 30 N. Y. S. 267.

The power of each member of other non-commercial firms is also limited. *Latta v. Kilbourn*, 150 U. S. 524, 14 S. Ct. 201, 37 L. Ed. 1169; *Harper v. McKinnis*, 53 Ohio St. 434, 42 N. E. 251; *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53; *Johnson v. Mon Lee*, 10 N. Y. S. 9; *McManus v. Smith*, 37 Oregon, 222, 61

Pac. 844; *Schellenbeck v. Studebaker*, 13 Ind. App. 437, 31 N. E. 845; *Lee v. First Nat. Bank (Kan.)*, 11 L. R. A. 233 n.; *Harris v. Baltimore*, 73 Md. 22, 8 L. R. A. 667.

(y) Negotiable paper of a commercial partnership, issued by one partner in the usual or apparent course of business, binds the firm in the hands of a purchaser without notice, though misused by him or issued without the firm's knowledge. *Dowling v. Exchange Bank*, 145 U. S. 512, 12 S. Ct. 928, 36 L. Ed. 795; *Childs v. Pellett*, 102 Mich. 558, 61 N. W. 54; *Bays v. Conner*, 105 Ind. 415; *Sondheim v. Gilbert*, 117 Ind. 71; *Midland Nat. Bank v. Schoen*, 123 Mo. 650, 27 S. W. 547; *Stavnow v. Kenefick*, 79 Mo. App. 41; *National Exchange Bank v. Wilgus (Ky.)*, 25 S. W. 2; *Heilbut v. Nevill*, L. R. 5 C. P. 478, 4 English Ruling Cas. 408. This applies to accommodation notes or indorsements signed and issued in the firm name by one member, especially when he has long been accustomed to so sign and issue. *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547; *Second Nat. Bank v. Weston*, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; *Altoona Second Nat. Bank v. Dunn*, 151 Penn. St. 228, 25 Atl. 80, 31 Am. St. Rep. 742, 754 n.

name of an individual, the presumption of law is that a note signed by him is his own note, and the contrary must be shown. (e)¹ If, however, a partner of a firm having other names, or the word "company" in its partnership style, sign a bill or note with his own name, and without the proper partnership style, or in other words to indicate that it is on partnership account, for money borrowed, he alone is answerable, although the money was borrowed for and applied to a partnership purpose. (f)²(x) Questions

partners will be liable without proof by the creditor that the money went to the use of the partnership. But it was held otherwise, if there were no such representations. — See *Whitaker v. Brown*, 16 Wend. 505, where it was held that a note, given by one partner in the name of the firm, is *of itself* presumptive evidence of the existence of a partnership debt, and if the other partners seek to avoid the payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that also with the knowledge of the payee. See *Thicknesse v. Bromilow*, 2 Cr.

& J. 425; *Barrett v. Swann*, 17 Me. 180; *Ensminger v. Marvin*, 5 Blackf. 210; *Bank of the United States v. Binney*, 5 Mason, 176; *Wright v. Hooker*, 6 Selden, 51.

(e) See cases in former note, and *Oliphant v. Mathews*, 16 Barb. 608.

(f) *Ripley v. Kingsbury*, 1 Day, 150, n.; *Foley v. Robards*, 3 Ired. L. 179; *Jaques v. Marquand*, 6 Cowen, 497; *Willis v. Hall*, 2 Dev. & B. 231; *Logan v. Bond*, 13 Ga. 192; *Hogan v. Reynolds*, 8 Ala. 59. Otherwise if the paper be signed with the partnership clause. *Pearce v. Wilkins*, 2 Comst. 469; *Hamilton v. Summers*, 12 B. Mon. 11.

¹ *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 204, decided that if the name of a firm is identical with that of an individual member of it, proof that such name was signed to a bill of exchange by the authority and for the purposes of the firm is necessary to make the firm liable; but it was said in the same case, on appeal, in 5 C. P. D. 109, affirming the judgment in the particular case, that the presumption in such a case is that the bill was given for the firm, and is binding upon it, at least where the individual carries on no business separate from the business of the firm, which presumption may be rebutted by proof that the bill was signed not in the name of the partnership, but of the individual for his private purposes. — K.

² If a note or other obligation is executed by all the partners individually, it is the obligation of the individuals only and not of the firm. *Freeman v. Campbell*, 55 Cal. 197; *Dunnica v. Clinkscates*, 73 Mo. 500; *Turner v. Jaycox*, 40 N. Y. 470; *Second Nat. Bank v. Burt*, 93 N. Y. 233, 245.

But if such obligation was in fact executed in the firm's business and for its benefit, it will be regarded as a copartnership obligation, and it will be payable out of the firm assets. *Ex parte Stone*, L. R. 8 Ch. 914; *Nelson v. Neely*, 63 Ind. 194; *Carson v. Byers*, 67 Ia. 606; *Spalding v. Wilson*, 80 Ky. 589, 595; *Mitchell v. D'Armond*, 30 La. An. 396; *Gay v. Johnson*, 45 N. H. 587; *Berkshire Woollen Co. v. Julliard*, 75 N. Y. 535; *In re Waldron*, 98 N. Y. 671; *Clanton v. Price*, 90 N. C. 96, 99; *McKee v. Hamilton*, 33 Ohio St. 7; *Frow, Jacobs & Co.'s Est.* 73 Pa. 459. The same result has been reached when a note was made by one partner and indorsed by the others. *Ex parte First Nat. Bank*, 70 Me. 369; *Thayer v. Smith*, 116 Mass. 363; *Booth v. Farmers', &c. Bank*, 74 N. Y. 228. So where the signing of a firm name as "M. & G. by G." to an instrument shows that it was intended to be the act of all the partners although but one partner, "G.," is named in the instrument, *George v. Tate*, 102 U. S. 564; and it is equally true that where all firm checks or notes are drawn in one partner's name, a check or note so drawn binds the firm. *Crocker v. Colwell*, 46 N. Y. 212; *McKee v. Hamilton*, 33 Ohio St. 7, 12. — A letter beginning "We hereby guarantee," signed by the firm name and each of the partners, is both joint and several. *Ex parte Harding*, 12 Ch. D. 557. — If there is no firm style, one partner may sign his copartners' names to a note given in the course of the partnership business, and bind them. *Nelson v. Neely*, 63 Ind. 194; *Kitner v. Whitlock*, 88 Ill. 513. — W.

(x) See *McIntyre v. Houseman*, 98 Ill. App. 76; *Hopkins v. Adey*, 92 Md. 1, 48 Atl. 41, 50 L. R. A. 498; *Baxter v. Rol-*

lins, 90 Iowa, 217, 57 N. W. 838, 48 Am. St. Rep. 432, 438 n.; *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138.

of this kind can be decided in many cases only by the special circumstances attending the transaction. For it is certain that if money has been actually borrowed by one partner on the *credit of the firm, and in the course of the business of the firm*, the other partners are liable for it, although the money was misapplied by him who borrowed it. (g) (x) And if the money be borrowed by one partner, not expressly on his individual credit, and it was in part borrowed for and used by the firm, the copartners are liable. (h)

*And where the money of a third person is in the hands *183 of a copartner as trustee, and he applies it to the use of the firm, with the knowledge and consent of the copartners, they are certainly bound. (i) And it has been decided, upon strong reasons, that they are so held without their knowledge and consent. (j) Still if a partner borrows money on his own individual credit, and subsequently applies it to the benefit of the firm, this does not make the firm liable to the original lender. (k)

A partner cannot bind his copartners by a submission of a partnership question to a reference. (kk) ¹ (y)

(g) *Emerson v. Harmon*, 14 Me. 271; *Church v. Sparrow*, 5 Wend. 223; *Onondaga County Bank v. De Puy*, 17 id. 47; *Waldo Bank v. Lumbert*, 16 Me. 416; *Winship v. Bank of United States*, 5 Pet. 529; *Steel v. Jennings*, Cheves, 183.— But see *Lloyd v. Freshfield*, 2 C. & P. 325; where *Bayley, J.*, is reported to have said: "In point of law, one of several partners may pledge the partnership name for money *bond fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lenders cannot recover of the other partners, if the money be misapplied."

(h) *Church v. Sparrow*, 5 Wend. 223; *Whitaker v. Brown*, 16 id. 505; *Miller v. Manice*, 6 Hill (N. Y.), 114. Whether the money was so borrowed and appropriated is a question for the jury. *Church v. Sparrow*, *supra*. See *Miller v. Manice*, *supra*; *Bond v. Gibson*, 1 Camp. 185; *Whitaker*

v. Brown, 16 Wend. 505; *Jaques v. Marquand*, 6 Cowen, 497.

(i) *Hutchinson v. Smith*, 7 Paige, 26; *Jaques v. Marquand*, 6 Cowen, 497; *Nicholson v. Leavitt*, 4 Sandf. 309.

(j) *Richardson v. French*, 4 Met. 577.

(k) *Green v. Tanner*, 8 Met. 411; *Bevan v. Lewis*, 1 Sim. 376; *Graeff v. Hitchman*, 5 Watts, 454; *Logan v. Bond*, 13 Ga. 192; *Wiggins v. Hammond*, 1 Mo. 121. If the note be signed A B, for A B & Co., the firm will be liable. *Staats v. Howlett*, 4 Denio, 559. If a partner borrow money on his own note for the use of the firm, he may afterwards substitute the note of the firm for his own, and it will be no fraud, and the firm will be bound. *Union Bank v. Eaton*, 5 Humph. 499. See *ante*, p. *180.

(kk) *Stead v. Salt*, 3 Bing. 101; *Backus v. Coyne*, 35 Mich. 5; *Martin v. Thrasher*, 40 Vt. 460; *contra* in *Hallack v. March*, 25 Ill. 48; *Gay v. Waltman*, 89 Penn. St. 453; see *Thomas v. Atherton*, 10 Ch. D. 185.

¹ Neither can one partner confess judgment to bind his copartners. *Hopper v. Lucas*, 86 Ind. 43; *Soper v. Fry*, 37 Mich. 236; *Rhodes v. Amsinck*, 38 Md. 344; *Ellis v. Ellis*, 47 N. J. L. 69; *Shedd v. Bank of Brattleboro*, 32 Vt. 709; *contra*, *Ross v.*

(x) *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554, 567 n.; *Baxter v. Rollins*, 90 Iowa, 217, 57 N. W. 838, 48 Am. St. Rep. 432, 438 n.; *Harris v. Baltimore*, 73 Md. 22, 8 L. R. A. 677.

(y) See *Mobile v. Wood*, 95 Fed. 537; *Kennett v. Hopkins*, 69 N. Y. S. 18, 60 App. Div. 629.

It was decided many years ago, in one case, that a purchase by one partner bound the others; and in another case, that a sale by one partner bound the others; (*l*) and these rules are *184 *the basis of a partnership liability now. And the seller or the purchaser will not be affected by the fraudulent intention of the partner in the transaction, unless there has been collusion, or want of good faith, or gross negligence, on his part. (*m*) But the power of one partner to dispose of partnership property is confined strictly to personal effects. (*n*)

A mortgage of firm property by a partner in his own name conveys no title. (*nn*) (*x*)

The act of each partner is considered as the act of the whole partnership, or of all the partners, only so far as that act was within the scope of the business of the firm; (*o*) but one copartner may bind the firm in matters out of their usual course of business, if they arose out of and were connected with their usual business. (*p*) Or if they receive the express sanction and confirmation of the firm. (*q*) And if a firm owe a debt, it is held that a partner binds the firm by their note for that debt, given by him against the wishes of his partners. (*qq*) Where any creditor of one member of a firm takes from his own debtor, either in payment or as

(*l*) *Lambert's case*, Godb. 244; *Hyatt v. Hare*, Comb. 383. And see *Winship v. Bank of United States*, 5 Pet. 561; *Walden v. Sherburne*, 15 Johns. 422; *Mills v. Barber*, 4 Day, 430; *Dougal v. Cowles*, 5 Day, 515.

(*m*) *Bond v. Gibson*, 1 Camp. 185.

(*n*) *Anderson v. Tompkins*, 1 Brock. 456; *Shaw*, C. J., in *Tapley v. Butterfield*, 1 Met. 519; *Coles v. Coles*, 15 Johns. 159. — Nor can one partner without special authority, bind the firm by a contract for the sale of real estate employed in the business of the firm. *Lawrence v. Taylor*, 5 Hill (N. Y.), 107. See *McCullough v. Somerville*, 8 Leigh, 415; *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson*

v. Tompkins, 1 Brock. 456; *Pierpont v. Graham*, 4 Wash. C. C. 234; *Kirby v. Ingersoll*, 1 Harr. Ch. (Mich.) 172; *Whitton v. Smith*, Freem. Ch. (Miss.) 231; *Duncan v. Clark*, 2 Rich. 587.

(*nn*) *Deeter v. Sellers*, 102 Ind. 458; *Clark v. Houghton*, 12 Gray, 38.

(*o*) *Hannan v. Johnson*, 18 E. L. & E. 400; s. c. 2 E. & B. 61; *Goodman v. White*, 2 Miss. 163; *Miller v. Hines*, 15 Ga. 197; *Alliance Bank v. Kearsley*, L. R. 6 C. P. 433.

(*p*) *Sandilands v. Marsh*, 2 B. & Ald. 673.

(*q*) *Ex parte Peele*, 6 Ves. 602.

(*qq*) *Partin v. Luderloh*, 6 Jones, Eq. 341.

Howell, 84 Penn. St. 129. (*y*) As to whether a partner, before or after dissolution, can cause the appearance of another partner to be entered to a suit against the firm, see *Hall v. Lanning*, 91 U. S. 160. — W.

(*x*) One partner may in good faith mortgage the firm's personality to secure its debts to one not notified of the firm's disapproval. *Settle v. Hargadine-McKittrick Co.*, 66 Fed. 850; *Hage v. Campbell*, 78 Wis. 572; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Carr*

v. Hertz, 54 N. J. Eq. 127, 700, 33 Atl. 194; see *Kirby v. McDonald*, 70 Fed. 139.

(*y*) And see *Adams v. Leeds Co.* 195 Penn. St. 70, 45 Atl. 666; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

security for his debt, the paper of the firm, the presumption of law is, that he took it in fraud of the firm; and without proof of their interest, or their assent and authority (which may be circumstantial), the firm will not be held. (r) And if a partner * applies partnership funds to the payment of his * 185 own debts, this act is void, although the creditor did not know that the funds belonged to the partnership. (s)¹ And a purchaser who buys partnership property from a partner, knowing

(r) *Gansevoort v. Williams*, 14 Wend. 33; *Minor v. Gaw*, 11 Sm. & M. 322; *Clay v. Cottrell*, 18 Penn. 408; *Homer v. Wood*, 11 Cush. 62; *Butter v. Stocking*, 4 Seld. 408; *Commonwealth Bank v. Law*, 127 Mass. 72; *Blodgett v. Sleeper*, 67 Me. 499.

(s) *Rogers v. Batchelor*, 12 Pet. 229; *Dob v. Halsey*, 16 Johns. 34; *Evernghim v. Ensworth*, 7 Wend. 326; *Halstead v. Shepard*, 23 Ala. 558; *Buck v. Mosley*, 24 Miss. 170; *Filden v. Lahens*, 9 Bosw. 436; *Whitmore v. Adams*, 17 Iowa, 567; *Burleigh v. Parton*, 21 Texas, 585.

¹ It is at least clear that any one receiving in settlement of a claim against an individual partner, money or property which belongs to the partnership, with knowledge of that fact, cannot retain it. See, in addition to cases cited in notes (s) and (t), *Kendal v. Wood*, L. R. 6 Ex. 243; *Heilbut v. Nevill*, L. R. 4 C. P. 354, 5 id. 478; *Hurt v. Clarke*, 56 Ala. 19; *Johnson v. Hersey*, 70 Me. 74; *Forney v. Adams*, 74 Mo. 138; *Todd v. Lorah*, 75 Pa. St. 155; *Hartley v. White*, 94 Pa. St. 31; *Cotzhausen v. Judd*, 43 Wis. 213.

It is also frequently said that it is immaterial that the settlement was made by the creditor of the individual partner in good faith and without knowledge that the money or property belonged to the firms. *Allen v. St. Louis Bank*, 120 U. S. 20; *Cannon v. Lindsey*, 85 Ala. 198; *Brewster v. Mott*, 5 Ill. 378; *McNair v. Platt*, 46 Ill. 211; *Ackley v. Staehlin*, 56 Mo. 558; *Caldwell v. Scott*, 54 N. H. 414; *Liberty Savings Bank v. Campbell*, 75 Va. 534, and cases cited in notes (s) and (t). But in most of these cases as a matter of fact the creditor did have knowledge.

In *Locke v. Lewis*, 124 Mass. 1, *Gray*, C. J., makes a thorough examination of the cases and states (at p. 7) a qualification of this principle as follows: "But if the private creditor has no knowledge that the property belongs to the partnership, and the partnership has entrusted its property to one partner in such a manner as to enable him to deal with it as his own, and to induce the public to believe it to be his, then the other partners fall within the rule that when one of two innocent persons must suffer, that one must suffer who by his acts or conduct has afforded the means of committing the fraud." See also *Kendal v. Wood*, L. R. 6 Ex. 243.

And it may perhaps still admit of doubt whether an innocent person who receives from a partner for value partnership property in ignorance that it is such, does not acquire a good title. See *Moriarty v. Bailey*, 46 Conn. 592; *Clarke v. Farrell*, 80 Ga. 622; *Warren v. Martin*, 24 Neb. 273; *Chase v. Bean*, 58 N. H. 183.

Where the transaction is such that it does not bind the firm, a difficulty of procedure frequently arises, when the firm seeks redress. It is held that as the fraudulent partner would have to be joined as plaintiff, no action at law can be maintained for a debt released or property transferred by a partner in fraud of the firm. *Sparrow v. Chisman*, 9 B. & C. 241; *Jones v. Yates*, 9 B. & C. 532; *Cochran v. Cunningham*, 16 Ala. 448; *Church v. First Nat. Bank*, 87 Ill. 68; *Blodgett v. Sleeper*, 67 Me. 499; *Homer v. Wood*, 11 Cush. 62; *Farley v. Lovell*, 103 Mass. 387; *Chase v. Bean*, 58 N. H. 183; *Craig v. Hulschizer*, 34 N. J. L. 363; *Cornels v. Stanhope*, 14 R. I. 97.

But in many jurisdictions this technical doctrine is rejected. *Johnson v. Crichton*, 56 Md. 108; *Stegall v. Coney*, 49 Miss. 761; *Forney v. Adams*, 74 Mo. 138; *Thomas v. Pennrich*, 28 Ohio St. 55; *Liberty Savings Bank v. Campbell*, 75 Va. 534; *Cotzhausen v. Judd*, 43 Wis. 213. See also *Heilbut v. Nevill*, L. R. 4 C. P. 354, 5 id. 478.

Where an action at law by all the partners is not allowed, the proper remedy is a bill in equity by the defrauded partners. *Piercy v. Fynney*, L. R. 12 Eq. 69, and cases cited, *supra*. — W.

that the transaction was a fraud on the firm, may be held a trustee for the firm. (t) (x)

Partners may be made liable for the torts of a copartner if connected with contract, and done apparently in due course of the business of the firm, and the existence of the copartnership and its business is that which gives the opportunity for the wrong and injury inflicted upon the innocent party. (u)¹ (y) It

(t) *Croughton v. Forrest*, 17 Mo. 131.

(u) *Willet v. Chambers*, Cowp. 814. And see *McClure v. Hill*, 36 Ark. 268; *Rolfe v. Dudley*, 58 Mich. 208; *Kuhn v. Weil*, 73 Mo. 213; *Lothrop v. Adams*, 133 Mass. 471. So where one partner purchases such articles as might be of use in the partnership business, and instantly converts them to his own separate use, the partnership is liable. *Bond v. Gibson*, 1 Camp. 185. See *Rapp v. Latham*, 2 B. & Ald. 795; *Stone v. Marsh*, 6 B. & C. 551 (*Fauntleroy's case*); *Hume v. Boland, Ry. & M.* 371; *Kilby v. Wilson, Ry. & M.* 178; *Edmonson v. Davis*, 4 Esp. 14; *Moreton v. Hardern*, 4 B. & C. 223; *Babcock v. Stone*, 3 McLean, 172. — The conversion by one partner of property which came into the possession of the firm on partnership account is the conversion of all. *Nisbet v. Patton*, 4 Rawle, 120. The partnership is liable to the innocent indorsee of a promissory note signed by one of the members in the name of the firm, without the knowledge or consent of his partner; although the

note was given for a debt unconnected with the business of the partnership. *Boardman v. Gore*, 15 Mass. 331. So the partnership is liable for the fraudulent representations of a partner relative to matters in the course of its business, although without the knowledge of his copartners. *Doremus v. McCormick*, 7 Gill, 49; *Beach v. State Bank*, 2 Cart. (Ind.) 489; *Hawkins v. Appleby*, 2 Sandf. 421; *Wiley v. Griswold*, 41 Iowa, 375; *Henslee v. Cannefax*, 49 Mo. 295; *Smith v. Collins*, 115 Mass. 388; *McKee v. Hamilton*, 34 Ohio St. 7; *Talbot v. Wilkins*, 31 Ark. 411. See *Schwabacker v. Riddle*, 84 Ill. 517. It is held that the implied authority of a partner does not extend to illegal contracts, as the borrowing of money at usurious interest, and will not bind his copartners without their knowledge or consent. *Hutchins v. Turner*, 8 Humph. 415. See *Pierce v. Jackson*, 6 Mass. 245; *Sherwood v. Marwick*, 5 Greenl. 295; *Coomer v. Bromley*, 12 E. L. & E. 307; *State v. Neal*, 7 Foster (N. H.), 131; *Graham v. Meyer*, 4 Blatch. 129.

¹ A firm is not liable for such torts, unless done in the course of the firm business. *Abraham v. Hall*, 59 Ala. 386; *Gwynn v. Duffield*, 66 Iowa, 708; *Rosenkrans v. Barker*, 115 Ill. 331; *Woodling v. Knickerbocker*, 31 Minn. 268; or with the copartners' knowledge and assent, *Loomis v. Barker*, 69 Ill. 360; or unless it receives the benefit of the transaction. *Durant v. Rogers*, 87 Ill. 508. — W.

(x) Whatever the form of transaction by which one partner uses the partnership property to pay or secure his own debt, equity will relieve by declaring a trust in favor of the firm. *Riddle v. Whitehill*, 135 U. S. 621, 10 S. Ct. 924, 34 L. Ed. 283; *Fletcher v. Sharpe* (Ind.) 1 L. R. A. 179; *Babcock v. Standish*, 53 N. J. L. 376, 30 L. R. A. 604. And a suit for such purpose will not be barred usually by the statutes of limitation applicable to suits to recover real or personal property. *Chouteau v. Barlow*, 110 U. S. 238, 3 S. Ct. 620, 28 L. Ed. 132; *Campbell v. Clark*, 101 Fed. 972, 42 C. C. A. 123.

(y) A partnership is liable for the fraud or other tortious act of one partner done in the course of the partnership business, especially when it has received a benefit

from the act. *Hughes v. Twisden*, 55 L. J. Ch. 481; *Rhodes v. Moules*, 64 id. 122; *Strang v. Bradner*, 114 U. S. 555, 5 S. Ct. 1038, 29 L. Ed. 248; *Lockwood v. Bartlett*, 130 N. Y. 340, 29 N. E. 257; *Page v. Citizens' Banking Co.* 111 Ga. 73, 51 L. R. A. 463, and note; *Wiley v. Stewart*, 122 Ill. 545, 14 N. E. 835; *Stokes v. Burney*, 3 Tex. Civ. App. 219; *Shapard v. Hynes*, 104 Fed. 449, 52 L. R. A. 675; *Guarantee Trust Co. v. E. C. Drew Inv. Co.*, 107 La. 251, 31 So. 736. A member of a firm of attorneys, who negligently conducts its business, or who makes fraudulent misrepresentations as to the investment of moneys intrusted to the firm, renders the firm civilly liable for his act. *Hughes v. Twisden*, 55 L. J. Ch. 481; *Blair v. Bromley*, 16 L. J. Ch. 495. So physi-

has * been held that one partner might bind the firm by a * 186 guaranty or letter of credit given in their name; (v) but it seems to be now settled that there must be a special authority for that purpose; (w) but this may be implied from the common course of business or previous transactions between the parties, or from subsequent adoption by the firm. (x) And if the word "surety" be added to the signature of the firm, this casts upon the holder the burden of proving the assent of the firm. (y) And if the signature or indorsement be in the usual form but the party receiving it knows that it is given by way of suretyship, he must prove by direct evidence or equivalent circumstances the assent of the partners. (z)

A release by one partner is a release by all, both in law and in equity. (a) (x) And a release to one partner is a release to

(v) *Hope v. Cust*, cited in 1 East, 48; *Ex parte Gardom*, 15 Ves. 286.

(w) *Sweetser v. French*, 2 Cush. 309; *McQuewans v. Hamlin*, 35 Penn. St. 517.

(x) *Crawford v. Sterling*, 4 Esp. 207; *Sutton v. Irwine*, 12 S. & R. 13; *Ex parte Nolte*, 2 Glyn & J. 295; *Hamill v. Purvis*, 2 Penn. 177; *Cremer v. Higginson*, 1 Mason, 323; *Foot v. Sabin*, 19 Johns. 154; *Laverty v. Burr*, 1 Wend. 531; N. Y. Fire Insurance Co. v. Bennett, 5 Conn. 574; *Andrews v. Planters' Bank*, 7 Sm. & M. 192; *Langan v. Hewett*, 13 Sm. & M. 122; *Sweetser v. French*, 2 Cush. 309. See *In re West of England Bank*, 14 Ch. D. 317; *Moran v. Prather*, 23 Wall. 492;

Dubuque Bank v. Carpenter, 34 Iowa, 433; s. c. 41 Iowa, 518.

(y) *Boyd v. Plumb*, 7 Wend. 309; *Rollins v. Stevens*, 31 Me. 454; *Butterfield v. Hensley*, 12 Gray, 226.

(z) *Darling v. March*, 22 Me. 188; *Commonwealth Bank v. Law*, 127 Mass. 72; *Security Bank v. McDonald*, 127 Mass. 82; *Lemoine v. Bank of No. America*, 3 Dillon, 44; *Moynahan v. Hanaford*, 42 Mich. 329; *Bloom v. Helm*, 53 Miss. 21.

(a) *Pierson v. Hooker*, 3 Johns. 68; *Bruen v. Marquand*, 17 Johns. 58; *Salmon v. Davis*, 4 Binn. 375; *Morse v. Bellows*, 7 N. H. 567; *Halsey v. Whitney*, 4 Mason, 206; *Smith v. Stone*, 4 G. & J. 310; *McBride v. Hagan*, 1 Wend. 326; *Noyes*

cians, who are copartners, are liable for the malpractice or professional negligence of one of them. *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632.

To render the firm liable for such a tort, by one member, as malicious prosecution or libel, or trespass, it must, it seems, be committed in connection with, or in prosecution of, the firm's business, or be approved by the other members. *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 26 Am. St. Rep. 123, 133; *Haney Manuf. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073; *Rosenkrans v. Barker*, 115 Ill. 331; *Marks v. Hastings*, 101 Ala. 165, 13 So. 297; *Farrell v. Friedlander*, 63 Hun, 254; *State v. Mason*, 26 Oregon, 273, 26 L. R. A. 779, and note; *Maxwell v. Habel*, 92 Ill. App. 510.

One partner's misconduct binds his copartners civilly but not criminally.

Hoover v. Wise, 91 U. S. 308, 311; *Williams v. Hendricks*, 115 Ala. 277, 41 L. R. A. 650, and note, 67 Am. St. Rep. 32, 50 n. The fraud of one partner is a defence to a suit by the firm upon a note payable to it. *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108. The firm is liable for trust funds used by one partner for partnership purposes. *Price v. Mulford*, 36 Hun, 247. See *Goldthwaite v. Janney* (Ala.), 28 L. R. A. 161 and note; *Randall v. Bank of America*, 161 N. Y. 632, 57 N. E. 1122, affirming *Randall v. Knevals*, 50 N. Y. S. 748, 27 App. Div. 146.

When there is a cause of action for a tort causing personal injuries due to the negligence of an employe of a partnership, it is not necessary to bring suit against its members as partners, but they may be sued individually, if so preferred. *Murphy v. Coppieters* (Cal.), 68 Pac. 970.

(x) As copartners must sue together to recover a firm debt, a release of a debt due

*187 all. (b) *But any fraud or collusion destroys the effect of such release. And the release, to discharge absolutely all the copartners, must be a technical release under seal. (c) And a discharge of one of several joint debtors by operation of law, without the consent or co-operation of the creditor, takes from him no remedy against the other debtor. (d)

The signature or acknowledgment of one partner, in matters relating to the partnership, in general, binds the firm; (e) as notice in legal proceedings, or abandonment to insurers by one

v. N. Haven, N. London & Stonington R. R. Co., 30 Conn. 1; Allen v. Cheever, 61 N. H. 32. The rule of law and equity is the same, and only collusion for fraudulent purposes between the partners and a debtor destroys the effect of such release. Barker v. Richardson, 1 Y. & Jer. 362; Cram v. Cadwell, 5 Cowen, 489.—And the fraud must be clearly established. Arton v. Booth, 4 Moore, 192; Furnival v. Weston, 7 Moore, 356. And see Legh v. Legh, 1 B. & P. 447; Jones v. Herbert, 7 Taunt. 421; Mountstephen v. Brooke, 1 Chitt. 391; Sweet v. Morrison, 103 N. Y. 235; Sloan v. McDowell, 71 N. C. 356. Where one partner signed a general release to a debtor of the firm, and it did not appear whether it was intended to apply to separate or to partnership demands, or whether the subscribing partner had on his separate account any demand against the debtor, the release was held a discharge from debts due the partnership. The release was a part of an indenture of assignment, in trust for creditors. Emerson v. Knower, 8 Pick. 63.—Where such release is for all demands, parol proof that a particular debt was not intended to be released is not admissible. Pierson v. Hooker, 3 Johns. 68.

(b) Hammon v. Roll, March, 202; Bower v. Swadlin, 1 Atk. 294; Collins v. Prosser, 1 B. & C. 682; American Bank v. Doolittle, 14 Pick. 126; Goodnow v. Smith, 18 Pick. 416; Clagett v. Salmon, 5 G. & J. 314; Burson v. Kincaid, 3 Penn. 57.—So a discharge of one surety of his whole liability is a discharge to the others. Nicholson v. Revill, 4 A. & E. 675; Mayhew v. Crickett, 2 Swanst. 192.—But a release to one partner may, by means of

recitals and provisos, be limited in its operations to the partner to whom it is given. Solly v. Forbes, 4 Moore, 448; 2 Br. & B. 38. See Wiggin v. Tudor, 23 Pick. 444. *Ex parte* Good, 5 Ch. D. 46; Greenwald v. Kaster, 86 Pa. 45.

(c) Shaw v. Pratt, 22 Pick. 305; Walker v. McCulloch, 4 Greenl. 421; Harrison v. Close, 2 Johns. 449; Catskill Bank v. Messenauer, 9 Cowen, 37; Lunt v. Stevens, 25 Me. 534; Shotwell v. Miller, Coxe, 81.—It has been held that a composition deed, given by the joint creditors of a partnership upon its dissolution, to that partner who winds up the affairs of the firm, is in the nature of a release, and will discharge the other partner from his liability. *Ex parte* Slater, 6 Ves. 146.—But a covenant not to sue one of several partners will not have the same effect. Bates on Part. § 385, and cases cited.

(d) Ward v. Johnson, 13 Mass. 152; Robertson v. Smith, 18 Johns. 459; Tooker v. Bennett, 3 Caines, 4; Townend v. Riddle, 2 N. H. 449.

(e) See Corps v. Robinson, 2 Wash. C. C. 388; Bound v. Lathrop, 4 Conn. 336; Fisk v. Copeland, 1 Overt. 383.—During the partnership one may enter an appearance in an action to bind the whole. Bennett v. Stickney, 17 Vt. 531. See *contra*, Haslet v. Street, 2 McCord, 311; Loomis v. Pierson, Harper, L. 470; But after dissolution one cannot acknowledge service for the firm. Demott v. Swaim, 5 Stew. & P. 293. And service of process upon one partner, after dissolution, will not authorize a judgment against the firm. Duncan v. Tombeckbee Bank, 4 Port. (Ala.) 181.

the firm by one partner after the debtor has notice of dissolution, and that any settlement must be made with both partners together, prevents an action by the firm. Gordon v. Albert, 168 Mass. 150,

46 N. E. 423. All the partners must sue together for the conversion of partnership property though one is insolvent. Russell v. Cole, 167 Mass. 6, 44 N. E. 1057.

who has affected insurance for himself and others. (*f*) And if one of several joint lessors, partners in trade, sign a notice to quit, this will be valid for all; (*g*) but not if they are not partners in trade. (*h*) And in general a notice to one partner is binding upon all; (*i*) as of a prior unrecorded deed, the knowledge of which, by one partner will avoid a subsequent deed to *all *188 the partners. (*j*) And notice of a want of consideration of a promissory note, received by one partner, affects all. (*k*)

Where a bill accepted by a firm is dishonored by one partner, notice of the dishonor need not be given to the other partners; (*l*) and where a bill or a note is indorsed by a firm, which is dissolved before the note is due, notice to one of the partners by a holder not having knowledge of the dissolution, is sufficient. (*m*) And where the drawer of a bill is a partner of the house on which it is drawn, he is chargeable without notice to him of the dishonor of the bill. (*n*) A partner cannot, merely by the authority given by the partnership, and without the authority of the partners, bind his copartner by his indorsement of negotiable paper not belonging to the partnership. (*nn*)

Generally, a partner cannot bind his copartners by deed, without express authority.¹ But it has been held that if he annex a seal

(*f*) *Hunt v. Royal Ex. Assurance Co.*, 5 M. & Sel. 47. So if one partner, for himself and partner, sign a note for the weekly payment, under the Lords' act, such note would bind the firm. *Meux v. Humphry*, 8 T. R. 25; *Burton v. Issit*, 5 B. & Ald. 267.

(*g*) *Doe v. Hulme*, 2 Man. & R. 483.

(*h*) *Goodtitle v. Woodward*, 3 B. & Ald. 689. But one joint-tenant may appoint a bailiff to distrain for rent due all the joint tenants. *Robinson v. Hofman*, 4 Bing. 562. And one partner may authorize a clerk to draw or accept notes or bills, in the name of the company. *Tillier v. Whitehead*, 1 Dallas, 269.

(*i*) *Alderson v. Pope*, 1 Camp. 404; *Ex parte Waitman*, 1 Mont. & A. 364; *Figgins v. Ward*, 2 Cr. & M. 424; *Carter v. Southall*, 3 M. & W. 128.

(*j*) *Barney v. Currier*, 1 Chipman (Vt.), 315; *Gilby v. Singleton*, 3 Litt. 250.

(*k*) *Quinn v. Fuller*, 7 Cush. 224. — So, in equity, service of a subpoena upon one partner may upon notice be made good service upon his copartner abroad. *Car-*

ington v. Cantillon, Bunb. 107; *Coles v. Gurney*, 1 Madd. 187. And see *Lansing v. McKillup*, 7 Cowen, 416.

(*l*) *Porthouse v. Parker*, 1 Camp. 82. See *Dabney v. Stidger*, 4 Sm. & M. 749. But it is otherwise in case of mere joint indorsers, who are *not* partners, notice in such case must be given to both. *Shepard v. Hawley*, 1 Conn. 368. Even, it seems, to hold either. *Bank, &c. v. Root*, 4 Cowen, 126.

(*m*) *Coster v. Thomason*, 19 Ala. 717; *Nott v. Douming*, 6 La. 684. And in such case it has been said, that one partner may, after dissolution, waive demand and notice for the other partners as well as for himself. *Darling v. March*, 22 Me. 184. But this may be doubted.

(*n*) *Gowan v. Jackson*, 20 Johns. 176. Notice of the dishonor of a note given to the surviving partner of a firm fixes the liability of a partnership, and binds the representatives of the deceased partner. *Dabney v. Stidger*, 4 Sm. & M. 749; *Cocke v. Bank of Tennessee*, 6 Humph. 51.

(*nn*) *Bowman v. Cecil Bank*, 3 Grant, 33.

¹ A release under seal by one partner, however, is binding. See *ante*, p. *186. And in States where seals have been abolished or made nugatory by statute, the rule does not apply. *Pearson v. Post*, 2 Dak. 220, 248. Nor does it apply to instruments which

for himself and his copartner, in the presence of his copartner, that will bind them both. (o) (x)

In some cases very slight circumstances appear to be sufficient to affect a party with the liabilities of partnership. (p) But the mere fact of persons giving a joint order for goods will not make them liable as partners, if it appear otherwise that the seller * 189 trusted to them severally. (q) Nor is a person made * a partner by a stipulation that a firm will be governed by his advice. (r)

If the terms of the contract, and all the facts necessary for its

(o) *Ball v. Dunsterville*, 4 T. R. 313; *Swan v. Steadman*, 4 Met. 548. See *Potter v. McCoy*, 26 Penn. St. 458; *Freeman v. Carhart*, 17 Ga. 348. In *Gram v. Seton*, 1 Hall, 262, the court seem inclined to maintain the general power of a partner to affix a seal for the firm in the partnership business. See also *Purviance v. Sutherland*, 2 Ohio (N. s.), 478.

(p) *Parker v. Barker*, 1 Br. & B. 9, 3 Moore, 226. — Persons are to be treated as partners if they so conduct and hold themselves out to others, whether their contract would make them so or not. *Stearns v. Haven*, 14 Vt. 540. See notes (q), (r), and (t), *post*.

(q) *Gibson v. Lupton*, 9 Bing. 297. See also *Hopkins v. Smith*, 11 Johns. 161; *Livingston v. Roosevelt*, 4 id. 266; *McIver v. Humble*, 16 East, 169; *De Berkomp v. Smith*, 1 Esp. 29; *Livingston v. Roosevelt*, 4 Johns. 266.

(r) *Barklie v. Scott*, 1 Hud. & B. 83. Because it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership. — So the fact that several persons associated together to run a line of stage-coaches, that they had a general meeting, and that debts were contracted on account of the company, do not prove a partnership as between themselves. *Chandler v. Brainard*, 14 Pick. 285; *Clark v. Reed*, 11 id. 446. — And the fact that two persons sign a note jointly was held not evidence of a partnership between them. *Hopkins v. Smith*, 11 Johns. 161. But see *Carwick v. Vickery*, Dougl. 653; *De Berkomp v. Smith*, 1 Esp. 29; 3 Kent (5th ed.), 30 n. See further as to what facts will constitute a partnership, *Smith v. Edwards*, 2 Har. & G. 411.

have the same legal effect without a seal as with the addition of one. *Hunter v. Parker*, 7 M. & W. 322; *Gibson v. Warden*, 14 Wall. 244; *Walsh v. Lennon*, 98 Ill. 27; *Moore v. Stevens*, 60 Miss. 809; *Woodruff v. King*, 47 Wis. 261. See *Schmertz v. Schreeve*, 62 Pa. St. 457; *Ash v. Guie*, 97 Pa. St. 493, 500.

It is generally held that parol authority or ratification of the other partners is sufficient to make the deed that of the firm, and such authority or ratification may be implied from conduct. *Gunter v. Williams*, 40 Ala. 561; *Jeffreys v. Coleman*, 20 Fla. 536; *Sutlive v. Jones*, 61 Ga. 676; *Herzog v. Sawyer*, 61 Md. 344; *Holbrook v. Chamberlain*, 116 Mass. 155; *Williams v. Gillies*, 75 N. Y. 197; *McDonald v. Eggleston*, 26 Vt. 154; *Kasson v. Estate of Brocker*, 47 Wis. 79. — W.

(s) *McGahan v. Rondout Bank*, 156 U. S. 218, 15 S. Ct. 347, 39 L. Ed. 403; *Miller v. Royal Flint Glass Works*, 172 Penn. St. 70, 33 Atl. 350.

When a seal is necessary, the instrument, to be binding on all, should be signed by the partners individually, and not by one in the firm name. *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135; *Brunson v. Morgan*, 76 Ala. 593; *McNeal P. & F. Co. v. Woltman*, 114 N. C. 178, 19 S. E. 109. But a deed to a partnership with the firm name as grantee, though irregular,

will enable the partners to convey. *Dunlap v. Green*, 60 Fed. 242. A member of a partnership has no implied authority to bind it by a sealed power of attorney. *Ellis v. Ellis*, 47 N. J. L. 69; see *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; *Clarke v. Slate Valley R. Co.*, 136 Penn. St. 408, 20 Atl. 562, 10 L. R. A. 238. But it is held that one partner may under seal compromise with and release a joint debtor of the firm. *Allen v. Cheever*, 61 N. H. 32.

construction, are ascertained, the question whether there is a partnership, is a question of law. (s)

No particular mode of holding oneself out as a partner is necessary to make one liable as such; but it must be a voluntary act; for otherwise a party might be charged with a ruinous responsibility without his knowledge, intention, or assent, and without fault on his part, and through the fraud or wrongful acts of others. (t) Where a person is received as a new member * into an old firm, and the new firm recognizes by pay- * 190 ment of interest a debt of the old firm, this is, in general, evidence of an adoption of the debt by the new firm, including the new partner, which will make him liable; (u) but it has not always nor necessarily this effect. Some knowledge of and assent to this payment must be brought home to the new partner, by direct testimony, or by showing such oversight of or share in the business of the firm as implies such knowledge; and perhaps there should be some evidence of assent by the * creditor to * 191 the transfer of the debt from the old to the new firm. (v) (x)

The liability of an incoming partner for old debts is not to be presumed, (w)¹ but may be proved by circumstances

(s) See *Chisholm v. Cowles*, 42 Ala. 179; *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McC. 20; *Drake v. Elwyn*, 1 Caines, 184; *Beecham v. Dodd*, 3 Har. 485; *Drennen v. House*, 41 Pa. 30; *Jones v. Call*, 93 N. C. 170; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429; *Boston, &c. Smelting Co. v. Smith*, 13 R. I. 27, 34; *Williams v. Connor*, 14 S. C. 621.

(t) Such circumstances as, according to the custom of merchants, usually indicate a partnership may be given in evidence against one whom it is sought to charge as a partner; such as the use of his name in printed invoices, bills of parcels, and advertisements, or on the printed signs attached to the place of business, and these may afford strong presumptive evidence of his acquiescence in the name and character of partner. In general, if he so acts as to justify others in believing him a partner, he will be liable as such. *Spencer v. Billing*, 3 Camp. 310; *Parker v. Barker*, 1 Br.

& B. 9, 3 Moore, 226. Nevertheless, this evidence may be rebutted by showing either that he was entirely ignorant of these transactions, or that he took the proper means of disowning them and denying his authority. One is not liable as a nominal partner because others use his name as that of a member of a firm, without his consent, although he previously belonged to the firm, provided he has taken the proper steps to notify the public of his retirement. *Newsome v. Coles*, 2 Camp. 617. And the plaintiff should be prepared to show that the acts of the defendant, as acts of partnership, were done by the defendant, with full knowledge and deliberation on his part. See *Fox v. Clifton*, 6 Bing. 776, 4 Mo. & P. 713.

(u) *Ex parte Jackson*, 1 Ves. 132. See especially *Ex parte Peele*, 6 Ves. 602.

(v) *Kirwan v. Kirwan*, 2 Cr. & M. 617. See also *Ex parte Sandham*, 4 Deac. & C. 812; *Stenburg v. Callanan*, 14 Iowa, 251.

(w) See *Catt v. Howard*, 3 Stark. 5.

¹ The presumption is against the assumption by an incoming partner of pre-existing debts, *Kountz v. Holthouse*, 85 Penn. St. 235; *Paradise v. Gerson*, 32 La. An. 532; to become so liable, he must expressly agree with the creditor to assume, *Shamberg v. Ruggles*, 83 Pa. 148; *Meador v. Hughes*, 14 Bush, 652; *Morehead v. Wristow*, 73 N. C. 398. See, however, *Poole v. Hintrager*, 60 Iowa, 180; *Arnold v. Nichols*, 64 N. Y. 117. The new partner's assent to assume, and the creditor's consent to accept

(x) See *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396, 47 Atl. 653, 51 L. R. A. 653.

indicating his willingness and intention to assume the old debts. (*ww*)

If persons who succeed to the interest of a retiring partner continue to transact the business in conjunction with the remaining partners as before, they become members of the firm as under the original articles in the absence of evidence to the contrary. (*wx*) (*xx*)

The authority of a partner to bind his firm rests indeed upon a necessity; for mercantile business could not be carried on by a partnership otherwise, without great inconvenience. And it is bounded and measured by this necessity, so that the partnership is not bound by the acts or contracts of any partner not within the legitimate scope of the partnership business. (*x*) (*yy*) An illustra-

(*ww*) *Updyke v. Doyle*, 7 R. I. 446.

(*ww*) *Meagher v. Cox*, 37 Ala. 201.

(*x*) *Dickinson v. Valpy*, 10 B. & C. 128; *Sandilands v. Marsh*, 2 B. & Ald. 673; *Sims v. Brutton*, 1 E. L. & E. 446. One partner cannot bind the firm or

transfer its property for his private debt; *Kemeys v. Richards*, 11 Barb. 312; *Lanier v. McCabe*, 2 Fla. 32; unless the other partners authorize or ratify the act, *Wheeler v. Rice*, 8 Cush. 205.

him, are both equally necessary, *Shoemaker, &c. Co. v. Bernard*, 2 Lea, 358; but very slight evidence of such assumption being sufficient. *Cross v. Burlington Bank*, 17 Kan. 336; *Shaw v. McGregory*, 105 Mass. 96. — K.

(*xx*) A contract for the purchase of a share in a partnership always implies, in the absence of an express stipulation, an agreement by the purchaser to indemnify the vendor against the partnership liabilities. *Dodson v. Downey*, [1901] 2 Ch. 620.

(*yy*) *Ketcham Nat. Bank v. Hagan*, 164 N. Y. 446, 58 N. E. 523; *Lord v. Hull*, 74 N. Y. S. 711, 37 Misc. Rep. 83; *Dickinson v. Valpy* (10 B. & C. 128), 19 English Ruling Cas. 423, 435, 436 n.; *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 28 N. E. 281; *Salt Lake City Brewing Co. v. Hawke* (Utah), 66 Pac. 1058. The giving by one partner of a firm note in payment of his private debt is not within the general authority of a partner to bind his firm, when not justified by its usual course of business or by the partnership articles. *Daniels v. Hammond*, 154 Mass. 165, 28 N. E. 12; *Brickett v. Downs*, 163 Mass. 70, 39 N. E. 776; *Rice v. Doane*, 164 Mass. 136, 41 N. E. 126; *Durrell v. Staples*, 169 Mass. 49, 47 N. E. 441. So the firm is *prima facie* not liable upon a note signed by one member and indorsed in the firm name, when not given in payment of its debts or to carry out its contracts. *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Reed v. Bacon*, 175 Mass. 407, 56 N. E. 716. A partnership may be liable on a firm note

made in the name of one member when it does business under his name. *Moore v. Williams* (Tex. Civ. App.), 62 S. W. 977.

Borrowing money on credit, or signing or indorsing negotiable paper, in the firm name, is not within the scope of the authority of a member of a law firm; the person who seeks to recover thereon has the burden of proof to show such authority expressly, by usage, estoppel, or ratification. *Worster v. Forbush*, 171 Mass. 423, 50 N. E. 936; *supra*, p. *181, n. (*xx*).

A partnership may be bound by acts of one partner within the scope of its apparent authority as such. *Rhodes v. Moules*, 71 L. T. 599. But unauthorized acts outside the apparent scope of the firm's business are not binding upon it. *Ex parte Agace* (2 Cox, 312), 19 English Ruling Cas. 439, 457, 459, n. Upon merely suspicious circumstances, not inconsistent with good faith, a stranger will not be charged with notice of a limitation upon one partner's authority to borrow money for his firm. *Int'l Trust Co. v. Wilson*, 161 Mass. 80, 36 N. E. 589.

A contract signed "A. & Co.," though not binding on the firm because beyond the scope of the partnership business, binds A. personally, though the firm receives the benefit. *Taft v. Church*, 162 Mass. 527, 39 N. E. 283; *McIntyer v.*

tion of this may be found in the rule which is held by authorities of great weight, that one partner cannot bind his firm by a submission to arbitration, without specific authority from his copartners; nor has a partner, as such, authority to consent to a judgment in an action against him and his copartners; (y) the reason given for these rules being, that a partner has no implied authority, except so far as is necessary to carry on the business of the firm. (z)

Another reason is also given, that *such implied authority * 192 might deprive the other partners of their legal rights or remedies.

So if a partner disposes of the partnership property in any manner for his personal and exclusive benefit, as by a sale on terms beneficial to himself alone, this is not valid as to the other partner without proof of his assent. (zz)

It is a familiar principle, that partners may limit or enlarge the power of each other, as between themselves, at their own pleasure; and it is certain that third persons are not affected by any such limitations or stipulations, unless they have notice or knowledge of them. (a) But whether they are bound by limitations of which they have notice, and therefore cannot hold the firm on the contract of a partner who, as they know, has exceeded the power given to him by his firm, may not be quite settled; but we think the better reason and authority lead to the conclusion that third parties are affected by such stipulations when made known to them. (b)

SECTION XIII.

POWER OF A MAJORITY.

Whether the majority of the partners of a firm can bind the minority is not yet quite determined by authority. Some cases

(y) *Hambidge v. De la Croute*, 3 M. G. & S. 742; *Morgan v. Richardson*, 16 Mo. 409; *Binney v. Le Gal*, 19 Barb. 592. See also *Grier v. Hood*, 25 Pa. 430; *Clark v. Bowen*, 22 How. 270.

(z) *Stead v. Salt*, 3 Bing. 101; *Kart-haus v. Ferrer*, 1 Pet. 228; *Buchanan v. Curry*, 19 Johns. 137; *Harrington v. Higham*, 13 Barb. 660; s. c. 15 id. 524. But see *Wilcox v. Singletary*, *Wright*, 420; *Southard v. Steele*, 3 Monr. 435;

Armstrong v. Robinson, 5 G. & J. 412; *Taylor v. Coryell*, 12 S. & R. 243.

(zz) *Cadwallader v. Kroesen*, 22 Md. 200. See * 185.

(a) *Blundell v. Windsor*, 8 Sim. 601; *Walburn v. Ingilby*, 1 Myl. & K. 61.

(b) See *Hallet v. Dowdall*, 9 E. L. & E. 347; s. c. 18 Q. B. 2; *Worcester Corn Ex. Co. v. L. & E. 627*; *In re Lea*, F. & L. Ins. Co., 23 E. L. & E. 422; *Fall River Union Bank v. Sturtevant*, 12 Cush. 372.

Houseman, 98 Ill. App. 76. See *Newman v. Eldridge*, 107 La. 315, 31 So. 688. And one partner may so make a contract apart

from the firm as to be entitled to its benefits. *Sullivan v. Louisville & N. R. Co.* (Ala.), 30 So. 528.

show a disposition to admit this power, but to confine its exercise to the internal concerns of the firm, (bb) or to those which are of little importance. The authorities on this subject will be found in our notes. (c) We think a distinction might be drawn,

* 193 * on principle, between partnerships made by articles, and by their provisions not determinable by either party at pleasure, and those which may be dissolved by mutual consent and terminated at once by either party, at his own will and pleasure. In the former case, it might be said that the majority should not be permitted to govern, because the minority have no refuge, no escape by dissolution; and if controlled absolutely by the majority they might be made to incur unreasonable danger. (x) But where any dissenting partner may dissolve the partnership at pleasure, then the majority should govern. Because that is but saying to the minority, choose either to go on with us in the transaction we propose and approve, or leave us to go on by ourselves, as you prefer. Where the copartnership is determinable at the will of any partner, the rule that the minority may govern only terminates a partnership between disagreeing partners. Where the partnership is not determinable at pleasure, it may be said that the rule that a minority may arrest or prohibit a transaction which they do not approve, gives them in fact a power to terminate a

(bb) As the appointment of a publisher of a newspaper owned by a partnership. *Peacock v. Cummings*, 46 Pa. 434.

(c) It has been laid down by a learned writer (*Chitty's Laws of Commerce*, vol. 3, p. 236), that in the absence of any express stipulation a majority must decide as to the disposition of the partnership property, — an opinion given with caution; and it may perhaps be more safe to say, that the power of the majority to bind the minority is confined to the ordinary transactions of the partnership. See 6 Ves. 777; 5 Bro. P. C. 489. One case holds that in all sea adventures the acts of the majority bind the whole; but in that case

provision to that effect was made by deed. *Falkland v. Cheney*, 5 Bro. P. C. 476. So in *Const. v. Harris*, Turn. & R. 525. Lord *Eldon's* opinion was in favor of the power of a majority to bind the minority, provided their conduct was *bona fide*. See also *Kirk v. Hodgson*, 3 Johns. Ch. 400; *Wilkins v. Pearce*, 5 Denio, 541; *Robinson v. Thompson*, 1 Vern. 465; *Ex parte Johnson*, 31 E. L. & E. 430; 3 Kent, Com. 45, n.; *Story on Part. § 123, n.*; *Johnston v. Dutton*, 27 Ala. 245; *Western St. Co. v. Walker*, 2 Iowa, 504; *Cooke v. Allison*, 30 La. An. 963; *Staples v. Sprague*, 75 Me. 458; *Zabriskie v. Hackensack, &c. R. Co.*, 18 N. J. Eq. 178.

(x) Even under articles, the majority control so long as, acting fairly and in good faith, they keep within the purposes and scope of the partnership; if, the number of members being even, they are evenly divided in opinion, and the articles do not provide for such a contingency, the power of the firm is suspended; and such disagreement, if continued when action is essential to the purposes of the partnership, may work its dissolution. *Clarke v. Slate V. R. Co.*, 136 Penn. St. 408, 20 Atl. 562, 10 L. R. A. 238; *Markle v. Wilbur*,

200 Penn. St. 457, 50 Atl. 204. These rules apply fully, it seems, to mining partnerships. See *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; holding that mining partnerships, unlike ordinary partnerships, are not dissolved by the death or insolvency of one member (*Ibid.*; *Thomas v. Hurst*, 73 Fed. 372, 374); which rule, under Cal. Civil Code, § 2453, applies, in California, to both ordinary and mining partnerships. *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727.

copartnership at pleasure, because if they can arrest one transaction, they may all. This is possible; but the inconveniences resulting from it seem to be less than those which might come from permitting a bare majority to retain the capital of copartners, and employ it in transactions which they disapprove, and expose it to hazards they are unwilling to encounter. Moreover, the rule that the majority might govern, would give to them the power of dissolving the partnership at pleasure; because, if they wished for a dissolution, they could always propose transactions so adverse to the views or interests of the minority as to compel them to assent to a dissolution as their only escape.

It must be regarded as certain that a majority cannot compel a minority to extend the business of the partnership to transactions beyond their original intention, or otherwise make a material * change in the business, not contemplated in the * 194 formation of the partnership, nor sanctioned by all the partners.

SECTION XIV.

OF DISSOLUTION.

The dissolution of a partnership does not affect the liability of the partners for former debts,¹ but in general, prevents the incurring of a new joint liability.

However it takes place, dissolution terminates altogether the power of a partner to carry on the business concerns of the partnership, in a way to bind former partners by any contract whatever. The former partners are partners no longer, but tenants in common; and where there is no agreement to the contrary, each partner after dissolution, possesses the same authority to adjust the affairs of the firm, by collecting its debts (*x*) and disposing of its property, as before the dissolution; but they can no longer bind each

¹ Nor will a dissolution prevent liability on a firm contract only partially performed. *Swire v. Redman*, 1 Q. B. D. 536; *Ayres v. Chicago, &c. Ry. Co.* 52 Ia. 478; *Jones v. Foster*, 67 Wis. 296. See *Johnson v. Hartshorne*, 52 N. Y. 173. Nor justify the other contracting party in abandoning the contract. *Dickson v. Indianapolis, &c. Co.*, 63 Ind. 9; *Palmer v. Sawyer*, 114 Mass. 1. But if the contract calls for, or is made in reliance on, the personal skill or credit of a particular partner, his death excuses non-performance of the contract on both sides. *Stevens v. Benning*, 1 K. & J. 168; *National Bank v. Hall*, 101 U. S. 43; *Redheffer v. Leathe*, 15 Mo. App. 12; *Hiatt v. Gilmer*, 6 Ired. L. 450; *Fulton v. Thompson*, 18 Tex. 278. — W.

(*x*) A partnership may, after its dissolution, sue to recover debts due to it. *Hyde v. Moxie Nerve Food Co.*, 160 Mass. 559, 36 N. E. 585.

other, even to the extent of varying the form of existing obligations. (d)¹ No partner can indorse a note of the firm, even to pay a prior debt of the firm. (e) It is said in England that a retired partner may authorize, even by parol, a remaining partner to indorse bills in the name of the firm, which will hold him; (f) but then, in fact, he is scarcely a *retired* partner. We should say that a general authority to a partner, to settle the affairs of the firm, whether it be an express authority, or the authority given by law to a surviving partner, would not give any power of this kind. (g)

It is important to know what makes a dissolution. If the partnership be for a time certain, one partner may maintain * 195 an * action at law against another for a breach of the articles in dissolving before the period therein limited; and the action may be brought before the expiration of the time for which the partnership was limited. The damages would be the profits which would have accrued to the plaintiff from the continuation of the partnership business. (h) Where a partnership is not to endure for a time certain by the articles of copartnership, or where that time has expired, it may undoubtedly be dissolved at the pleasure of any partner. (i)² (x) But the dissolution should

(d) *Torrey v. Baxter*, 13 Vt. 452; *Woodworth v. Downer*, id. 522; *Robbins v. Fuller*, 24 N. Y. (10 Smith) 470. See *post*, p. * 200.

(e) *Humphries v. Chastain*, 5 Ga. 166; *Glasscock v. Smith*, 25 Ala. 474; *Fellows v. Wyman*, 33 N. H. 351. Perhaps some doubt is thrown on this conclusion by *Fowle v. Harrington*, 1 Cush. 146, and *Temple v. Seaver*, 11 Cush. 314.

(f) *Smith v. Winter*, 4 M. & W. 454.

(g) *Long v. Story*, 10 Mo. 636; *Parker v. Cousins*, 2 Gratt. 372; *Lusk v. Smith*, 8 Barb. 570; *Hurst v. Hill*, 8 Md. 399; *Palmer v. Dodge*, 4 Ohio (N. S.) 21; *Hamilton v. Seaman*, 1 Cart. (Ind.) 185; *Fowler v. Richardson*, 3 Sneed, 508; *Merritt v. Pollys*, 16 B. Mon. 355. But see *Kemp v. Coffin*, 3 Greene (Ia.), 190.

(h) *Solomon v. Kirkwood*, 55 Mich. 256,

259; *Bagley v. Smith*, 10 N. Y. (6 Seld.) 489.

(i) *Griswold v. Waddington*, 15 Johns. 82. — But notice should be given to the other partner. *Nerot v. Bernard*, 4 Russ. 260; *Peacock v. Peacock*, 16 Ves. 50. — This should be a reasonable notice where the articles are totally silent upon the subject, and where, without such notice, injury would be inflicted, or fraud indicated. *Howell v. Harvey*, 5 Ark. 280. — The duration may be gathered from the terms of the articles, although not expressly provided for. *Wheeler v. Van Wart*, 2 Jur. 252. See also *Crawshaw v. Collins*, 15 Ves. 227; *Wilson v. Greenwood*, 1 Swanst. 480; *Washburn v. Goodman*, 17 Pick. 519. — In *Sanderson v. Milton Stage Co.*, 18 Vt. 107, it was *held*, where one partner gave the other notice that the copartnership

¹ The liability of former partners for debts incurred during the existence of the partnership continues unless by a novation the creditors agree either expressly or impliedly to discharge the old debtors and look to others, usually a new firm succeeding the former partnership, for payment, such others in turn agreeing to assume the old debts. *Hart v. Alexander*, 2 M. & W. 484; *Regester v. Dodge*, 19 Blatch. 79; *Bucklin v. Bucklin*, 97 Mass. 256. — W.

² “A partnership for an indefinite period is in law a partnership at the will of the partners, and either partner may withdraw when he pleases, and dissolve the partner-

(x) A partnership continuing beyond the time fixed for its termination is, as between the partners, a partnership at will. *Brooks v. Brooks*, 85 L. T. 453. In other

be made with due notice to the other partner or partners and at such time and in such manner as would not cause unnecessary injury to them; nor would the law sanction fraud in this matter. (*ii*) Whether, when the partnership is by articles which stipulate its continuance for a specified period, one partner may dissolve it within that period, is not, perhaps, quite certain. By the civil law, such dissolution is permitted, on the ground that it would be useless and mischievous to hold reluctant partners together. (*j*) In England the weight of authority is decidedly opposed to such dissolution, as a breach of contract; (*k*) still it is difficult to deny that one may assign his interest, and this would operate a dissolution; or he may contract a debt, and let his interest be taken in execution. A court of equity might interfere to prevent such assignment; but would not, in case of debt, unless there was collusion, or the creditor's interests could not otherwise be secured. (*l*) And even if the partnership by the articles be dis-

was dissolved, but this was not assented to by the other, and the parties did not afterwards act upon it, that it did not operate as a dissolution of the firm.

(*ii*) See *Stemmer's Appeal*, 58 Penn. St. 168.

(*j*) *Vinnius in Ins.* 3, 26, 4; *Ferriere in Id.* tome V. 156; *Dig.* 17, 2, 14; *Domat*, b. 1, tit. 8, § 5, art. 1-8, by *Strahan*.

(*k*) *Peacock v. Peacock*, 16 Ves. 56; *Crawshay v. Maule*, 1 Swanst. 495. See *Pearpont v. Graham*, 4 Wash. C. C. 234, affirming the rule indicated by the English authorities.

(*l*) *Marquand v. N. Y. Man. Co.* 17 Johns. 525. In this case, the assignment

by one partner of all his interest in the partnership was held to dissolve it, although by the articles it was to continue till two partners should demand its dissolution. In *Skinner v. Dayton*, 19 Johns. 538, it was held that the partnership is dissoluble at the pleasure of any partner although he has entered into a covenant for its continuance for seven years, — the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. See *Mason v. Connell*, 1 Whart. 388; *Whitton v. Smith*, 1 Freem. Ch. (Miss.) 231; *Beaver v. Lewis*, 14 Ark. 138; *Solomon v. Kirkwood*, 55 Mich. 256; *Cole v. Moxley*, 12 W. Va. 730. In *Bishop v. Breckles*, 1 Hoff. Ch. 534, the

ship, if he acts without any fraudulent purpose." *Morton, J.*, in *Fletcher v. Reed*, 131 Mass. 312; *Major v. Todd*, 84 Mich. 85, 96. Although one partner paid a bonus for a good-will established by the other, *McElvey v. Lewis*, 76 N. Y. 373; *Sistare v. Cushing*, 4 Hun, 503; *Carlton v. Cummins*, 51 Ind. 478. But a partner cannot treat the partnership as at an end because of his partner's dishonesty or bad character, and absorb all the joint benefits and property, when he knew of such characteristics at the formation of the partnership. *Amble v. Whipple*, 20 Wall. 546; see *McMahon v. McClernan*, 10 W. Va. 419. And a partnership, though its period is not expressed, may not be a partnership at will, if it appears from the purpose of the enterprise that the partners had a contrary intention. *Pearce v. Ham*, 113 U. S. 585, 593; *Morris v. Peckham*, 51 Conn. 128; *Walker v. Whipple*, 58 Mich. 476. — W.

respects it is presumed to continue subject to the stipulations of the original articles. *Neilson v. Mossend Iron Co.*, 11 A. C. 298; *Daw v. Herring* [1892], 1 Ch. 284; *Myers v. Myers*, 60 L. J. Ch. 311, 61 L. T. 757. As to third persons a partnership once existing is presumed to continue until notice is given of its dissolution. *Second Nat. Bank v. Weston*, 161 N. Y.

520, 55 N. E. 1080, 76 Am. St. Rep. 283; *Carstens v. Earles* (Wash.) 67 Pac. 404; *First Nat. Bank v. Grignon* (Idaho), 65 Pac. 365. As to such notice and its effect, see *supra*, p. *169; 3 Kent Com. (14th. ed.), 54, n. (y); 19 English Ruling Cas. 757, 758, 769; *Robinson v. Floyd* (Penn.), 28 Atl. 258, 33 Am. L. Reg. n. s. 624 and note.

soluble at pleasure, equity will decree specific performance of them if this be necessary to give the plaintiff his rights. (*ll*) And when it decrees a dissolution it may determine at what day the partnership shall be considered as at an end. (*lm*) (*x*)

*196 * It has been questioned whether a court would infer an agreement for a continuance of the partnership for a definite period from circumstances; as the taking of a lease of an estate to be used as partnership property, or the like. But it may well be doubted, whether such an inference would be drawn merely from circumstances, unless they made the agreement quite certain. (*m*)

A court of equity would always decree a dissolution at the prayer of one or more copartners, if it were shown that the other partner or partners were guilty of fraud, or gross misconduct in the affairs of the partnership; or it may restrain a partner from injurious action. (*n*) But it will not interfere for slight causes; and perhaps for nothing less than unquestionable fraud, or an amotion of the complaining partner from his share in the business, or such conduct as renders the carrying on of the business of the firm substantially impossible. (*o*) If the bill seeks to correct in some way the proceedings of a firm, but not to dissolve it, it is not usual

*197 to appoint a receiver, *although this might be done. But if the prayer is to dissolve the partnership, it is usual to appoint a receiver. (*p*)

Any assignment of a copartner's interest in the partnership funds operates, *ipso facto*, a dissolution; this would certainly be true of the assignment of the whole of a copartner's interest, and perhaps of the assignment of any portion of his interest which required a closing of the partnership business and accounts to determine the value of the portion assigned; and although the

question was considered doubtful, but the rule of the civil law deemed more reasonable, and the refusal of one partner to proceed properly in the business of the partnership was held sufficient cause for a decree of dissolution.

(*ll*) Whitworth v. Harris, 40 Miss. 483.

(*lm*) Dumont v. Ruepprecht, 38 Ala. 175.

(*m*) Crawshaw v. Maule, 1 Swanst. 495, 508, 521. See Marshall v. Marshall, cited 2 Bell, Com. 841, n. 3, and 643, n. 1.

(*n*) Kemble v. Kean, 6 Sim. 333; Meaher v. Cox, 37 Ala. 201.

(*o*) Blakeney v. Dufaur, 15 Beav. 40, 15 E. L. & E. 76; Blake v. Dorgan, 1 Greene (Iowa), 537; Terrell v. Goddard, 18 Ga. 664; Renton v. Chaplain, 1 Stock. 62.

(*p*) Hall v. Hall, 3 E. L. & E. 191; s. c. 3 Mac. & G. 79; Roberts v. Eberhardt, 23 E. L. & E. 245; s. c. 1 Kay, 148; Speights v. Peters, 9 Gill, 472; Sloane v. Moore, 37 Penn. St. 217.

(*x*) An injunction may be granted to prevent wrong until such time; or to prevent a violation of the partnership articles, though the bill does not pray for a disso-

lution. Leavitt v. Windsor Land Co., 54 Fed. 439; Abrahams v. Myers, 40 Md. 499.

assignment was made only to give a collateral security. (q) And an assignment by one partner of his share of the future profits to another partner is a dissolution of the * partner- * 198 ship, because the essence of that is a participation of the profits. (r)

As death operates of itself a dissolution, (s) ¹ (x) so in England

(q) Horton's Appeal, 13 Penn. St. 67; Parkhurst v. Kinsman, 1 Blatch. 488; Marquand v. New York Manuf. Co. 17 Johns. 525.—In Whitton v. Smith, 1 Freem. Ch. (Miss.) 231, it was held that a sale or assignment by one partner of all his interest in the partnership property, operates as a dissolution, *ipso facto*, although the partnership articles provide for a continuance of the partnership for a definite period.—See Conwell v. Sandidge, 5 Dana, 213; Cochran v. Perry, 8 W. & S. 262.—But the true principle seems to be stated in Taft v. Buffum, 14 Pick. 322, where Putnam, J. remarked: "If, after a sale, the partner assigning his interest had ceased to have any concern in the establishment, had entered into other business on his own separate account, or, as it might be, had removed to a foreign country or place, and there carried on business for himself, or lived upon his own funds or otherwise; upon such evidence we should all think that the jury ought to find that the copartnership was dissolved. On the other hand, if (as in the present case it is found) the partner so assigning, after the conveyance, continued to act as a partner, making himself liable as such by drafts and other partnership business, just as he had done before

the conveyance; then it would seem to a majority of the court that the jury ought to find that the partnership was not dissolved." Coll. on Part. § 110.—See Buford v. McNeeley, 2 Dev. Eq. 481; Dana v. Lull, 17 Vt. 390; Bank v. Carrollton R. Co. 11 Wall. 624; Munroe v. Hamilton, 60 Ala. 226; Miller v. Brigham, 50 Cal. 615; Barkley v. Tapp, 87 Ind. 25; Blaker v. Sands, 29 Kan. 551; Dupont v. McLaran, 61 Mo. 502; Morse v. Gleason, 64 N. Y. 204; Carroll v. Evans, 27 Tex. 262; Ayer v. Ayer, 41 Vt. 346.

(r) Heath v. Sansom, 4 B. & Ad. 175; Edens v. Williams, 36 Ill. 252.

(s) Vulliamy v. Noble, 3 Meriv. 593; Murray v. Mumford, 6 Cowen, 441; Cobble v. Tomlinson, 50 Ind. 550; Martine v. International Ins. Soc. 53 N. Y. 339; Slocomb v. Lizardi, 21 La. An. 355; Canfield v. Hard, 6 Conn. 184; Burwell v. Mandeville, 2 How. 560; Knapp v. McBride, 7 Ala. 19.—In such case the dissolution takes effect from the time of the death, however numerous the association, and this not only as to the deceased partner, but also as to all of the survivors. Dyer v. Clark, 5 Met. 575; Scholefeld v. Eichelberger, 7 Pet. 586. And the same rule applies to a silent partner. Washburn v. Goodman, 17 Pick. 520.

¹ Whether death will work a dissolution in a partnership or voluntary association composed of many members depends upon the intention as gathered from the terms and character of the organization. Jones v. Clark, 42 Cal. 180; Machinists' Nat. Bank v. Dean, 124 Mass. 81; Walker v. Wait, 50 Vt. 668. See Duffield v. Brainerd, 45 Conn. 424.—K.

(x) A surviving partner has no power, after the firm's dissolution by the death of one member, to continue to give firm notes. Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; First Nat. Bank v. State Sav. Bank (Mich.), 89 N. W. 941; Friedman v. Engel, 91 Mo. App., 67 S. W. 725.

The rule that a partner's death dissolves the firm is closely allied to that by which the death of a principal terminates his agent's authority, which is briefly referred to *supra*, p. * 71, and which the following decisions more fully illustrate. An agreement coupled with an interest may be revoked by the principal when created by

an instrument, which provides for such revocation. Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22. See Willcox & Gibbs Sewing Machine Co. v. Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. Ed. 882; McClaskey v. Barr, 50 Fed. 712; Sheehan v. National S. S. Co., 87 Fed. 167, 30 C. C. A. 593; Hall v. Gambrill, 92 Fed. 32, 34 C. C. A. 190; Pacific Bank v. Hannah, 90 Fed. 72, 32 C. C. A. 522; Callanan v. Chapin, 158 Mass. 113, 120, 32 N. E. 941; Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784; Merry v. Lynch, 68 Maine, 94, 25 Am. L. Rev. 74; Bird v. Phillips (Iowa), 87 N. W. 414; McLane v. Maurer (Tex. Civ.

civil death has the same effect ; as outlawry, or attainder for treason or felony. We have not this civil death in this country ; and imprisonment for a term of years, or even for life, would probably have only the effect of other incapacity ; and so would absconding for debt or crime. (t) That is, it would not be a dissolution of the partnership, nor cause a dissolution at once, *proprio vigore*, but it would be good ground for applying to any court having authority to grant a dissolution. When either partner becomes disabled to act, or when the business becomes wholly impracticable, a court of equity would dissolve the partnership, or treat it as dissolved, as the justice of the case might require. (u) The contract of partnership is mutual ; and it would be obviously unjust to hold one party to his contract, when it had become impossible for the other to fulfil his part. If the party so disabled from active aid, was, by the terms of the contract, only a silent or dormant partner, only contributing capital, and sharing with his partner the profit and loss arising from the use made of the capital by the active partner, the above reason would seem not applicable, because his capital might remain as before. But in this case, if an application comes from the active partner, he certainly should be permitted to renounce the benefit of the capital under such circumstances, if he wished to do so. And if the application comes from the party owning the capital, or his representatives, they as certainly ought to be permitted to withdraw the capital from hazards which the owner could no longer estimate nor provide for, nor advise in relation to. And we think with Mr. Justice Story and Mr. Chief Justice Parker, that it may well be doubted whether the rule of law should not be that

* 199 absolute insanity * or any equivalent disability, operates at once, and *ipso facto*, a dissolution. (v) But it is said that

(t) *Whitman v. Leonard*, 3 Pick. 177.

(u) *Leaf v. Coles*, 12 E. L. & E. 117.

(v) Story on Part. § 295 ; *Jones v. Noy*, 2 Myl. & K. 125. In *Isler v. Baker*,

6 Humph. 85, it was held that an inquisition of lunacy, found against a member of a partnership, *ipso facto* dissolves the partnership. See also *Griswold v. Wad-*

App.), 66 S. W. 693. A power of attorney providing for compensation by allowing one-half of the land recovered is not a contract so coupled with an interest that it will not be terminated by the principal's death. *Wainwright v. Massenburg*, 129 N. C. 46, 39 S. E. 725. Such a power, when executed by several persons, is revoked as to part of them by their death, and, perhaps, also, as to the others. See *Hanrick v. Patrick*, 119 U. S. 156, 174, 7 S. Ct. 147, 30 L. Ed. 396.

A contract of purchase is not fulfilled

by payment to an agent after his principal's death, though the payment is made in ignorance of such death. *Long v. Thayer*, 150 U. S. 520, 14 S. C. 189, 37 L. Ed. 1167 ; *Weber v. Bridgman*, 113 N. Y. 600 ; *Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 284 ; *Davis v. Davis*, 93 Ala. 173. The principal's death terminates a stockbroker's authority to carry stocks purchased for him to the next regular day of settlement, and it is the broker's duty to close the account. *In re Overweg*, Haas v. Durant, (1900) 1 Ch. 209.

a decree of dissolution for the cause of insanity has no retrospective action; not even to the time when the bill was filed. (*w*) (*xx*)

Nothing is more common than for a firm to go on without change of name, or of business, or even new books of account, when a member leaves it, or a new member is added. Yet, strictly speaking, the old partnership was dissolved and a new one formed by any change among its members. Thus a mortgage to a firm to cover advances, was held not applicable to the firm after a new member was added. (*ww*)

Bankruptcy of the firm, or of one partner, operates an immediate dissolution. (*x*) ¹ (*yy*) Insolvency under the statutes would have the same effect; (*y*) but not the mere insolvency which is only

dington, 15 Johns. 57; *Davis v. Lane*, 10 N. H. 161, where *Parker, C. J.*, said: "It has been held in England, that the insanity of one partner does not operate as a dissolution of the partnership, but that object must be attained through a court of equity. *Sayer v. Bennet*, cited 2 Ves. & B. 303. *Gow on Part.* 272. But the soundness of the principle may perhaps be doubted. *Waters v. Taylor*, 2 Ves. & B. 303; *Griswold v. Waddington*, 15 Johns. 57, 82, cited *supra*."

(*w*) *Besch v. Frolich*, 1 Phil. Ch. 172; *Helmores v. Smith*, 35 Ch. D. 436.

(*ww*) *Abat v. Penny*, 19 La. An. 289.

(*x*) *Gates v. Beecher*, 60 N. Y. 518; *Allen v. Woonsocket Co.*, 11 R. I. 288; *Wilkins v. Davis*, 2 Lowell, 511; *In re Leland*, 5 Benedict, 168; *Fox v. Hanbury*, Cowp. 448. *Lord Mansfield*: "An act of bankruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade." See *Wilson v. Greenwood*, 1 Swanst. 482; *Ex*

parte Smith, 5 Ves. 295; *Ex parte Williams*, 11 Ves. 5; *Crawshaw v. Collins*, 15 Ves. 218; *Dutton v. Morrison*, 17 Ves. 193; *Griswold v. Waddington*, 15 Johns. 82; s. c. 16 Johns. 491; *Marquand v. N. Y. Manuf. Co.*, 17 id. 535; *Arnold v. Brown*, 24 Pick. 89; *Atwood v. Gillett*, 2 Doug. (Mich.) 206; *Coll. on Part. B. 1*, ch. 2, § 3; *Story on Part.* § 313. But "an act of bankruptcy, however, does not dissolve the partnership *instantly*. It must be followed by a fiat and adjudication. 'The adjudication that he is a bankrupt,' said Lord *Loughborough*, 'is what severs the partnership.'" *Coll. on Part.* § 111; *Ex parte Smith*, 5 Ves. 295; *Story on Part.* § 314. The English law gives effect to the dissolution from the declaration of bankruptcy under a commission; but this relates back to the act of bankruptcy, and vests the property in the assignees from that period by operation of law. *Fox v. Hanbury, supra*; *Ex parte Smith*, 5 Ves. 296; *Barker v. Goodair*, 11 Ves. 83; *Thomason v. Frere*, 10 East, 418; 3 Kent, Com. 59.

(*y*) *Williamson v. Wilson*, 1 Bland, 418; *Gowan v. Jeffries*, 2 Ashm. 305, and cases cited *supra*.

¹ So an assignment by an insolvent firm in trust for creditors works a dissolution if no provision is made for a continuance. *McKelvy's Appeal*, 72 Pa. St. 409. — K.

(*xx*) See *Breaux v. Le Blanc*, 50 La. An. 228, 23 So. 281, 69 Am. St. Rep. 403, 427 n.; *Raymond v. Vaughan*, 128 Ill. 256, 4 L. R. A. 440. Upon a bill for dissolution, the insane partner may be restrained from interfering in the firm's affairs. *J. v. S.*, [1894] 3 Ch. 72. At common law, a partnership is also dissolved by a marriage between two of the partners. *Nerot v. Burnand*, 4 Russ. 247, 260; *Bassett v. Shephardson*, 52 Mich. 3.

See *Haggett v. Hurley*, 91 Me. 542, 41 L. R. A. 362; *Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, 934 n. A woman's marriage also terminates the authority of her agent to lease her lands, at least at common law. *Brown v. Miller*, 46 Mo. App. 1.

(*yy*) See 3 Kent Com. (14th ed.), 58 n.; *Breaux v. Le Blanc (supra)*, 69 Am. St. Rep. 403, 412 n.

an inability to pay debts, until a refusal to pay; (z) and probably not until interference with the firm by attachment or other legal process, by a creditor of the firm, or of an indebted

* 200 * partner. In the last case, it would seem to operate as a transfer of the partner's interest. And bankruptcy destroys the right of a partner to bind the firm by his acknowledgment of debt. (a) But either of the solvent and competent partners may collect, adjust, and receipt for partnership accounts. (b)

After a dissolution from any cause, we hold that no partner can bind his former partners by any new contract, not even if it relates to a previous transaction; (x) thus it is held that he cannot make a promissory note binding the firm for a partnership debt contracted before the dissolution. (bb)¹ nor renew a note given before the dissolution. (bc)² But the authorities are not in agreement on this question. (bd)

Whether a partnership is absolutely dissolved or only suspended, where the partners are domiciled in different countries,

(z) The insolvency of a partnership does not *per se* dissolve it. *Arnold v. Brown*, 24 Pick. 93.

(a) *Atwood v. Gillett*, 2 Doug. (Mich.) 206.

(b) *Fox v. Hanbury*, Cowp. 445; *Harvey v. Crickett*, 5 M. & Sel. 336; *Gordon v. Freeman*, 11 Ill. 14; *Major v. Hawkes* 12 Ill. 298.

(bb) *Cunningham v. Bragg*, 37 Ala. 436.

(bc) *Lumberman's Bank v. Pratt*, 51 Me. 563; *Curry v. White*, 51 Cal. 530; *Montreal Bank v. Page*, 98 Ill. 109;

Seward v. L'Estrange, 36 Tex. 295; *Meyer v. Atkins*, 29 La. An. 586; *Maxey v. Strong*, 53 Miss. 280; *Floyd v. Miller*, 61 Ind. 224; *Jenness v. Carleton*, 40 Mich. 343; though authorized to wind up affairs, *Smith v. Sheldon*, 35 Mich. 42; *Mauney v. Coit*, 80 N. C. 200; *contra*, *Lloyd v. Thomas*, 79 Penn. St. 68.

(bd) Thus it is said that notes given by a partner in settlement of the business after dissolution, bind the other partners, in *Ward v. Tyler*, 52 Penn. St. 393, and that they do not, in *Lange v. Kennedy*, 20 Wis. 279.

¹ Nor can he by part payment or acknowledgment remove the bar of the Statute of Limitations. *Newman v. McComas*, 43 Md. 70; *Mayberry v. Willoughby*, 5 Neb. 368; *Tate v. Clements*, 16 Fla. 339; *Maxey v. Strong*, 53 Miss. 280; *Dowzelot v. Rawlings*, 58 Mo. 75; *Crumless v. Sturgess*, 6 Heiskell, 190; *Folk v. Russell*, 7 Baxter, 591; *contra*, *Merritt v. Day*, 9 Vroom, 32; *Mix v. Shattuck*, 50 Vt. 421; *Feigley v. Whitaker*, 22 Ohio St. 606. — W.

² But a demand by or on a former partner, after dissolution, on a firm note, will charge an indorser. *Gates v. Beecher*, 60 N. Y. 518; *Fourth Bank, &c. v. Henschen*, 52 Mo. 207. — K.

(x) A change in a partnership dissolves its contracts only when the contract is of such a personal character that it must be performed by the individuals who entered into it, and by no one else. *Phillips v. Alhambra Palace Co.*, [1901] 1 K. B. 59, distinguishing *Tasker v. Shepherd*, 6 H. & N. 575. See *Brace v. Calder*, [1895] 2 Q. B. 253. A contract of service is not, as matter of law, dissolved by the death of a partner. *Hughes v. Gross*, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620. When the

partnership business continues as before after one partner's death, earnings upon such partner's share constitute income of his estate under a division of income by his will. *In re Slocum*, 169 N. Y. 153, 62 N. E. 130. So partnership profits partly earned in the testator's lifetime, and not ascertained until after his death, are not apportionable, but are income of his estate. *Lambert v. Lambert*, 43 L. J. Ch. 106.

by the breaking out of a war between the countries, may not be positively settled, but the weight of authority is in favor of the dissolution. (c)¹ (x)

Although the death of a partner operates a dissolution of the partnership, the articles of copartnership may provide for its continuance, by an agreement that the executors, administrators, heirs, or other designated person, shall take the place of a deceased partner. (d) But where executors, in execution of a will, * carry on the business of a partnership for the * 201 benefit of the heir, the whole property is liable, and not

(c) *Griswold v. Waddington*, 15 Johns. 57; 16 Id. 438. In this case, the authorities and principles governing contracts with persons domiciled in an enemy's country, were fully reviewed by Chancellor *Kent*, in the Court of Errors. *McConnell v. Hector*, 3 B. & P. 113; *Scholefield v. Eichelberger*, 7 Pet. 586; *Woods v. Wilder*, 43 N. Y. 164; *New Orleans Bank v. Matthews*, 49 N. Y. 12; *Hubbard v. Matthews*, 54 N. Y. 43; *Taylor v. Hutchinson*, 25 Gratt. 536; *Booker v. Kirkpatrick*, 26 Gratt. 145; *Planters' Bank v. St. John*, 1 Woods, 585. See *McStea v. Matthews*, 50 N. Y. 166; *Matthews v. McStea*, 91 U. S. 7. The partnership in such cases will be illegal, notwithstanding one or more partners are resident in a neutral country. *The San Jose Indiano*, 2 Gallis, 268; *The Franklin*, 6 Rob. Adm. 127. And the property of a house of trade established in an enemy's country is condemnable as prize, whatever may be the domicile of the partners. *The Freund-schaft*, 4 Wheat. 105; *Story on Part.* § 316.

(d) *Wrexham v. Huddleston*, 1 Swanst. 514, n.; *Crawshay v. Maule*, 1 Swanst. 520; *Pearce v. Chamberlain*, 2 Ves. Sen. 33; *Balmain v. Shore*, 9 Ves. 500; *Warner v. Cunningham*, 3 Dow, 76; *Gratz v. Bayard*, 11 S. & R. 41; *Knapp v. McBride*, 7 Ala. 28. And such express agreement for the continuance of the partnership after the death of one partner is necessary, although the partnership is for a term of years. *Gillespie v. Hamilton*, 3 Madd. 251; *Scholefield v. Eichelberger*, 7 Pet. 586; *Pigott v. Bagley, McClel. & Y.* 575. It is not settled whether stipulations in the articles of partnership,

providing for its continuance after the death of a partner for the benefit of the heirs, is binding on them. *Louisiana Bank v. Kenner's Succession*, 1 La. 384. But, says *Kent*, "the better opinion is, that they are not anywhere absolutely binding. It is at the option of the representatives, and if they do not consent, the death of the party puts an end to the partnership." 3 *Kent, Com.* 57, n. *Pigott v. Bagley, McClel. & Y.* 569; *Kershaw v. Matthews*, 2 Russ. 62. — A partner may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory; but, in that case, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. *Ex parte Garland*, 10 Ves. 110; *Thompson v. Andrews*, 1 Myl. & K. 116; *Vincent v. Martin*, 79 Ala. 540; *Brasfield v. French*, 59 Miss. 632; *Wild v. Davenport*, 48 N. J. L. 129; *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Mandeville's Ex'r*, 2 How. 560, 576. The court in this case said: "A testator directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner or executor, or other person carrying on the trade, may be personally responsible for all the debts contracted."

¹ Where a firm is dissolved by war, notice of dishonor of a firm note given to a partner remaining where its place of business was, binds all, including a partner in the hostile territory. *Hubbard v. Matthews*, 54 N. Y. 43. — K.

(x) See *Breaux v. Le Blanc (supra)*, 69 Am. St. Rep. 403, 418 n.

merely the capital in the business. (e) And if, without such requirement in the will, executors put or leave the funds of the deceased in the partnership, voluntarily, they would be liable personally as partners. (ee)

When a partner dies, the partnership property goes to the survivors for the purpose of settlement, and they have all the power necessary for this purpose, and no more. (f)¹ Thus they may apply the funds of the firm to discharge incumbrances on the real estate, or to execute a contract for purchase of real estate. (ff) But they cannot renew a promissory note and bind their partners

(c) *McNellie v. Acton*, 21 E. L. & E. 3; *Laughlin v. Lorentz*, 48 Penn. St. 275. [But see the cases cited in note (d) ante.]

(ee) *Richter v. Poppenhusen*, 39 How. Pr. (N. Y.), 82.

(f) *Ex parte Ruffin*, 6 Ves. 119, 126; *Ex parte Williams*, 11 Ves. 5; *Crawshay v. Collins*, 15 Ves. 218; *Peacock v. Peacock*, 16 Ves. 49, 57; *Harvey v. Crickett*, 5 M. & Sel. 336; *Butchart v. Dresser*, 31 E. L. & E. 121; *Barney v. Smith*, 4 Har. & J. 495; *Murray v. Mumford*, 6 Cowen, 441; *Washburn v. Goodman*, 17 Pick. 519; *Rice v. Richards*, 1 Busb. Eq. (N. C.) 277; *Shields v. Fuller*, 4 Wis. 102; *Van Valkenburg v. Bradley*, 14 Iowa, 108. But in *Buckley v. Barber*, 1 E. L. & E. 506, Baron *Parke* doubts whether sur-

viving partners have a power to sell and give a good legal title to the share of the partnership property belonging to the executors of the deceased, even when they sell in order to pay the debts of the deceased and of themselves, and decides that at all events the survivors have no power to dispose of it otherwise than to pay such debt, certainly not to mortgage it together with their own as a security for a debt principally due from them, and in part only from the deceased. In Louisiana the rule of the French law prevails, and the surviving partner has no power to sue for the partnership debts without the authority of the court. *Connelly v. Cheever*, 16 La. 30; *Hyde v. Brashear*, 19 La. 402.

(ff) *Shearer v. Shearer*, 98 Mass. 107.

¹ For the purpose of winding up the partnership business after dissolution, a partner has power to pay or compromise firm debts. *Tutt v. Cloney*, 62 Mo. 116; *Moist's Appeal*, 74 Pa. 166. And may prefer one creditor over another. *Emerson v. Senter*, 118 U. S. 3; *Smith v. Dennison*, 101 Ill. 531; *Roach v. Brannon*, 57 Miss. 490, 500; *Easton v. Courtwright*, 84 Mo. 27; *Haynes v. Brooks*, 116 N. Y. 487. He may receive payment of debts due the firm. *Tyng v. Thayer*, 8 Allen, 391; *Robbins v. Fuller*, 24 N. Y. 570; or transfer the firm property in payment of debts, or to reduce the assets to cash. *Milner v. Cooper*, 65 Ia. 190; *Thursby v. Lidgerwood*, 69 N. Y. 198; *Calvert v. Miller*, 94 N. C. 600. He may draw cheques upon the partnership account. *Backhouse v. Charlton*, 8 Ch. D. 444; or complete performance of an unfinished contract, *Rust v. Chisholm*, 57 Md. 376. But there is no power to enter into new contracts so as to bind the old firm, as by the acceptance of an existing offer, see *Goodspeed v. South Bend Plow Co.*, 45 Mich. 237; or by issuing negotiable paper. *Curry v. White*, 51 Cal. 530; *Hayden v. Cretcher*, 75 Ind. 108; *Maxey v. Strong*, 53 Miss. 280; *Gardner v. Conn.*, 34 Ohio St. 187; *Bank v. Green*, 40 Ohio St. 431, 439; *Roots v. Mason City, &c. Salt Co.*, 27 W. Va. 483. There has been some difference of opinion as to the power of a surviving partner to indorse negotiable paper payable to the firm. It is held that he has not such power in *Glasscock v. Smith*, 25 Ala. 474; *Stair v. Richardson*, 108 Ind. 429; *Lumberman's Bank v. Pratt*, 51 Me. 563; *Bryant v. Lord*, 19 Minn. 396; *Fellows v. Wyman*, 33 N. H. 351; *Cavitt v. James*, 39 Tex. 189; *Dana v. Conant*, 30 Vt. 246. And see *Smith v. Winter*, 4 M. & W. 454. A contrary view is taken in *Johnson v. Berlizheimer*, 84 Ill. 54; *Chappell v. Allen*, 38 Mo. 213. As a surviving partner has power to sell or transfer firm property, the only apparent objection to such an indorsement arises from the fact that an indorsement is ordinarily an obligation as well as a transfer. This objection does not apply to an indorsement without recourse, and hence the power to indorse the firm name without recourse should be admitted. *Waite v. Foster*, 33 Me. 424. See *Bates, Partnership*, § 690. — W.

to the new note, although they will be themselves bound by it, nor can a partner do this who is authorized by the partners, on a dissolution, to wind up the business. (*fg*) (*x*) It is said that the survivors can charge nothing for their trouble or labor in settling the concern. (*g*)¹ (*y*) Nor is a partner entitled to compensation for extra services in the absence of an express *con- * 202 tract, and it is said that there is no principle of the law which authorizes an inquiry into the inequality of the services of partners, unless there be an express stipulation to that effect. (*h*) (*z*)

They are tenants in common with the representatives of the deceased, as to the choses in possession. And they have a lien on them to settle the affairs of the concern, and pay its debts. (*i*)² And if a surviving partner has paid more than his proportion of the firm's debts, he may claim repayment from the estate of the deceased. But after his lien on the partnership funds is exhausted, he can claim only in common and equally with the separate creditors of the deceased. (*j*)

(*fg*) *Myatts v. Bell*, 41 Ala. 222.

(*g*) *Beatty v. Wray*, 19 Penn. St. 516.

See *Willett v. Blanford*, 1 Hare, 253, for the discretion of the court as to shares of partners.

(*h*) *Piper v. Smith*, 1 Head, 93; *Murray v. Johnston*, id. 353.

(*i*) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 5.

(*j*) *Busby v. Chenault*, 13 B. Mon. 554.

¹ *Dunlap v. Watson*, 124 Mass. 305; *Johnson v. Hartshorne*, 52 N. Y. 173; *Brown's Appeal*, 89 Penn. St. 139; *Denver v. Roane*, 99 U. S. 355; *contra*, *Royster v. Johnson*, 73 N. C. 474; nor if appointed receiver on his own application, *Brien v. Harriman*, 1 Tenn. Ch. 467. But a partner who, at his own risk, continues the business in order to preserve the good-will and to sell the property and business to advantage, may be allowed a reasonable compensation, *Cameron v. Francisco*, 26 Ohio St. 190; and if a surviving partner, with the assent of the administrator of the deceased partner, employs extra labor to finish existing contracts, enters upon new contracts, employing the machinery, patents, and property of the firm therein, then, to the extent of his personal services devoted to such extra work, he is entitled to compensation, *Schenkl v. Dana*, 118 Mass. 236. And see *Robinson v. Simmons*, 146 Mass. 167. — K.

² Though this statement is sometimes made, *Tremper v. Conklin*, 44 N. Y. 58, 61, it is erroneous. Partners are joint tenants, and on the death of one, the title to the partnership property vests absolutely in the survivor, the representatives of the deceased partner having merely a right to an accounting. *Davidson v. Weems*, 58 Ala. 187; *Nicklaus v. Dahn*, 63 Ind. 87; *Brown v. Allen*, 35 Iowa, 306; *Smith v. Wood*, 31 Md. 293; *Bush v. Clark*, 127 Mass. 111; *Bassett v. Miller*, 39 Mich. 133; *Williams v. Whedon*, 109 N. Y. 333. See also *Emerson v. Senter*, 118 U. S. 3, 8; *Durant v. Pierson*, 124 N. Y. 444, 452; *Bates on Partnership*, § 712. And on the surviving partner's death his representative succeeds to his title. *Costley v. Wilkerson*, 49 Ala. 210; *Brooks v. Brooks*, 12 Heisk. 12. — W.

(*x*) *Potter v. Tolbert*, 113 Mich. 486, 71 N. W. 849; *Brown v. Bamberger*, 110 Ala. 342, 20 So. 114; *Huntington White Lime Co. v. Mock*, 14 Ind. App. 221, 42 N. E. 761; *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554, 564 n.

(*y*) This is not an absolute rule. See

Thayer v. Badger, 171 Mass. 279, 50 N. E. 541; *Porter v. Long*, 124 Mich. 584, 83 N. W. 601; *Gilmore v. Ham*, 141 N. Y. 1, 40 Am. St. Rep. 554, 570 n.

(*z*) See *Lell v. Hardesty*, (Ky.), 66 S. W. 643.

Whether a creditor of the firm may proceed against the estate of the deceased partner without first exhausting his remedies against the partnership funds, is not certain, but the prevailing rule in this country is that he must first look to the partnership funds. (*k*)

If the survivors carry on the concern, and enter into new transactions with the partnership funds, they do so at their peril; and the representatives of the deceased may elect to call on them for the capital with a share of the profits, or with interest. (*l*)¹

After allowing a reasonable time for a settlement, a court of equity will enjoin a survivor from further prosecution of the business, and will appoint a receiver, and direct an account to be taken. (*m*)

A court of equity will interfere and decree a dissolution, * 203 upon * a case distinctly made out, of positive and injurious wrong, done by one or more of the partners, against the interest of the firm; (*n*) (*x*) and when called upon to settle the

(*k*) In England it seems that he may go at once to the estate of the deceased partner. *Devaynes v. Noble*, 1 Meriv. 529; *Sumner v. Powell*, 2 Meriv. 37; *Wilkinson v. Henderson*, 1 Myl. & K. 582; *In re Hodgson*, 31 Ch. D. 177. And this doctrine seems to be supported in *Fillyan v. Laverty*, 3 Fla. 72; *Camp v. Grant*, 21 Conn. 41; *Silverman v. Chase*, 90 Ill. 37; *Ralston v. Moore*, 105 Ind. 243; *Sampson v. Shaw*, 101 Mass. 145, 152; *Blair v. Wood*, 108 Pa. 278. But see *Waldron v. Simmons*, 28 Ala. 629; *Pullen v. Whitfield*, 55 Ga. 174; *Haines v. Hollister*, 64 N. Y. 1; *First Nat. Bank v. Morgan*, 73 N. Y. 593; *Buckingham v. Ludlum*, 37 N. J. Eq. 137.

(*l*) *Brown v. Litton*, 1 P. Wms. 140; *Hammond v. Douglas*, 5 Ves. 539; *Featherstonough v. Fenwick*, 17 Ves.

298; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Sigourney v. Munn*, 7 Conn. 11; *Crawshay v. Collins*, 2 Russ. 345; s. c. 15 Ves. 218; 3 Kent. Com. 64; *Millard v. Ramsdell*, 1 Harring. Ch. (Mich.) 373; *Bernie v. Vandever*, 16 Ark. 616. But a partner appointed receiver is not held as partner to account for profits for partnership money invested in trade. *Whitesides v. Lafferty*, 3 Humph. 150.

(*m*) *Murray v. Mumford*, 6 Cowen, 441; *Walker v. House*, 4 Md. Ch. 39; *Crawshay v. Maule*, 1 Swanst. 495.

(*n*) *Tattersall v. Grootte*, 2 B. & P. 131; *Ex parte Broome*, 1 Rose, 69; *Hamil v. Stokes*, 4 Price, 161; s. c. *Daniel*, 20; *Oldaker v. Lavender*, 6 Sim. 239; *Green v. Barrett*, 1 Sim. 45; *Jones v. Yates*, 9 B. & C. 532.

¹ A survivor mixing firm property with his own is liable for resulting confusion unless he can distinguish each from the other. *Diversey v. Johnson*, 93 Ill. 547. — K.

(*x*) Or of embittered relations and threats between the members. *Whalen v. Stephens*, 193 Ill. 121, 61 N. E. 921; *Ryman v. Ryman* (Va.), 40 S. E. 96; 3 Kent. Com. (14th ed.), 61, n. 1; *Breaux v. Le Blanc*, 50 La. An. 228, 23 So. 281, 69 Am. St. Rep. 403, 423, 432 n.

A partner who does not exercise care and good faith in selling the firm property may be required to account for what he should have received. *Dewey v. Chapin*, 156 Mass. 35, 30 N. E. 223. A partner's

wilful neglect of the firm's interests may cause a forfeiture of the premium paid by him. See *Yates v. Cousins*, 60 L. T. 535.

One partner may in equity have a mistake corrected in the amount paid to the copartner upon dissolution. *Moors v. Bigelow*, 158 Mass. 60, 32 N. E. 900. And he may, at least under the Massachusetts statute, maintain a bill in equity to restrain the further use of his name after the time limited for the partnership has expired. *Lawrence v. Hull*, 169 Mass. 250, 47 N. E.

affairs of a partnership, it will respect any stipulations between the partners as to the mode of settlement. In the absence of such stipulations it will be governed by the last settled account, both as to its result and its method, unless the account be set aside for fraud, actual or constructive, or be open to objection, as oppressive and unreasonable. (o) (x) Nor will a partner be allowed compensation for services to the firm, or any peculiar advantage, without express stipulation, or circumstances of equivalent force. (p) The presumption of law is that the losses are to be equally borne, and the profits equally divided, even if the money or the labor is provided in different proportions. (q)

While it is a general rule that every partner is bound to exercise due skill and diligence in promoting the interests of the firm, without reward or compensation, unless it be otherwise agreed between the parties, (qq)¹ such agreement may be implied from the course of business pursued between the partners, as disclosed by the evidence; and when a partner renders services which neither the law nor the agreement of the parties imposes upon him, it is said that an agreement that he shall be paid is implied. (r)

(o) *Jackson v. Sedgwick*, 1 Swanst. 460, 469; *Pettyt v. Janeson*, 6 Madd. 146; *Oldaker v. Lavender*, 6 Sim. 239; *Desha v. Sheppard*, 20 Ala. 747; *Story* on Part. §§ 206, 349.

(p) *Lee v. Lashbrooke*, 8 Dana, 214; *Coursen v. Hamlin*, 2 Duer, 513; *Day v. Lockwood*, 24 Conn. 185. But if some of those who are partners really act as trustees for the company, they may have a right to repayment of their advances. See *In re German Mining Co.* 27 E. L. & E. 158.

(q) *Webster v. Bray*, 7 Hare, 159; *Gould v. Gould*, 6 Wend. 263; *Donelson v. Posey*, 13 Ala. 752; *Roach v. Perry*, 16 Ill. 37; *Lyman v. Lyman*, 2 Paine, C. C. 11.

(qq) An attorney at law, who was a partner in a mercantile firm, was not allowed to charge commissions for collecting the debts of the firm, in *Wanduzer v. McMillan*, 37 Ga. 299. See also *Drew v. Ferson*, 22 Wis. 651.

(r) *Levi v. Kanrick*, 13 Iowa, 344.

¹ Each partner must work to the extent of his ability for the firm, failing to do which he is chargeable on a settlement of accounts for the value of his services. *Marsh's Appeal*, 69 Penn. St. 30. — K.

1001. See *Holbrook v. Nesbitt*, 163 Mass. 120, 39 N. E. 794.

When necessary to accomplish justice, the partnership may be treated as continuing after one partner's death, and its affairs closed at a later date, as if the deceased partner voluntarily sought a dissolution. *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670.

(x) See *Karrick v. Hannaman*, 168 U. S. 328, 18 S. Ct. 135, 42 L. Ed. 484; *Crawshay v. Collins* (15 Ves. 218), 19 English Ruling Cas. 682, 722 n.; *Brew v. Hastings*, 196 Penn. St. 222, 46 Atl. 257, 79 Am. St. Rep. 706, 709 n.; *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826; 40 Am. St. Rep. 554, 554 n.; *Breaux v. Le Blanc*,

50 La. Ann. 228, 23 So. 281, 69 Am. St. Rep. 403, 414 n.; *Stewart v. Robinson*, 115 N. Y. 328, 22 N. E. 160, 5 L. R. A. 410 and note; *Hart v. Bowen*, 86 Fed. 877, 31 C. C. A. 31, 171 U. S. 688, 18 S. Ct. 943. The deceased partner's estate is not liable for the firm's breach of trust after his death. *Devaynes v. Noble* (1 Mer. 616), 19 English Ruling Cas. 771, 776 n. If the surviving partner assumes existing obligations of the firm, he becomes according to some decisions the principal debtor in his relation to the deceased partner's estate, and that estate becomes a surety. *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 549; *Lodge v. Dicus* (3 B. & Ald. 611), 19 English Ruling Cas. 724, 736 n.

A dissolution will be decreed, if the court are satisfied that the whole scheme and purpose of the partnership were absurd and unpracticable; (s) or that the original agreement between the parties was tainted with fraud. (t) In such cases, all the * 204 * partners must be made parties to the bill. (u) Even after a dissolution, and while the affairs are in settlement, the court will interfere, by injunction or a receiver, if necessary to prevent waste or wrong. (v)

When a court of equity winds up a partnership concern, it is done by a sale of the partnership effects; (w) and either partner may, it is said, insist upon a sale. (x) (xx).

Proper notice should be given of a dissolution; for a firm may be bound, by a contract made after dissolution or retirement of one or more, by a former partner, in the usual course of business, with a person who had no notice or knowledge of the dissolution. (y) The requirement of notice in case of dissolution is quite similar to that stated in a previous section in relation to a retiring partner.

SECTION XV.

OF THE RIGHTS OF CREDITORS IN RESPECT TO PARTNERSHIP FUNDS.

The property of a partnership is bound to the payment of the partnership debts, and the right of a private creditor of one copartner to that partner's interest in the property of the firm, is

(s) *Beaumont v. Meredith*, 3 Ves. & B. 180; *Buckley v. Cater*, 17 Ves. 15; *Pearce v. Piper*, 17 Ves. 1; *Reeve v. Parkins*, 2 Jac. & W. 390.

(t) *Hynes v. Stewart*, 10 B. Mon. 429; *Fogg v. Johnston*, 27 Ala. 432.

(u) *Long v. Yonge*, 2 Sim. 369.

(v) *Roberts v. Eberhardt*, 23 E. L. & E. 245; s. c. 1 Kay, 148; *Mayson v. Beazley*, 27 Miss. 185; *Milliken v. Lov- ing*, 37 Me. 408.

(w) *Crawshay v. Maule*, 1 Swanst. 495; *Crawshay v. Collins*, 15 Ves. 218.

(x) *Lyman v. Lyman*, 2 Paine, C. C. 11.

(y) *Merritt v. Pollys*, 16 B. Mon. 355; *Clapp v. Rogers*, 2 Kern. 283; *Devins v. Harris*, 3 Greene (Iowa), 186; *Pope v. Risley*, 23 Mo. 185; *Brown v. Clark*, 14 Penn. St. 469; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Lyon v. Johnston*, 28 Conn. 1; *Myers v. Smith*, 15 Iowa, 181; *Reilly v. Smith*, 16 La. An. 31.

(xx) The death of one partner ends the partnership, both at law and in equity; in some cases the executors of the deceased partner are entitled to his share of the assets, and they may have the assets sold, and the share realized at once; with respect to the partners, where there is in

equity no survivorship of property, there is in equity no survivorship of liability. *Beresford v. Browning*, L. R. 20 Eq. 576, 1 Ch. D. 30. See *Brown v. Cushman*, 173 Mass. 368, 53 N. E. 860; *Breaux v. Le Blanc*, 50 La. Ann. 228, 23 So. 281, 69 Am. St. Rep. 403, 414 n.

postponed to the right of the partnership creditor. (z)¹ But it * is said that if the contract between the partners pre- * 205 vents them from having any lien on the partnership effects for the payment of the partnership debts, the partnership creditors have no preference over individual creditors. (a)

Difficult questions sometimes arise where the private creditor seeks to attach or levy upon the partnership property, or the interest of the indebted partner therein. Where attachment by mesne process exists, such attachment is allowed; but it is generally made subject to the paramount rights of the partnership creditors. (b)² (x) And such attachment is defeated by the

(z) *Murrill v. Neill*, 8 How. 414; *Pierce v. Jackson*, 6 Mass. 243; *Tappan v. Blaisdell*, 5 N. H. 190; *Brewster v. Hammett*, 4 Conn. 540; *Commercial Bank v. Wilkins*, 9 Greenl. 23; *Douglas v. Winslow*, 20 Me. 89; *Donelson v. Posey*, 13 Ala. (n. s.) 752; *Filey v. Phelps*, 18 Conn. 294; *Pearson v. Keedy*, 6 B. Mon. 128; *Black v. Bush*, 7 id. 210; *Glenn v. Gill*, 2 Md. 1; *Sutcliffe v. Dohrman*, 13 Ohio, 181; *Baker's Appeal*, 21 Penn. St. 76. Preference is denied to the creditors of the partnership, where there has been a *bona fide* sale of the partnership effects without the reservation of a lien. *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Reese v. Bradford*, 13 Ala. 387. See *Smith v. Edwards*, 7 Humph. 106. An assignment by partners of their joint and separate property for the payment of their debts, with preference to certain partnership creditors and certain individual creditors, has been held valid. *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 50. — In Vermont the creditors of the partnership, in attaching partnership property, are at law entitled to no preference to creditors of an individual partner. *Reed v. Shepardson*, 2 Vt. 120; *Clark v. Lyman*, 8 Vt. 290. In equity partnership effects are pledged to each partner until he is released from all his partnership obligations, and are first chargeable with the claims of the firm's creditors, notwithstanding prior attachments of the separate creditors. *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Bardwell v. Perry*, id. 292; *Crooker v. Crooker*, 46 Me. 250.

(a) *Rice v. Barnard*, 20 Vt. 479; *Snodgrass' Appeal*, 13 Penn. St. 471; *Jones v. Lusk*, 2 Met. (Ky.) 356. See also *Case v. Beauregard*, 99 U. S. 119; *Rose v. Titsworth*, 37 N. J. Eq. 333; *Saunders v. Reilly*, 105 N. Y. 12; *Strauss v. Frederick*, 91 N. C. 121; *Foster v. Barnes*, 81 Pa. St. 377. But see *Tenney v. Johnson*, 43 N. H. 144.

(b) *Pierce v. Jackson*, 6 Mass. 242; *Phillips v. Bridge*, 11 id. 248; *Newman v. Bagley*, 16 Pick. 572; *Allen v. Wells*, 22 id. 450; *Trowbridge v. Cushman*, 24 id. 310; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Smith v. Barker*, 1 Fairf. 458; *Douglas v. Winslow*, 20 Me. 89; *Tappan v. Blaisdell*, 5 N. H. 190. *Richardson, C. J.*: "According to the old cases in the courts of law, the separate creditor took the goods of the partners, and sold the share of his debtor, without inquiring what were the rights of the other partners, or what was the real share of each. *Bachurst v. Clinkard*, 1 Show. 173, 1 Salk. 392, 1 Comyns, 277. . . . It is now settled that each partner has a lien on the partnership property, in respect to the balance due to him, and the liabilities he may have incurred on account of the partnership." *Morrison v. Blodgett*, 8 N. H. 238; *Page v. Carpenter*, 10 id. 77; *Dow v. Sayward*, 12 id. 276; *Brewster v. Hammett*, 4 Conn. 540; *Washburn v. The Bank of Bellows Falls*, 19 Vt. 278; In the matter of *Smith*, 16 Johns. 102; *Robbins v. Cooper*, 6 Johns. Ch. 186. But when a partnership is dissolved and a creditor afterwards takes the joint and

¹ It is equally true that no partner has a right to share in the firm property except after payment of its liabilities. *Staats v. Bristow*, 73 N. Y. 264; *Rice v. McMartin*, 39 Conn. 573; *Hall v. Clagett*, 48 Md. 223; *Conant v. Frary*, 49 Ind. 530. — K.

² An attachment of firm goods in a suit against one partner is not valid against a

(x) A debtor's interest in the firm's equity. *Sanborn v. Royce*, 132 Mass. 594; *Russell v. Cole*, 167 Mass. 6, 44

* 206 mere *insolvency of the firm, although the partnership creditors have commenced no action for the recovery of their debts. (c) But where one partner is dormant, the creditor of the other is not then postponed in his attachment of the stock in trade, to a creditor of the same firm who had discovered the dormant partner, and makes him defendant. (d) But such postponement would be made, where the first attaching creditor's debt did not arise from the partnership business, and the debt of the second creditor did arise therefrom. (e) The same rule is applied to attachments by trustee process, and to direct attachments. (f)

* 207 * Formerly, both in England and in this country, the principle of moieties prevailed. That is, the private creditor took the proportion of the partnership stock which

several note of the individual partners, he is not a creditor of the partnership, nor entitled to preference as such. Page v. Carpenter, 10 N. H. 77. In Conroy v. Woods, 13 Cal. 626, it is held that when one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner, attaching first. See James v. Stratton, 32 Ill. 202.

(c) Pierce v. Jackson, 6 Mass. 242; Fisk v. Herrick, 6 id. 271; Rice v. Austin, 17 id. 206; Commercial Bank v. Wilkins, 9 Greenl. 28; Lyndon v. Gorham, 1 Gall. 368.

(d) The reason of this exception is, that the public rely on the personal credit of the ostensible owner, and not on that of the dormant partners. Lord v. Baldwin, 6 Pick. 348; French v. Chase, 6 Greenl. 166. These cases are affirmed in Cammack v. Johnson, 1 Green, Ch. 163. See also Van Valen v. Russell, 13 Barb. 590; Brown's Appeal, 17 Pa. 480; Carey v.

Bright, 58 Pa. 70; Wright v. Herrick, 125 Mass. 154; Pinschower v. Hauks, 18 Nev. 99; Elliot v. Stevens, 38 N. H. 311.

(e) Winter v. Richards, 10 Conn. 37. This case determines that a first attaching creditor, who has dealt with a partner in the course of the business of the partnership, but at the same time in ignorance of its existence, shall not be postponed to subsequent attaching creditors, to whom the dormant partners were known when the business transactions took place or subsequently disclosed before their attachments, but that he shall be postponed if his claims did not arise from a partnership transaction, while that of the subsequent attaching creditor did. The court distinguished Lord v. Baldwin from the case before them, and considered the result in that case perfectly compatible with its decision. See Allen v. Dunn, 15 Me. 292.

(f) Fisk v. Herrick, 6 Mass. 271; Church v. Knox, 2 Conn. 514; Barber v. Hartford Bank, 9 id. 407; Lyndon v. Gorham, 1 Gallis. 367; Mobley v. Lombard, 7 How. (Miss.) 318.

subsequent attachment by a firm creditor. Kistner v. Sidlinger; Bogue's Appeal, 83 Penn. St. 101; Eighth Bank v. Fitch, 49 N. Y. 539; Fargo v. Ames, 45 Iowa, 491; First Nat. Bank v. Brenneisen, 97 Mo. 145; Cox v. Russell, 44 Iowa, 556. — K.

N. E. 1057, 57 Am. St. Rep. 432, 436; Haman v. Brennan, 170 Mass. 405, 49 N. E. 655. Creditors have, as such, no lien on the partnership assets, and the creditors of one partner cannot in any way apply or diminish such assets to the prejudice of the firm's creditors. Goldthwaite v. Janney, 102 Ala. 431; 15 So. 560, 48 Am. St. Rep. 56, 28 L. R. A. 161; Smith

v. Smith, 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 359, 364; Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645 and note; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. Rep. 887, 30 L. R. A. 549; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 60 Pac. 62, 46 L. R. A. 481 and note. See 41 Am. L. Reg. n. s. 189.

belonged by numerical division to his debtor. (*g*) But now, both there and here, the rule is well settled that if partnership effects can be taken either by attachment or on execution to secure or satisfy the debts of one of the partners, this can be done only to the extent of that partner's interest, and subject to the settlement of all partnership accounts. (*h*) The levy of execution does not give the creditor * a separate possession of the * 208 goods. The indebted partner had no such possession himself; and the levy gives to his creditor only that which the debtor had; and that is a right to call for an account, and then a right to the balance which may be found to belong to him upon a settlement. And it must still be regarded as unsettled, whether a sheriff levying an execution of a separate creditor on a partner's interest, can take any, and if any what, actual possession of the partnership property. (*i*) * Considering the great * 209

(*g*) *Heydon v. Heydon*, 1 Salk. 392. See *Jacky v. Butler*, 2 Ld. Raym. 871; *Bachurst v. Clinkard*, 1 Show. 173; *Mariott v. Shaw*, 1 Comyns, 277; *Rex v. Manning*, 2 id. 616. See *Eddie v. Davidson*, Dougl. 650; *Parker v. Pistor*, 3 C. & P. 288; *Wallace v. Patterson*, 2 Har. & McH. 463; *Lyndon v. Gorham*, 1 Gallis. 367; *McCarty v. Emlin*, 2 Dallas, 278; *Church v. Knox*, 2 Conn. 514. The same rule is recognized as law in Vermont, but not in equity. *Reed v. Shepardson*, 2 Vt. 120; *Clark v. Lyman*, 8 id. 290; *Washburn v. Bank of Bellows Falls*, 19 id. 278.

(*h*) *Fox v. Hanbury*, Cowp. 445; *Eddie v. Davidson*, Dougl. 650; *West v. Skip*, 1 Ves. Sen. 239; *Hankey v. Garratt*, 1 Ves. Jr. 236; *Taylor v. Fields*, 4 id. 396; *Young v. Keighley*, 15 Ves. 557; *In re Wait*, 1 Jac. & W. 608, Lord *Eldon*; *Dutton v. Morrison*, 17 Ves. 193; *Commercial Bank v. Wilkins*, 9 Greenl. 33; *Doner v. Stauffer*, 1 Penn. St. 198; *Winston v. Ewing*, 1 Ala. (N. S.) 129; *Story on Part.* § 261; *Coll. on Part.* § 822 n., *ante*, note (*h*); *Crane v. French*, 1 Wend. 311; *Tappan v. Blaisdell*, 5 N. H. 190; *Burgess v. Atkins*, 5 Blackf. 337, 338. *Dewey, J.*: "The general rule of law is, that in levying an execution against one partner for his separate debt, the officer may take possession of all the joint property of the firm, in order to inventory and appraise it; he has no authority to divide it; he can only sell the joint interest of the debtor, whatever it may be, and the purchaser will stand in the place of the debtor, and hold the same interest in the joint concern which he held."

(*i*) In *Scrugham v. Carter*, 12 Wend.

131, it was held that replevin does not lie against a sheriff in such a case for taking the property and removing it to a place of safe custody, and the remedy of the other partners is to obtain an order staying proceedings until an account be taken in equity. In *Burrall v. Acker*, 23 id. 606, he was held authorized to take joint possession, with the other partners, of the partnership property, after the levy and before the sale, but whether he was entitled to exclusive possession, was not decided. *Phillips v. Cook*, 24 Wend. 389, decided that, on an execution at law against one of two partners, the sheriff might lawfully seize, not merely the moiety, but the *corpus* of the joint estate, or the whole, or as much of the entire partnership effects as might be necessary to satisfy the execution, and deliver the property sold to the purchaser; and if he purchases with notice of the partnership, he takes subject to an account between the partners, and to the equitable claims of the partnership creditors. *Bates v. James*, 3 Duer, 45. It has since been held that he is equally subject to an account whether he had such notice or not. *Walsh v. Adams*, 3 Denio, 125. The same cases affirm his power to deliver all the goods of the partnership to the purchaser. *Birdseye v. Ray*, 4 Hill (N. Y.), 158, affirms *Phillips v. Cook*, so far as it relates to the seizure of the whole of the joint estate by the sheriff on an execution against one partner for his separate debt. But the sheriff subjects himself to an action if he sells the entire property in the goods of the copartnership, or anything more than the debtor

diversity of authority, as shown by our note, and consequent uncertainty, as to this power of the sheriff, the question seems to call for statutory provisions; but in the absence of such provisions, and on general principles, it would seem that the sheriff cannot take or give, by sale, specific possession of the partnership property. He takes and can sell only the right and interest of the indebted partner to and in the whole fund. (x)

Different rules and modes of practice prevail in different parts of this country. But wherever it can be done, the better and safer way would probably be for the writ to be a trustee process, or in the nature of a foreign attachment, and this should be served on the other partners as alleged trustees, and a return made by the sheriff that he had attached all the right and interest of the partner defendant in the stock and property of the partnership. And the other partners being summoned as trustees would be obliged to disclose in their answer the

partner's interest in them. *Waddell v. Cook*, 2 Hill (N. Y.), 47 n.; *Walsh v. Adams*, 3 Denio, 125. In New York it is held that neither a court of law nor of equity will stay execution at law against the joint estate for a separate debt until account be taken. *Moody v. Payne*, 2 Johns. Ch. 548; *In re Smith*, 16 Johns. 106, n.; *Phillips v. Cook*, 24 Wend. 389; *Hergman v. Dettlebach*, 11 How. Pr. 46. See *Reed v. Howard*, 2 Met. 36. But the rule has been disapproved. *Cammack v. Johnson*, 1 Green, Ch. 168. In Alabama, the sheriff is held justified in taking exclusive possession of the goods of the firm until the aid of a court of equity is successfully invoked. *Moore v. Sample*, 3 Ala. (N. S.) 319. In New Hampshire the right of a sheriff to take possession of partnership property, levied on for the private debt of a partner, has been denied after an elaborate examination of the question. *Gibson v. Stevens*, 7 N. H. 352, 357. *Parker, J.*: "The specific property of a partnership cannot be lawfully taken and sold to satisfy the private debt of one of the partners. . . . If the sheriff can sell only the interest of the partner, and not the goods, he must be liable if he make actual seizure of the specific property, either to the partnership or to the other partners. *Wilson v. Conine*, 2 Johns. 280. Especially if he sell the whole, as in this case. 1 Gallis. 370.; 15 Mass. 82."

Morrison v. Blodgett, 8 N. H. 238. In *Crane v. French*, 1 Wend. 313, *Savage, C. J.*, after considering the subject, says: "The sheriff therefore sells the mere right and title to the partnership property, but does not deliver possession." See also 5 N. H. 193; 2 Conn. 516, 517. The conclusion that the sheriff, upon an execution against one partner, is not to deliver to his vendee, and is not to seize the partnership effects, is sustained, therefore, not only by the reason of the thing, after the adoption of the general principle before stated, but by express authority." These cases are affirmed in *Page v. Carpenter*, 10 N. H. 77; *Dow v. Sayward*, 12 id. 271, 14 id. 9. See *Taylor v. Fields*, 4 Ves. 396; *Johnson v. Evans*, 7 Man. & G. 240, 249, 250, *Tindal, C. J.*; *Coll. on Part.*, B. iii. ch. vi. § 10. — In *Newman v. Bean*, 1 Foster (N. H.), 93, it was held that an action might be maintained against a third person who seizes goods on execution belonging to a partnership, for the debt of an individual partner, and excludes the other partners from the possession of them. See on this subject 26 Am. Jur., art. 3. See also *Place v. Sweetzer*, 16 Ohio, 142; *Newhall v. Buckingham*, 14 Ill. 405; *Hill v. Wiggan*, 1 Foster (N. H.), 292; *Vann v. Hussey*, 1 Jones, 381; *Deal v. Bogue*, 20 Pa. St. 228; *Lucas v. Laws*, 27 id. 211; *Reinheimer v. Hemmingway*, 35 id. 432.

(x) See *Skavdale v. Moyer*, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481 and note; *Russell v. Cole*, 167 Mass. 6, 44

N. E. 1057, 57 Am. St. Rep. 432 and note.

state of the concern, which will show the interest of the partner defendant.

After sale on execution, the sheriff should convey to the purchaser all the right and interest of the indebted partner in the stock and property of the partnership. And the purchaser would then have the right to demand an account, and a transfer to him of whatever balance or property would, upon such account, have belonged to his debtor, and would have, perhaps, the same right of possession. (j)¹

* That the private creditors of one of the partners cannot * 211 reach the partnership funds until the claims of the part-

(j) *Morrison v. Blodgett*, 8 N. H. 254. *v. Carpenter*, 10 N. H. 77; s. c. 14 N. H. See *Dow v. Sayward*, 12 N. H. 276; Page 9, 12.

¹ It is held in most jurisdictions that a partner's interest in partnership property may be attached on mesne process or taken on an execution for an individual debt of that partner. Recent cases almost universally hold also that in no way can the creditor obtain more than the interest of the indebted partner, after partnership creditors have been satisfied and equities between the partners adjusted. But further than this the extent of the creditor's right and the method of exercising it vary. In some jurisdictions a mode of procedure is provided by statute. *Anderson v. Cheney*, 51 Ga. 372; *Richards v. Haines*, 30 Iowa, 574; *Kaine's Appeal*, 92 Pa. 273 (see *Dengler's Appeal*, 125 Pa. 12); *Middlebrook v. Zapp*, 79 Tex. 321.

Where no such method is provided, the sheriff may generally seize all the partnership property and sell the debtor's interest therein. *Farley v. Moog*, 79 Ala. 148; *Clark v. Cushing*, 52 Cal. 617; *Wright v. Ward*, 65 Cal. 525; *White v. Jones*, 38 Ill. 159; *Williams v. Lewis*, 115 Ind. 45; *Chopin v. Wilson*, 27 La. An. 444; *Hacker v. Johnson*, 66 Me. 21; *People's Bank v. Shrycock*, 48 Md. 427; *Barrett v. McKenzie*, 24 Minn. 20; *Lane v. Lenfest*, 40 Minn. 375; *Atkins v. Saxton*, 77 N. Y. 195; *Kaufman v. Schoeffel*, 46 Hun, 571; *Nixon v. Nash*, 12 Ohio St. 647; *Trafford v. Hubbard*, 15 R. I. 326.

If the partnership prove insolvent or the indebted partner proves to be entitled to nothing on an accounting, the attaching creditor gets nothing. *Wilson v. Strobach*, 59 Ala. 488; *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Staats v. Bristow*, 73 N. Y. 265.

It is often said that the sheriff must not act in hostility to the other partners or treat the property as belonging solely to the debtor, or he will be a trespasser. See *Daniel v. Owens*, 70 Ala. 297; *Atkins v. Saxton*, 77 N. Y. 195; *Snell v. Crowe*, 3 Utah, 26. And the sheriff may not attach or levy on particular chattels, for a partner's right is to the balance found due him on a settlement of the whole business, not to a particular share in each chattel. *Daniel v. Owens*, 70 Ala. 297; *Tait v. Murphy*, 80 Ala. 440; *Stumph v. Bauer*, 76 Ind. 157; *Williams v. Lewis*, 115 Ind. 45; *Levy v. Cowan*, 27 La. An. 556; *Hutchinson v. Dubois*, 45 Mich. 143; *Irby v. Graham*, 46 Miss. 423, 430; *Vandike v. Roskam*, 67 Pa. 330.

For the same reason a debt due the firm cannot be garnished by a creditor of one partner. *People's Bank v. Shrycock*, 48 Md. 427; *Bulfinch v. Winchenbach*, 3 Allen, 161; *Williams v. Gage*, 49 Miss. 777; *Myers v. Smith*, 29 Ohio St. 120; *Sweet v. Reed*, 12 R. I. 121.

Contrary decisions, that a particular chattel or debt may be seized or garnished though any right obtained thereby is subject to the claims of partnership creditors and the satisfaction of partnership equities, are *Hershfield v. Clafin*, 25 Kan. 166; *Thompson v. Lewis*, 34 Me. 167; *Fogg v. Lawry*, 68 Me. 78; *Randall v. Johnson*, 13 R. I. 338; *Saunders v. Bartlett*, 12 Heisk. 316.

In some jurisdictions, though the sheriff may sell the partner's interest, neither he nor a purchaser from him can take possession. *Treadwell v. Brown*, 43 N. H. 290; *Garvin v. Paul*, 47 N. H. 158; *Richard v. Allen*, 117 Pa. 199.

And in Massachusetts, it may be doubted whether a creditor of a partner has any means of attaching or levying at law on his debtor's interest in the partnership. *Fay v. Duggan*, 135 Mass. 242. See also *Hutchinson v. Dubois*, 45 Mich. 143. — W.

nership creditors are satisfied, is now the universal rule both in courts of law and of equity. (*k*) But whether the private property of a partner is equally preserved for his private creditors, is not perhaps certain. At law, no such rule seems to be well established. But where the partnership has failed, and the partnership property is held as a fund for the partnership creditors, the justice of holding the private property of individual partners for the exclusive benefit of their private creditors, is obvious. Then each fund would be held separate; the partnership assets for the partnership creditors, and the assets of each partner for his own creditors, and only the balance of each fund, after the special claims upon it were discharged, would be applicable to the claims of the other class. But this cannot now be asserted, on authority, to be a settled rule, even in equity. (*l*) (*x*)

(*k*) *Murrill v. Neill*, 8 How. 414; *Shedd v. Wilson*, 1 Williams, 478; *Converse v. McKee*, 14 Tex. 20.

(*l*) In the time of Lord *Hardwicke* joint creditors were allowed, in bankruptcy, to prove their debts under a separate commission against one partner, or under separate commissions against all the partners, but only for the purpose of assenting to or dissenting from the certificate, and were considered to have an equitable right to the surplus of the separate estate, after payment of the separate creditors. *Ex parte Baudier*, 1 Atk. 98; *Ex parte Voguel*, id. 132; *Ex parte Oldknow*, Co. B. L. ch. 6, § 15; *Ex parte Cobham*, id. See *Dutton v. Morrison*, 17 Ves. 207; *Ex parte Farlow*, 1 Rose, 422. Lord *Thurlow* broke in upon this rule, allowing joint creditors to prove and take dividends under a separate commission, and holding that a commission of bankruptcy was an execution for all the creditors, and that no distinction ought to be made between joint and separate debts, but that they ought to be paid ratably out of the bankrupt's property. *Ex parte Haydon*, Co. B. L. ch. 6, § 15; s. c. 1 Bro. Ch. 453; *Ex parte Copland*, Co. B. L. ch. 6, § 15; s. c. 1 Cox, 459; *Ex parte Hodgson*, 2 Bro. Ch. 5; *Ex parte Page*, id. 119; *Ex parte Flintum*, id. 120. Lord *Roslyn* restored the principle of Lord *Hardwicke's* rule (*Ex parte Elton*, 3 Ves. 238; *Ex parte Abell*, 4 id. 837), which was adopted by Lord *Eldon* less out of regard to the reason of the rule itself than for the sake of establishing a uniform practice. *Ex parte Clay*, 6 Ves. 813; *Ex parte Kensington*, 14 id. 447; *Ex parte Taitt*, 16 id.

193. See his remarks in *Chiswell v. Gray*, 9 Ves. 126; *Barker v. Goodair*, 11 id. 86, and such is the English law. Gow on Part. 312. There are, however, three exceptions to this rule: "1st, where a joint creditor is the petitioning creditor under a separate fiat; 2d, where there is no joint estate, and no solvent partner; 3rd, where there are no separate debts. In the first case the petitioning creditor, and in the second all the joint creditors, may prove against the separate estate *pari passu* with the separate creditors. In the last case, as there are no separate creditors, the joint creditors will be admitted *pari passu* with each other upon the separate estate." Coll. on Part. § 923; Story on Part. §§ 378-382. But see *Emanuel v. Bird*, 19 Ala. 596, and *Cleg-horn v. Ins. Bank of Columbus*, 9 Ga. 319. The history of the English rule was reviewed in *Murray v. Murray*, 5 Johns. Ch. 60. It has been adopted by some American courts. *Woodrop v. Ward*, 3 Desaus. 203; *Tunno v. Trezevant*, 2 id. 270; *Hall v. Hall*, 2 McCord, Ch. 302; *McCulloch v. Dashiell*, 1 Har. & G. 96; *Greene v. Butterworth*, 45 N. J. Eq. 738; *Murrill v. Neill*, 8 How. 414. See *In re Marwick*, Davies, 229; *In re Warren*, id. 320; *Morris v. Morris*, 4 Gratt. 293. In *Jackson v. Cornell*, 1 Sandf. Ch. 348, the Assistant Vice-Chancellor said: "It is not denied that the rule of equity is uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter

(*x*) That it is so in bankruptcy, see *In re Meyer*, 98 Fed. 976, 39 C. C. A.

368, 3 Ann. Bankr. Rep. 559; *In re Sand-erlin*, 109 Fed. 857.

The rights of partnership creditors to a preference in the distribution * of the partnership property must not be * 212 taken to extend so far as to affect a *bona fide* transmutation of partnership into private property made prior to or upon a dissolution. While the partnership remains and its business is going on, whether it be in fact solvent or not, any honest distribution of the partnership effects among the members of the firm cannot * be disturbed by any equities of credi- * 213 tors of the partnership. (m)¹ In Illinois the rule in equity is stated to be this : the assets of a deceased and of insolvent partners, if there be partnership and separate property, will be distributed by paying the firm debts out of the joint estate, and the individual debts out of the separate estate ; that the joint and individual debts should be kept distinct and the assets of

are to be first paid out of the separate effects of their debtor before the partnership creditors can claim anything. See *Wilder v. Keeler*, 3 Paige, 167 ; *Egberts v. Wood*, id. 517 ; *Payne v. Matthews*, 6 id. 19 ; *Hutchinson v. Smith*, 7 id. 26 ; 1 Story Eq. §§ 625, 675." And it was held in *Jackson v. Cornell* that a general assignment of his separate property made by an insolvent copartner, which prefers the creditors of the firm to the exclusion of his own, is fraudulent and void as to the latter. The English rule has been discarded in Pennsylvania. *Bell v. Newman*, 5 S. & R. 78 ; *In re Sperry*, 1 Ashm. 347. And Lord *Thurlow's* rule prevails in Connecticut, although the surviving partner be solvent and within the jurisdiction of the Court. *Camp v. Grant*, 21 Conn. 41. See also *Shackelford v. Clark*, 78 Mo. 491 ; *Pearce v. Cooke*, 13 R. I. 184 ; *Hutzler v. Phillips*, 26 S. C. 136 ; *Cox v. Miller*, 54 Tex. 16 ; *Bardwell v. Perry*, 19 Vt. 292 ; *Pettyjohn's Ex. v. Woodruff*, 86 Va. 478. In Massachusetts, whatever may be the rule in a court of equity, an attachment of the separate property of a partner for a partnership debt is not defeated at law by a subsequent attachment of the same property for his separate debt. *Allen v. Wells*, 22 Pick. 450. See *Stevens v. Perry*, 113 Mass. 380 ; *Fullam v. Abrams*, 29 Kan. 725 ; *Cunningham v. Gushee*, 73 Me. 417 ; *Howell v. Teel*, 29 N. J. Eq. 490 ; *Straus v. Kerngood*, 21 Gratt. 584. And in the distribution of the estates of deceased insolvent debtors, partnership debts are paid ratably with

the private claims. *Sparhawk v. Russell*, 10 Met. 305. But in New Hampshire the English rule has been adopted in the law, to its fullest extent, and where real estate of one partner was set off on execution for a debt due from the partnership, and afterwards the same land was set off for a separate debt of the same partner, the last levy was held to prevail over the first and to give the legal title. *Jarvis v. Brooks*, 3 Foster (N. H.), 136 ; *Weaver v. Weaver*, 46 N. H. 188. And see *Preston v. Colby*, 117 Ill. 477 ; *Bardwell v. Perry*, 19 Vt. 292, 303. Mr. Justice *Story* says of the English rule : " It now stands as much, if not more, upon the general ground of authority, and the maxim *stare decisis*, than upon the ground of any equitable reasoning." *Story* on Part. § 377. And he says further : " It is not, perhaps, too much to say that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence ;" but " should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity." § 382. Chancellor *Kent*, on the other hand, remarks : " For my part, I am free to confess that I feel no hostility to the rule, and think that it is, upon the whole, reasonable and just." 3 Kent Com. 65 n. See also *Walker v. Eyth*, 25 Penn. St. 216 ; *Morrison v. Kurtz*, 15 Ill. 193 ; *Baker v. Wimpee*, 19 Ga. 87 ; *Young v. Frier*, 1 Stock. 465.

(m) *Ex parte Ruffin*, 6 Ves. 119 ; *Allen v. Center Valley Co.*, 21 Conn. 130.

¹ *Hollis v. Staley*, 3 Baxter, 167 ; *Case v. Beauregard*, 99 U. S. 119 ; *In re Long*, 7 Benedict, 141 ; *Schmidlapp v. Currie*, 55 Miss. 597. See *Menagh v. Whitwell*, 52 N. Y. 146, that the firm must be solvent. — K.

the two estates marshalled accordingly; that joint creditors must first resort to the joint fund, and the creditors of the individual partners to their separate property; that upon the inadequacy of either of these, then the joint or separate estate may be applied according to the exigency of the case; that if there is no joint fund nor any solvent partner, joint creditors may participate equally with a private creditor in the estate of a deceased partner, and if there should be a surplus of the joint fund, the creditor of

* 214 an individual partner may resort * to that. (n) Nor have the joint creditors such a lien on the partnership funds, as to avoid a transfer in good faith and for value to a purchaser, by partners, before judgment and execution. (o)

SECTION XVI.

LIMITED PARTNERSHIP.

This species of partnership has been but recently introduced into this country, but has already been adopted in very many of our States, and promises to be of great utility.¹ We have borrowed it from the continent of Europe, as it was formerly unknown in English practice, and is not recognized by the common law of England. Limited partnership is now permitted in England, but it is not the same thing there that it is in this country.

With us, a limited partnership, or, as it is sometimes called, a special partnership, arises wholly from statute, and is defined and determined by statutory provisions. The purpose of it is to enable a party to put into the stock of a firm a definite sum of money, and abide a responsibility and share a profit which shall be in proportion to the money thus contributed, and no more. By the common law of partnership, he who had any interest in the stock, and received any proportion of the profits, is a partner, and as such, liable *in solido* for the whole debts of the firm. And mere joint-stock companies, without incorporation, are, as to all purposes of liability, like common partnerships. (q) Capitalists were therefore

(n) *Pahlman v. Graves*, 26 Ill. 405. See *Preston v. Colby*, 117 Ill. 477.

(o) *Greenwood v. Brodhead*, 8 Barb. 593; *Waterman v. Hunt*, 2 R. I. 298; *Allen v. Center Valley Co.*, 21 Conn. 130.

See, however, *Ferson v. Munroe*, 1 Foster (N. H.), 462.

(q) *Cox v. Bodfish*, 35 Me. 302; *Pipe v. Bateman*, 1 Clarke (Iowa), 369; *Williams v. Bank of Michigan*, 7 Wend. 542; *Hess v. Werts*, 4 S. & R. 356.

¹ It has been adopted in all the States and several of the Territories of this country. *Bates, Limited Partnership*, Preface. — W.

unwilling to place their capital in the stock of a trading company, unless advantages were offered them equivalent to this great risk. Men of * business capacity, who had only their skill, * 215 industry, and integrity, could not always borrow adequate capital, because they could not give absolute security; and they could not pay as a premium for the risk more than legal interest, because the usury laws prohibited this. But they may now enter into an arrangement with a capitalist, by which they receive from him adequate means for carrying on their business profitably, paying him a fair share of the profits earned by the combination of his capital and their labor, while he runs the risk of losing the capital which is thus earning him a profit, but knows that he can lose no more.

Partnerships of this kind, being, as has been stated, wholly unknown to the common law, are authorized and regulated only by statute. And these statutes differ considerably in the several States. But the provisions are generally to the following effect. First, there must be one or more who are *general* partners, and one or more who are *special* partners; secondly, the names of the special partners do not appear in the firm, nor have they all the powers and duties of active members; thirdly, the sum proposed to be contributed by the special partners must be actually paid in; fourthly, the arrangement must be in writing, specifying the names of the partners, the amount paid in, etc., which is to be acknowledged before a magistrate, and then recorded and advertised, in such way as shall give the public distinct knowledge of what it is, and who they are, that persons dealing with the firm give credit to. Besides these general provisions, others of a more particular nature are sometimes introduced. Thus in some States, no special partnership may carry on the business of insurance or banking. And there are often special provisions to give greater security to the public and persons dealing with such firms. But for these we must refer the reader to the statutes of the several States.

A special partner, complying with the requirements of the law, cannot be held as personally liable for the debts of the firm; although, of course, the whole amount which he contributes goes into the fund to which the creditors of the firm may look.

* It seems to be quite well settled, that the special part- * 216 ner must, at his own peril, comply precisely with the requirements of the statutes. (*qq*) Any disregard of them or want of

(*qq*) *Haggerty v. Foster*, 103 Mass. 17; *v. Hogg*, 38 Penn. St. 153; *Hartland v. Pierce v. Bryant*, 5 Allen, 91; *Richardson Chace*, 39 Barb. 283; *Van Ingen v. Whit-*

conformity, although it be accidental and entirely innocent on his part, or any material mistake by another, as by the printer who prints the advertisement, deprives him of benefit of the statute. He is then a partner at common law, and, as such, liable *in solido* for the whole debts of the firm. (r) (x)

If a special partner sells out his interest to the general partner for a sum exceeding his invested capital, it has been held that this was such a withdrawal of his capital as the statute prohibits, and that it made him liable. (s) But it seems that the special partner may make loans to the partnership. (ss)

If the special partner of one firm is the general partner of another firm, the second firm may claim as creditor of the first firm. (t)

man, 62 N. Y. 513; *Durant v. Abendroth*, 69 N. Y. 148, 152.

(r) *Hubbard v. Morgan*, U. S. D. C. for N. Y., May, 1839, cited in 3 Kent Com. 36; *Argall v. Smith*, 3 Denio, 435. See *Hogg v. Orgill*, 34 Penn. St. 344, as to payment in checks of third persons, by special partner, being equivalent to an *actual cash payment*, as required by the New York statute.

(s) *Beers v. Reynolds*, 12 Barb. 288; s. c. 1 Kern. 97.

(x) See *Waters v. Harris*, 17 N. Y. S. 370, 28 Abb. N. C. 89; *Jennings' Appeal* (Penn.), 16 Atl. 19, 2 L. R. A. 43 and note; *Tilge v. Brooks*, 124 Penn. St. 178, 16 Atl. 746, 2 L. R. A. 796; *Vanhorn v. Corcoran*, 127 Penn. St. 255, 18 Atl. 16, 4 L. R. A. 386; *Rehfuss v. Moore*, 134 Penn. St. 462, 19 Atl. 756, 7 L. R. A. 663; *Chick v. Robinson*, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833.

Where the use of a special partner's name is authorized by the Mass. St. 1887, c. 248, § 1, it is implied in § 4 that the special partner is not liable as a general partner. *Groves v. Wilson*, 168 Mass. 370, 47 N. E. 100. In Pennsylvania there is no implied relation of suretyship among general partners to a special partner, by which one of the former is required to make up to the latter a loss on his capital occasioned by the failure of another to pay his indebtedness to the firm. *Bunting v. Bunting*, 199 Penn. St. 27, 48 Atl. 681.

The decisions in different States upon the question whether, upon the renewal of a limited partnership, it becomes a general partnership if the capital is impaired, are not in harmony. See *Haddock v. Grinnell Manuf. Co.*, 109 Penn. St. 372, 382;

(ss) *Walkensham v. Perzell*, 4 Rob. 426.

(t) *Hayes v. Bement*, 3 Sandf. 394. See also *Hayes v. Heyer*, 35 N. Y. 826. The rights, duties, and liabilities of special partners are considered under various points of view, in *Singer v. Kelly*, 44 Penn. St. 145; *Dunning's Appeal*, 44 Penn. St. 150; *McKnight v. Ratcliff*, 44 Penn. St. 156; *Harris v. Murray*, 28 N. Y. 574.

Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712. In Massachusetts, the statutory amendment of 1887, c. 248, § 3, providing that no renewal shall be made unless the capital is "equal in amount or more than" the special partners' original contributions, is construed as meaning equal in value as a resource or asset of the partnership. *Durgin v. Colburn*, 176 Mass. 110, 57 N. E. 213.

In Michigan partnership associations are governed by the law of corporations, rather than by that of limited partnerships. *Rouse, Hazard & Co. v. Detroit Cycle Co.*, 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; *Staver & Abbott Manuf. Co. v. Blake*, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798.

As to voluntary associations as partnerships and the distribution of their property on dissolution, see *Garham v. Mutual Aid Society*, 161 Mass. 357, 37 N. E. 447; *Kane v. Shields*, 167 Mass. 392, 45 N. E. 758; *Edwards v. Warren Linoline Works*, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791; 3 Kent Com. (14th ed.), p. *27, n. 1; *supra*, p. *148, n. (y).

* CHAPTER XIII.

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NEW PARTIES BY NOVATION.

THE term "novation" has not been much used in English or American law, but may be found in some late English cases; and the thing itself, or this form of contract, may be found in many cases, both in England and in this country. The word is borrowed from the civil law, where it forms an important topic; and we may find a clear statement of its principles in Pothier's work on Contracts. (α)¹ It is defined thus: a transaction whereby a debtor is discharged from his liability to his original creditor, by contracting a new obligation in favor of a new creditor, by the order of his original creditor. Thus, A owes B one thousand dollars; B owes C the same sum, and at the request of C, orders A to pay that sum, when it shall fall due, to C. To this A consents, and B discharges A from all obligation to him. A thus contracts a new obligation to C, and his original obligation to B is at an end. By the civil law, any new contract entered into for the purpose and with the effect of dissolving an existing contract was regarded as a novation, and in the above case the civil law would recognize two sorts of contracts of novation; the contract by which A is discharged from his liability to B by contracting a new obligation to C, and the novation by which B would be discharged from his obligation to C by procuring A as a new debtor. But, in the common law, the rights and obligations of the parties in both cases are governed by the same rule. (χ)

(α) Part 3, ch. 2, art. 4.

¹ The various kinds of novation are considered and many cases collected in an article by Professor J. B. Ames, in 6 Harv. L. Rev. 184. — W.

(χ) See *Willard v. Wood*, 135 U. S. 309, 10 S. Ct. 831, 34 L. Ed. 210, affirming 4 Mackey, 538; *Runkle v. Burnham*, 153 U. S. 216, 14 S. Ct. 837, 38 L. Ed. 694; *Dexter v. Sayward*, 51 Fed. 729; *American Paper Bag Co. v. Van Nortwick*, 52 Fed. 752, 3 C. C. A. 274; *Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 Fed. 298, 12 C. C. A. 636; *London Electric Lighting Co. v. London Corp.*, [1900] 1 Ch. 602; *British Homes Ass. Corp. v.*

Paterson, [1902] 2 Ch. 404, 499; *Capital Traction Co. v. Offutt*, 17 App. D. C. 292, 53 L. R. A. 390 and note; *Elastic Tip Co. v. Arnold Schwinn & Co.*, 178 Mass. 101, 59 N. E. 813; *Williams v. Weinbaum*, 178 Mass. 238, 59 N. E. 620. A novation is invalid if made under a mutual mistake. Such a contract must be proved like other contracts, and is not presumed when the original parties are held to their contract, and that is

A leading English case is *Tatlock v. Harris*. (b) It will be seen, from the statement of the cases in the * note, that the principle deducible from them is, that if A owes B, and B owes C, and it is agreed by these three parties that A shall pay this debt to C, and A is by this agreement discharged from his debt to B, and B is also discharged from his debt to C, then there is an obligation created from A to C, and C may bring an action against A in his own name. (c)¹

(b) 3 T. R. 174, deciding that where a bill of exchange was drawn by the defendant and others on the defendant alone, in favor of a fictitious person (which was known to all parties concerned in drawing the bill), and the defendant received the value of it from the second indorser, a *bona fide* holder for valuable consideration might recover the amount of it in an action against the acceptor for money paid or money had and received; and *Butler, J.*, puts this case: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum against A." See also *Wilson v. Coupland*, 5 B. & Ald. 228; *Heaton v. Angier*, 7 N. H. 397; *Thompson v. Percival*, 5 B. & Ad. 925, 3 Nev. & M. 171. In such case the defendant's undertaking is not to pay the debt of a third person within the meaning of the Statute of Frauds. *Bird v. Gammon*, 3

Bing. N. C. 883; *Meert v. Moessard*, 1 Mo. & P. 8; *Arnold v. Lyman*, 17 Mass. 400; *French v. French*, 2 Man. & G. 644, 3 Scott, N. R. 125; *Blunt v. Boyd*, 3 Barb. 209.

(c) So if in such case the promise of A to pay C is conditional, as to pay whatever may hereafter be found due from A to B, and after such amount is ascertained but before it is paid, B becomes bankrupt, still C may sue A for the amount of A's debt to B. *Crowfoot v. Gurney*, 9 Bing. 372. See also *Hodgson v. Anderson*, 3 B. & C. 842. In order to constitute an assignment of a debt or a novation, so as to enable the transferee to bring an action in his own name in a court of law, the assent of the debtor to the agreed transfer is absolutely essential, and there must be a promise founded on sufficient consideration to pay it to the transferee. In equity there need be no promise by the debtor to the assignee in order to entitle him to

¹ Thus, where a mortgagor conveys the mortgaged premises, and his grantee agrees to assume and pay the mortgaged debt, and the mortgagee accepts him as his

more advantageous for the party claiming against the novation. *Haubert v. Mausshardt*, 89 Cal. 433, 26 Pac. 899; *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727. So the fact that a party thinks himself bound by an existing contract is evidence that he did not intend to make a new contract. See *In re Northumberland Ave. Hotel Co.*, 33 Ch. D. 16; *Howard v. Patent Ivory Manuf. Co.*, 38 Ch. D. 156; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. 196, and [1902] 1 Ch. 146.

In some jurisdictions, at least, an express agreement is necessary in order that a new note may discharge a former note by novation. *Savings Bank v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273.

It is competent for the Legislature, in authorizing the consolidation of corporations, to make the new corporation, although it is a new person as to acquiring new rights or making new contracts,

directly liable for the existing obligations of the old corporations. *Compton v. Railway Co.*, 45 Ohio St. 592, 618, 16 N. E. 110; *Day v. Worcester, N. & R. R. Co.*, 151 Mass. 302, 23 N. E. 824. In equity the new corporation is liable upon such obligations to the extent of the assets received. *Morrison v. American Snuff Co. (Miss.)*, 30 So. 723. Apart from statute, to render the new corporation directly liable at law, there must be a new contract made, amounting to a novation. *Ewing v. Composite Brake Shoe Co.*, 169 Mass. 72, 47 N. E. 241.

When a corporation succeeds directly to the business of a partnership, and assumes its obligations and duties, it is liable for goods ordered by the partnership and delivered to the corporation without a formal novation and a release of the partnership. *Mitrovich v. Fresno Fruit Packing Co.*, 123 Cal. 379, 382, 55 Pac. 1064.

This would certainly seem to be in contradiction or exception to the ancient rule that a personal contract cannot be assigned so as to give the assignee a right of action in his own name. But it is not so much an exception as a different thing. It is the case of a new contract formed and a former contract dissolved. * And the general principles in relation to *con-* * 219 *sideration* attach to the whole transaction. (d) (x) Thus, to give to the transaction its full legal efficacy, the original liabilities must be extinguished. For if the debt from A to B be not discharged by A's promise to pay it to C, then there is no consideration for this promise, and no action can be maintained upon it; (e)¹ but * if this liability be discharged, then * 220

sue in his own name. Lord *Eldon* in *Ex parte South*, 3 Swanst. 392; *Tibbits v. George*, 5 A. & E. 115, 116; *Robbins v. Bacon*, 3 Greenl. (2d ed.) 346 n.; *Blin v. Pierce*, 20 Vt. 25; *L'Estrange v. L'Estrange*, 1 E. L. & E. 153 n.; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 141; *Mandeville v. Welch*, 4 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15. See also *Schlosser's Appeal*, 58 Penn. St. 493.

(d) For example, in order that an assignment of a chose in action should be valid against the creditors of the assignor, it must be *bona fide* and upon adequate consideration. *Langley v. Berry*, 14 N. H. 82; *Giddings v. Coleman*, 12 N. H. 153. The assignment, however, need not, al-

though in writing, express to be for value received. *Johnson v. Thayer*, 17 Me. 401; *Legro v. Staples*, 16 Me. 252; *Adams v. Robinson*, 1 Pick. 461. It is sufficient if it be so in point of fact; and this must be proved *alivunde* than from the face of the paper. *Langley v. Berry*, *supra*. See *post*, Chapter on Assignment.

(e) *Cuxon v. Chadley*, 3 B. & C. 591. *Butterfield v. Hartshorn*, 7 N. H. 345, was an action of assumpsit for money had and received. The plaintiff held a claim against the estate of a person deceased. The executor of the estate sold a farm belonging thereto to the defendant, and left in the defendant's hands a portion of the purchase-money to pay the plaintiff and

debtor, a novation results, *Campbell v. Smith*, 71 N. Y. 26; *Calvo v. Davies*, 73 N. Y. 211; *Merriman v. Moore*, 90 Penn. St. 78; or where a new firm takes upon itself the liabilities of the old, and a creditor, with knowledge of that fact, agrees to accept the new firm as debtor, and releases the old firm, *Shaw v. McGregory*, 105 Mass. 96; *Silverman v. Chase*, 90 Ill. 37. Such a release may be inferred from the acceptance of interest, the receiving of new notes, or the proving a claim in bankruptcy, *Bilborough v. Holmes*, 5 Ch. D. 255; *Wright v. Brosseau*, 73 Ill. 381; but the mere acceptance of the note of an individual partner after dissolution is not enough without an express agreement, *Leabo v. Goode*, 67 Mo. 126; otherwise, of a bond given for a simple contract debt, *Bennett v. Cadwell*, 70 Penn. St. 253. See *Hountz v. Holthouse*, 85 Penn. St. 235, as to the assumption of firm debts by an incoming partner. — A compromise between the creditor and debtor, by which the amount, the terms and mode of payment of the debt, the rate of interest and nature of the securities are changed, is not a novation, unless the intention of the parties so to do is particularly expressed. *Baker v. Frellsen*, 32 La. An. 822. — The debtor also must assent to the new arrangement to give it validity; as where an ice company, with which a customer from dissatisfaction had ceased to deal, bought out the company with which the customer had subsequently contracted for ice, and continued to deliver ice to him without notifying him of the purchase until after the consumption of the ice, it was *held*, that no recovery could be had for the ice so delivered. *Boston Ice Co. v. Potter*, 123 Mass. 28. — K.

¹ There must be an absolute extinguishment of the original debt. *Caswell v. Fellows*,

(x) See *Humiston v. Wood*, 124 U. S. 12, 8 S. Ct. 347, 31 L. Ed. 354; *Danzig v. Gumersell*, 27 Fed. 185; *North Alabama Development Co. v. Orman*, 55 Fed.

18, 5 C. C. A. 22, affirming 53 Fed. 469; *Vance v. Royal Clay Manuf. Co.*, 82 Fed. 251.

it is a sufficient consideration; and if at the same time C gives up his claim on B as the ground on which B orders A to pay C, then the consideration for which A promises to pay C may be considered as moving from C. An order addressed by a creditor to his debtor, directing him to pay the debt to some one to whom the creditor is indebted, operates as a substitution of the new debt for the old one, when it is presented to the debtor, and assented to by him, and not before; and also provided this third party gives up his original claim against the first creditor, and not otherwise. (*f*) The mutual assent of all the three parties seems to be necessary to make it an effectual novation, or substitution; for so long as the debtor has made no promise or come under no obligation to the party in whose favor the order is given, it is a mere mandate which the creditor may revoke at his pleasure. (*g*)¹ And if the person in whose favor the order

* 221 is drawn has in consideration *thereof discharged the debt due to him, and so may hold this order as against the creditor giving it, still it is not a novation. He must sue in the name of the party drawing the order, unless the person on whom it is made has agreed with him in whose favor it is made to comply with the order. (*h*) And if the action is brought in the name of

other creditors their demands against the estate, which the defendant promised the executor to pay. This action was brought to recover the amount of the plaintiff's demand. *Held*, that he could not recover. *Upham, J.*: "To entitle the plaintiff to recover, there must be an extinguishment of the original debt; and it is questionable whether, in cases of this kind, anything can operate as an extinguishment of the original debt, but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim." See also *Warren v. Batchelder*, 15 N. H. 129; *Wharton v. Walker*, 4 B. & C. 163; *French v. French*, 2 Man. & G. 644; 3 *Scott, N. R.* 125; *Thomas v. Shillibeer*, 1 M. & W. 124; *Moore v.*

Hill, 2 Peake, 10; *Maxwell v. Jameson*, 2 B. & Ald. 55; *Short v. City of New Orleans*, 4 La. An. 281; *McKinney v. Alvis*, 14 Ill. 34.

(*f*) See *Ford v. Adams*, 2 Barb. 349; *Gails v. Sch. Osceola*, 14 La. An. 54.

(*g*) *Owen v. Bowen*, 4 C. & P. 93. In this case A gave a sum of money into the hands of B, to pay to C, but B had not paid it over. It was *held*, that if C had not consented to receive this sum of B, A might countermand the authority and recover it back from B. See also *Gibson v. Minet*, 1 C. & P. 247.

(*h*) The agreement of *all* parties seems essential to complete this contract, and unless there is a promise by the debtor to pay the new substituted creditor the

110 Mass. 52. As to extension of the time of payment being a sufficient consideration, see *Windham v. Doles*, 59 Ga. 265; *Hixon v. Hetherington*, 57 Ala. 165. — K.

¹ All three parties must concur in the same agreement, *Murphy v. Hanrahan*, 50 Wis. 485, 489; which the original and substituted debtor may rescind at any time before the latter has notice that the creditor accepts him, *Trimble v. Strother*, 25 Ohio St. 378; *Durham v. Bischoff*, 47 Ind. 211. The acceptance of the new for the original contract discharges the old debt, whether the new contract is ever performed or not. *Morris v. Harvey*, 75 Va. 726. By accepting a third person in substitution for the original debtor the creditor assumes the risk of such person's insolvency. *Cadens v. Teasdale*, 53 Vt. 469. See also *Andrews v. Campbell*, 36 Ohio St. 361; *Flanagin v. Hambleton*, 54 Md. 222; *Drake v. Hill*, 53 Ia. 37; *Shaffer v. McKanna*, 24 Kau. 22. — K.

the original creditor, it is subject to the equitable defences which may exist between him and the debtor. But after such assent or agreement is given, then the order is irrevocable, and neither party can recede from the agreement. (i) The old debt is entirely discharged.

It will be seen, therefore, that in such case the debtor does not undertake to pay the debt of another, but contracts an entirely new debt of his own, the consideration of which is the absolute discharge of the old debt. Consequently this new promise is not within the provisions of the Statute of Frauds relating to a promise to pay the debt of another. (j)

There is one point upon which some uncertainty exists as to the principles of the civil law concerning novation, but upon which the rule of the common law is clear. If the order be for less than the whole debt due from him on whom it is made to the maker, it seems not to be entirely agreed upon by civilians whether such an order, assented to and complied with, would * or would not discharge the whole of the original * 222 debt. But there can be no doubt that by the common law it would be a discharge only *pro tanto*, unless there were a distinct agreement and a valid promise that it should be taken for the whole. (k)

amount for which he was originally liable to his own creditor, there is no privity of contract, and an action at law will not lie by the transferee in his own name. *Williams v. Everett*, 14 East, 582; *Mandeville v. Welch*, 5 Wheat. 277; *Trustees of Howard College v. Pace*, 15 Ga. 486; *Gibson v. Cooke*, 20 Pick. 18. See *Wharton v. Walker*, 4 B. & C. 163; *Scott v. Porcher*, 3 Meriv. 652; *Wedlake v. Hurley*, 1 Cr. & J. 83; *Baron v. Husband*, 4 B. & Ad. 614. But see *Hall v. Marston*, 17 Mass. 575. — And the creditor must also consent to take the new debtor as his sole security, and to extinguish his claim against his former debtor. *Butterfield v. Hartshorn*, 7 N. H. 345.

(i) See *Ainslie v. Boynton*, 2 Barb. 258; *Hodges v. Eastman*, 12 Vt. 358; *Surtees v. Hubbard*, 4 Esp. 203. In this case *Lord Ellenborough* observed: "Choses in action generally are not assignable. Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent; he may have an account against the assignor, and wish to have his set-off; but if there is anything

like an assent on the part of the holder of the money, in that case I think that this [assumpsit for money had and received], which is an equitable action, is maintainable." *Beecker v. Beecker*, 7 Johns. 103; *Holly v. Rathbone*, 8 id. 149; *Norris v. Hall*, 18 Me. 332; *Clement v. Clement*, 8 N. H. 472.

(j) *Bird v. Gammon*, 3 Bing. N. C. 883; *Blunt v. Boyd*, 3 Barb. 209. And see *ante*, note (b), p. * 217.

(k) *Heathcote v. Crookshanks*, 2 T. R. 27; *Fitch v. Sutton*, 5 East, 230; *Pinnel's case*, 5 Rep. 117; *Cumber v. Wane*, 1 Stra. 426. See also *Sibree v. Tripp*, 15 M. & W. 23, where the case of *Cumber v. Wane* was much discussed, and somewhat qualified. — Neither will an order or draft for part only of a debt due from the drawee to the drawer, without the consent of the drawee, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignee for the whole or any part of the sum due from the debtor. *Gibson v. Cooke*, 20 Pick. 15; *Mandeville v. Welch*, 5 Wheat. 277; *Robbins v. Bacon*, 3 Greenl. (2d ed.) 346 n.

NEW PARTIES BY ASSIGNMENT.

SECT. I. — *Of Assignments of Choses in Action.*

ANY right under a contract, either express or implied, which has not been reduced to *possession*, is a chose in *action*; (*a*) and is so called because it can be enforced against an adverse party only by an action at law. At common law, the transfer of such chose in action was entirely forbidden. The reason was said to be this. A chose in action, by its very nature and definition, is a right which cannot be enforced against a reluctant party, except by an action, or suit at law. And if this be transferred, the only thing which passes is a right to go to law; and so much did the ancient law abhor litigation, that such transfers were wholly * 224 prohibited. (*b*) But we apprehend that the *stronger and

(*a*) 2 Bl. Com. 396, 397; 1 Dane, Abr. 92. A *chose in action* is not limited, however, to a right arising under contract. "It includes all rights to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract, express or implied. In both cases, the debt or damages of the owner is a 'thing in action.'" Per *Bronson*, C. J., *Gillet v. Fairchild*, 4 Denio, 80. It was accordingly held in that case that a receiver of an insolvent corporation, who was empowered by law to sue for and recover "all the estate, debts, and *things in action*" belonging to the corporation, might maintain *trover* for the conversion of the personal property of the corporation, before the plaintiff was appointed receiver. See also *Hall v. Robinson*, 2 Comst. 293.

(*b*) "It is to be observed, that by the ancient maxim of the common law, a right of entry or a chose in action cannot be granted or transferred to a stranger, and thereby is avoided great oppression, injury, and injustice." Co. Lit. 266 a. So again in *Lampet's case*, 10 Rep. 48,

Lord Coke says: "The great wisdom and policy of the sages and founders of our law have provided, that no possibility, right, title, nor *thing in action*, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." At what time this doctrine, which, it is said, had relation originally only to *landed estates*, was first adjudged to be equally applicable to the assignment of a mere *personal chattel not in possession*, it is not easy to decide; it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text-writers, and the reports contain numberless observations and cases on the subject. *Chitty & Hulme on Bills*, p. 6. — But it is to be observed that the king was always an exception to this rule, for he might always either grant or receive a possibility or chose in action by assignment. *Breverton's case*, *Dyer*, 30 b; Co. Lit. 232 b, n. (1). And it seems that in this country the same exception exists in respect to the government of the United States. *United States v. Buford*, 3 Pet. 30.

better reason was, that no debtor shall have a new creditor substituted for the original one, without his consent; for he may have substantial reasons for choosing whom he should owe. (x)

Courts of equity have, for a long time, disregarded this rule; (c) and, as a general rule, they permit the assignee of a chose in action to sustain an action in his own name, if he can go into equity at all; but when such a case comes before them, they apply such equitable rules as would prevent the debtor from being oppressed or injured. (d) Such an assignment is regarded * in * 225 equity as a declaration of trust, and an authorization to the

(c) *Anon. Freem. Ch. (Miss.) 145*; *Wright v. Wright*, 1 Ves. Sen. 409; *Warnstrey v. Tanfield*, 1 Chanc. 29; *Row v. Dawson*, 1 Ves. Sen. 331; *Prosser v. Edmonds*, 1 Y. & Coll. 481; *Hinkle v. Wanzer*, 17 How. 353; *Bigelow v. Willson*, 1 Pick. 485, 493; *Dix v. Cobb*, 4 Mass. 508, 511; *Haskell v. Hilton*, 30 Me. 419; *Miller v. Whittier*, 32 id. 203; *Moor v. Veazie*, id. 342; *Ex parte Foster*, 2 Story, 133.

(d) The mere fact of one's being the assignee of a chose in action will not entitle him to go into a court of equity. His remedy is generally complete at law by a suit in the name of the assignor, and to that he will be left. It is only when the legal remedy is in some manner obstructed or rendered insufficient that a court of equity will interpose. *Motteux v. London Ass. Co.*, 1 Atk. 545, 547; *Dhegetoft v. London Ass. Co.*, *Mosely*, 83; *Hammond v. Messenger*, 9 Sim. 327, 332. See also *Keys v. Williams*, 3 Y. & Col. 462, 466; *Rose v. Clarke*, 1 Y. & Col. Ch. 534, 548; *James v. Newton*, 142 Mass. 366. The doctrine has been distinctly held also in

New York: *Carter v. United Ins. Co.*, 1 Johns. Ch. 463; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596. And in Maryland: *Grover v. Christie*, 2 Har. & J. 67; *Adair v. Winchester*, 7 G. & J. 114. And in Tennessee: *Smiley v. Bell*, Mart. & Y. 378. And in Virginia: *Moseley v. Boush*, 4 Rand. 392. There is no conflict between this case and *Winn v. Bowles*, 6 Munf. 23, which simply decided that the statute of Virginia, authorizing the assignee of a chose in action to sue in his own name, did not take away the former Chancery jurisdiction. *Townsend v. Carpenter*, 11 Ohio, 21. That case does not indeed decide that the mere fact of one's being an assignee of a chose in action will entitle him to enforce his claim in equity. In California, by statute, "the assignee of a non-negotiable note has a right of action not only against his immediate assignor, but also against previous assignors, in short, against every person from whom the note has passed by assignment. *Hamilton v. McDonald*, 18 Cal. 128. See also *Kendall v. United States*, 7 Wallace, 113; *Moore v. Lowrey*, 25 Iowa, 336.

(x) This is especially true when there is a personal element of skill or confidence in the original contract, or when the assignment will make the contract more burdensome to the other party. See *Tolhurst v. Associated Portland Cement Manufacturers*, [1901] 2 K. B. 811; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *International Fibre Syndicate v. Dawson*, 84 L. T. 803; *Horst v. Roehm*, 84 Fed. 565. Contracts of a personal nature, such as publishing agreements, or those requiring skill in manufacturing, are not assignable. *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21; *Dr. Jaeger's Sanitary Woollen Co. v. Walker*, 77 L. T. 180; *Cochrane v. Exchange Telegraph Co.*, 65 L. J. Ch. 344; *Bancroft v.*

Scribner, 72 Fed. 988, 21 C. C. A. 352; *Edison v. Babka*, 111 Mich. 235, 69 N. W. 449. In these agreements the contract, or nature of the work called for, must inevitably suggest that a personal confidence or trust is reposed. *Nixon v. Zuricalday*, 144 N. Y. 300, 39 N. E. 340; *Horst v. Roehm*, 84 Fed. 565.

When the contractor, under bond for performance of such a contract as a building contract, renounces all interest in the contract, and refuses to go on with the work, he breaks the contract, and the contractee is under no obligation to accept an offer to perform by one to whom, without the contractee's consent, he has assigned the contract. *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437.

assignee to reduce the interest to possession. (e) (x) But if the assignee be a mere nominal holder, without interest in the thing assigned, then the suit should be brought, even in equity, in the name of the party in interest. (f)

The fraudulent intent of the assignor generally defeats the assignment, although the assignee is innocent. (ff) ¹

There are assignments of choses in action which will not be sustained either in equity or at law, as being against public policy.²

As by an officer in the army or navy, of his pay (g) (y) or

* 226 * his commission, (h) or the salaries of judges, (i) (z) or of a

(e) Co. Lit. 232 b, n. (1); Morrison v. Deaderick, 10 Humph. 342.

(f) Field v. Maghee, 5 Paige, 539; Rogers v. Traders' Insurance Co., 6 Paige, 583.

(ff) Flanigan v. Lampman, 12 Mich. 58.

(g) Stone v. Lidderdale, 2 Anst. 533; McCarthy v. Goold, 1 Ball & B. 387; Davis v. Duke of Marlborough, 1 Swanst.

74; Flarty v. Odium, 3 T. R. 681; Grenfell v. Dean and Canons of Windsor, 2 Beav. 544; Jenkins v. Hooker, 19 Barb. 435.

(h) Collyer v. Fallon, Turn. & R. 459.

(i) Lord Kenyon, Flarty v. Odium, 3 T. R. 681. But it seems a city officer may lawfully make an assignment of his salary yet to grow due, so as to prevent its attachment upon a trustee process. Brackett

¹ That the assignee of a non-negotiable certificate, indorsed in blank by the owner, may write an absolute assignment over the indorsement, and by a sale of it for value, cut off the rights of the owner, see Cowdrey v. Vandenburg, 101 U. S. 572. — K.

² The general principle that a public officer cannot assign the future salary of his office as against public policy, is laid down in Bliss v. Lawrence, 58 N. Y. 442, which was the case of a clerk in the United States Treasury Department in the city of New York. — The assignment of a life insurance policy to a person having no insurable interest in the life insured, was held invalid in Warnock v. Davis, 104 U. S. 775. But see Vol. II. p. * 479 n. — K.

(x) Williamson v. Yager, 91 Ky. 282, 15 S. W. 660, 34 L. R. A. 184, 189, 208 n. An assignment of a fractional part of a claim is good in equity, when the person who is to pay raises no objection; and, under an agreement to transfer property when obtained, the right in equity attaches to the property, as between the parties, before possession is taken, just as at law a title to goods bargained and sold passes to the purchaser, as between him and the vendor, without actual delivery. James v. Newton, 142 Mass. 366, 8 N. E. 122; Folsom v. Cornell, 150 Mass. 115, 22 N. E. 705; Kingsbury v. Burrill, 151 Mass. 199, 203, 24 N. E. 36; Richardson v. White, 167 Mass. 58, 44 N. E. 1072; Cook v. Bidwell, 8 Fed. 452.

A provision of a contract that it shall not be assigned without the written consent of the other party may be waived, and such waiver may be proved by conduct. Staples v. Somerville, 176 Mass. 237, 57 N. E. 380.

(y) Sect. 3477 of the U. S. Rev. Stats. declaring void transfers and assignments

of claims against the United States, is for the protection of the government and not of the claimant, and is said to be analogous to the rule against maintenance and champerty; it applies only to voluntary assignments, and not to transfers of title by operation of law; as to heirs or assignees in bankruptcy. Hager v. Swayne, 149 U. S. 242, 247, 13 S. Ct. 841, 37 L. Ed. 719; Price v. Forrest, 173 U. S. 410, 19 S. Ct. 434, 43 L. Ed. 740; Thayer v. Pressey, 175 Mass. 225, 233, 235, 56 N. E. 5; Jernegan v. Osborn, 155 Mass. 207, 29 N. E. 520.

Sect. 3737 of those statutes annuls transfers of government contracts so far as the United States are concerned; but not every contract in contravention of the terms of a statute is absolutely void, and this provision does not enable a contractor to treat his own agreement as avoided. Burck v. Taylor, 152 U. S. 634, 14 S. Ct. 696, 38 L. Ed. 573; Dulaney v. Scudder, 94 Fed. 6; 18 Att. Gen. Op. 83; 19 id. 186.

(z) So of the assignment, by any public officer, of the future salary or fees of his

mere right to file a bill in equity for a fraud, (*j*) or a right of action for an injury to the person, an action for which dies with the person. (*k*) But a judgment in such action may be assigned, and claims for torts to property. (*kk*) (*x*) But after the conversion of a chattel, the owner may sell it so as to give the purchaser a right to claim it of the wrong-doer. (*l*)

A mere right of entry for condition broken has been held not assignable. (*ll*) (*y*)

v. Blake, 7 Met. 335. And see *State Bank v. Hastings*, 15 Wis. 75.

(*j*) *Prosser v. Edmonds*, 1 Y. & Col. 481; *Morrison v. Deaderick*, 10 Humph. 342.

(*k*) *Gardner v. Adams*, 12 Wend. 297; *Thurman v. Wells*, 18 Barb. 500; *Cook v. Newman*, 8 How. Pr. 523. In general mere personal torts, which do not survive, are not capable of passing by assignment, while vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment. *Story*, J., *Comegys v. Vasse*, 1 Pet. 193, 213; *Lazard v. Wheeler*, 22 Cal. 173.

(*kk*) *Jordan v. Gillen*, 44 N. H. 424.

office. *Lawrence v. Bliss*, 58 N. Y. 442; *August v. Crane*, 59 N. Y. S. 583, 28 Misc. Rep. 549; *State v. Barnes*, 10 So. Dak. 306, 73 N. W. 80.

(*x*) In Michigan the right to sue for the conversion of property is held to be assignable, *Boynton v. Roe*, 114 Mich. 401, 72 N. W. 257; as is a cause of action for a trespass previously committed in cutting timber from land. *Gates v. Comstock*, 107 Mich. 546, 65 N. W. 544. In the latter case, the declaration must allege the assignment, which is not necessary in trover or replevin. *Ibid.*; *Warren v. Dwyer*, 91 Mich. 414, 51 N. W. 1062.

As to the assignment of judgments, see *Childstrom v. Eppinger* (127 Cal. 326, 59 Pac. 696), 78 Am. St. Rep. 46, 47 n.; *Lewis v. Third St. Ry. Co.*, 26 Wash. 28, 700, 66 Pac. 150.

(*y*) So the right of entry for breach of a condition subsequent in a deed is not assignable. *Locke v. Hale*, 165 Mass. 20, 42 N. E. 331.

An invention is assignable before a patent is obtained therefor. *Burton v. Burton Stock Car Co.*, 171 Mass. 437, 50 N. E. 1029. The name of a hotel or theatre is assignable; but a trademark which is the name of the proprietor of a business, though it can be sold with the business, cannot be sold apart therefrom. *Symonds v. Jones*, 82 Me. 302, 19 Atl. 820, 17 Am.

(*l*) *Hall v. Robinson*, 2 Comst. 293, overruling *Gardner v. Adams*, so far as the latter conflicts with what is stated in the text. This case is no exception to the rule that a right of action for a tort cannot be assigned. It merely decides that the owner of a chattel may sell it and convey a good title to it, notwithstanding it has been wrongfully converted, and then the vendee may demand it in his own right; and, upon a refusal to deliver it, bring his action, not for the conversion done to the vendor, but for the conversion done to himself by such refusal. And see *Andrews v. Bond*, 16 Barb. 633; *Franklin v. Neate*, 13 M. & W. 481.

(*ll*) *Warner v. Beckett*, 3 Conn. 468.

St. Rep. 485, 496 n., 8 L. R. A. 570; *Messer v. The Fadettes*, 168 Mass. 140, 46 N. E. 407. A contract, performance of which is secured by a bond, cannot be assigned without the obligee's consent, though it may be properly performed by agents. *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Williams v. Weinbaum*, 178 Mass. 238, 59 N. E. 626.

An assignment may be absolute or partial. *McDaniel v. Maxwell*, 21 Oregon, 202, 27 Pac. 952, 28 Am. St. Rep. 740, 744 n.; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *White v. Dame*, 176 Mass. 542, 57 N. E. 995; *Cotting v. Foster*, 178 Mass. 564, 60 N. E. 386; *Commercial Nat. Bank v. Portland*, 37 Oregon, 33, 38, 54 Pac. 814, 60 id. 563.

A mechanic's lien is assignable, and passes with an assignment of the debt secured. *Wiley v. Connelly*, 179 Mass. 360, 60 N. E. 784; *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528, 530 n.

A contract of sale which contains no provision for an assignment and requires personal acts by the vendee before title passes, is not assignable. *Wheeler v. Walton & W. Co.*, 64 Fed. 664. A defeasible assignment of a chose in action, which the assignee may collect in case of breach, need not be foreclosed. *McKie v. Gregory*,

Courts of law also permit and protect assignments of choses in action, to a certain extent. (*m*)¹ If the debtor assent to the assignment, and promise to pay the assignee, an action may be brought by the assignee in his own name, (*n*) but otherwise he * 227 * must bring it in the name of the assignor; (*o*) (*x*) and this rule applies to an assignment of a negotiable bill or note, unless it be indorsed by the assignor. (*p*) And the action brought in the name of the assignor for the benefit of the assignee is open to all equitable defences; but only to those which are equitable. That is, the debtor may make all defences which he might have made if the suit were for the benefit of the assignor as well as in his name, provided these defences rest upon honest transactions which took place between the debtor and the assignor before the

(*m*) *Buller, J., Master v. Miller*, 4 T. R. 320, 340. See *Winch v. Keeley*, 1 T. R. 619; *Dix v. Cobb*, 4 Mass. 508; *Welch v. Mandeville*, 1 Wheat. 233; *Legh v. Legh*, 1 B. & P. 447; *Eastman v. Wright*, 6 Pick. 316, 322; *Owings v. Low*, 5 G. & J. 134, 145; *Hickey v. Burt*, 7 Taunt. 48; *Graham v. Gracie*, 13 Q. B. 548.

(*n*) *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 id. 281; *Barrett v. Union M. F. Ins. Co.*, 7 Cush. 175; *Currier v. Hodgdon*, 3 N. H. 82; *Morse v. Bellows*, 7 id. 549, 565; *Moar v. Wright*, 1 Vt. 57; *Bucklin v. Ward*, 7 id. 195; *Hodges v. Eastman*, 12 id. 358; *Stiles v. Farrar*, 18 id. 444; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 id. 484; *Barger v. Collins*, 7 Harr. & J. 213, 219; *Clarke v.*

Thompson, 2 R. I. 146. Such a transaction seems to fall within the law of novation; and the question would be as to the consideration on which the promise of the original debtor to the assignee is founded. See *Ford v. Adams*, 2 Barb. 349; *Tibbits v. George*, 5 A. & E. 115.

(*o*) *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.), 88; *Usher v. De Wolfe*, 13 Mass. 290; *Coolidge v. Ruggles*, 15 id. 387; *Skinner v. Somes*, 14 id. 107; *Palmer v. Merrill*, 6 Cush. 282. See also *supra*, note (*m*). [Unless by statute the assignee or real party in interest is allowed to sue in his own name.]

(*p*) *Freeman v. Perry*, 22 Conn. 617; See also *Hedges v. Sealy*, 9 Barb. 214.

¹ A voluntary assignment of a chose in action not affecting creditors made in good faith, is good as against a subsequent assignee for value. *Putnam v. Story*, 132 Mass. 205. — K.

175 Mass. 505, 56 N. E. 720. The equitable assignee of a mortgage cannot sue in his own name for the conversion of the mortgaged property. *Baker v. Seavey*, 163 Mass. 522, 40 N. E. 863. The same rules apply to assignments of notes secured by vendor's lien as to those secured by mortgage. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 29 S. W. 903, 27 L. R. A. 663.

Wages to be earned under a subsisting employment may be assigned, but not the possibility of future wages under an employment not continuous. *O'Keefe v. Allen*, 20 R. I. 414, 39 Atl. 752; *Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105. The right to enforce an agreement not to engage in a certain business may pass by assignment. *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157.

The right to sue for a fraud is not assignable when not connected with anything which has a present legal value or existence. *Archer v. Freeman*, 124 Cal. 528, 57 Pac. 474.

(*r*) The tendency is towards greater liberality in this respect. *Howard v. Lombard*, 175 Mass. 570, 579, 56 N. E. 888. An ordinary appointment as receiver, made in another jurisdiction, enables the appointee to sue in his own name only when he has a right of property as assignee. *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *Ewing v. King*, 169 Mass. 97, 47 N. E. 597. See *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 185, 210 n. The Massachusetts statute of 1897, c. 402, enables the assignee of an ordinary chose in action to sue in his own name.

assignment, or after the assignment and before the debtor had notice or knowledge of it. (*q*) The same rule holds as to the equities existing between an assignor and his assignee in respect to a chose in action held for value and without notice by a subsequent assignee. The latter takes the exact position of his vendor. (*r*) The assignee of a non-negotiable obligation can take no rights which his assignor did not possess, and, generally, make no defences he could not make. (*rr*)¹ The assignment of a note to which a lien is attached by way of security, carries with it, in general, the lien. (*rs*)²

The death of the assignor will not defeat the assignment, but the assignee may bring the action in the name of the executor or administrator of the deceased. (*s*) If the assignment be in good faith and for valuable consideration, although the action be brought in the name of the assignor, neither his release nor his bankruptcy will defeat it. (*t*) A debt due for goods sold and delivered, and resting for evidence on a book account, may * be so as- * 228 signed, (*u*) or an unliquidated balance of accounts, (*v*) or a contingent debt, (*w*)³ or a judgment, (*x*) or a bond; but an action on a bond must be in the name of the obligee, although it be made payable expressly to "assigns." (*y*) And it has been held that a

(*q*) *Mangles v. Dixon*, 18 E. L. & E. 82; *Bartlett v. Pearson*, 29 Me. 9, 15; *Guerry v. Perryman*, 6 Ga. 119; *Wood v. Perry*, 1 Barb. 114, 131; *Commercial Bank v. Colt*, 15 id. 506; *Sanborn v. Little*, 3 N. H. 539; *Norton v. Rose*, 2 Wash. (Va.) 233; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Hackett v. Martin*, 8 Greenl. 77; *Greene v. Darling*, 5 Mason, 201, 214; *Comstock v. Farnum*, 2 Mass. 96; *Wood v. Partridge*, 11 id. 488; *McJilton v. Love*, 13 Ill. 486; *Thompson v. Emery*, 7 Foster (N. H.), 269; *Faull v. Tinsman*, 36 Penn. St. 108. See *Patterson v. Atherton*, 3 McLean, 147, in which a different doctrine seems to be held, but on very insufficient grounds.

(*r*) *Bush v. Lathrop*, 22 N. Y. (8 Smith) 535.

(*rr*) *Gray v. Thomas*, 18 La. An. 412.

(*rs*) *Forwood v. Dehoney*, 5 Bush, 174;

Guy v. Butler, 6 Bush, 508; *Perry v. Roberts*, 30 Ind. 244.

(*s*) *Dawes v. Boylston*, 9 Mass. 337, 346; *Cutts v. Perkins*, 12 id. 206, 210.

(*t*) *Dix v. Cobb*, 4 Mass. 508, 511; *Brown v. Maine Bank*, 11 id. 153; *Webb v. Steele*, 13 N. H. 230, 236; *Duncklee v. Greenfield Steam Mill Co.*, 3 Foster (N. H.), 245; *Anderson v. Miller*, 7 Sm. & M. 586; *Parker v. Kelley*, 10 id. 184; *Winch v. Keely*, 1 T. R. 619; *Blin v. Pierce*, 20 Vt. 25; *Blake v. Buchanan*, 22 Vt. 548; *Parsons v. Woodward*, 2 N. J. 196; *Jewett v. Dockray*, 34 Me. 45.

(*u*) *Dix v. Cobb*, 4 Mass. 508.

(*v*) *Crocker v. Whitney*, 10 Mass. 316.

(*w*) *Cutts v. Perkins*, 12 Mass. 206.

(*x*) *Brown v. Maine Bank*, 11 Mass. 153; *Dunn v. Snell*, 15 id. 481.

(*y*) *Skinner v. Somes*, 14 Mass. 107.

¹ For a learned discussion of the rights of assignees of non-negotiable choses in action, see the opinion of Dwight, C., in *Union College Trustees v. Wheeler*, 61 N. Y. 88. — K.

² So an assignment by a stockholder of his shares of stock carries his proportionate share of the assets, including all undeclared dividends. *Boardman v. Lake Shore, &c. R. Co.*, 84 N. Y. 157. — K.

³ An assignment of money to become due is valid, and if the person from whom the money is to become due, after notice of the assignment, advances such money to the assignor, the assignee may recover it of him. *Brice v. Bannister*, 3 Q. B. D. 569. See also *Philadelphia v. Lockhardt*, 73 Penn. St. 211. — K.

grant of a franchise to a town, as the right of fishery, may be the subject of a legal assignment or release, and the assignee or releasee may maintain an action respecting it in his own name. (z) But a servant bound by indenture cannot be transferred or assigned by the master to another, because the master has only a personal trust. (a) ¹ The right of a mortgagor to redeem his equity of redemption after the same has been taken and sold on execution, is assignable both at law and in equity. (b) (x) The respective interests of a crew of a privateer in a prize cannot be assigned, because, by the statute of the United States, they have no right in or control over the property until it has been libelled, condemned, and sold by the marshal, and the proceeds, after all legal deductions, paid over to the prize agents. (c) ²

(z) *Watertown v. White*, 13 Mass. 477.

(a) *Hall v. Gardner*, 1 Mass. 172; *Davis v. Coburn*, 8 id. 299; *Clement v. Clement*, 8 N. H. 472; *Graham v. Kinder*, 11 B. Mon. 60. So the powers and duties of the testamentary guardian of an infant

are a personal trust, which cannot be assigned. *Balch v. Smith*, 12 N. H. 437.

(b) *Bigelow v. Willson*, 4 Pick. 485.

(c) *Usher v. De Wolfe*, 13 Mass. 290; *Alexander v. Wellington*, 2 Russ. & M. 35.

¹ A contract to keep wagons let to a railway company in repair is not an agreement for personal performance, such that it cannot be assigned and the repair of the wagons by the assignee be a sufficient performance of the contract, *British Wagon Co. v. Lea*, 5 Q. B. D. 149; and equally so of a contract for street-cleaning, *Devlin v. Mayor, &c. of New York*, 63 N. Y. 8. Compare *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379; *Delaware County Com's v. Diebold, &c. Co.*, 133 U. S. 473. — W.

² But a right in a sum awarded to the owner of property by his own government by way of compensation for its destruction by the act of a foreign government, either

(x) A statute provision that when land is conveyed subject to a mortgage, and the conveyance provides that the grantee shall assume the mortgage, its holder may sue the grantee without an assignment, is not unconstitutional as imposing, in favor of a stranger, a new liability on a party to a contract. *Dunning v. Leavitt*, 85 N. Y. 30; *Colchester Sav. Bank v. Brown* (Conn.), 52 Atl. 316; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 39; *Hare v. Murphy*, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; *Marble Savings Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 198; *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411; *Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629.

The general rule is that privity of a contract is necessary for the maintenance of an action at law, and that, if this privity is lacking, the proceeding must be in equity. *Keller v. Ashford*, 133 U. S. 610,

10 S. Ct. 494, 33 L. Ed. 667; *Johns v. Willson*, 180 U. S. 440, 21 S. Ct. 445, 45 L. Ed. 616; *Everett v. Independent School District*, 109 Fed. 697; *Fairfield v. Rural Independent School Districts*, 111 Fed. 108. See *Jager v. Vollinger*, 174 Mass. 521, 55 N. E. 458.

The test whether a stranger to the contract can sue thereon appears to be whether he can be sued upon the contract. *Drimmie v. Davies*, [1899] 1 I. R. 176, 182. As to contracts for the benefit of a third person, see Professor Williston's article in 15 *Harvard L. Rev.* 767; 51 *L. R. A.* 653 n. A third person, who, by such conduct as the payment of money, has assented to a written agreement signed by others, but not by himself, cannot, in an action arising out of that contract, introduce verbal evidence of a subsequent variance, in order to proceed against the parties as on a new and independent contract, or to recover back the money so paid as money had and received, without resorting to the written agreement. *Day v. Canning*, 5 L. J. (O. S.) K. B. 231.

SECTION II.

OF THE MANNER OF ASSIGNMENT.

It was once held that the assignment of an instrument must be of as high a nature as the instrument assigned. (*d*) But this rule has been very much relaxed, if not overthrown; and indeed it has been determined that the equitable interest in a chose in action may be assigned for a valuable consideration * by a mere * 229 delivery of the evidence of the contract; and that it is not necessary that the assignment should be in writing. (*e*)¹ So the equitable interest in a judgment may be assigned by a delivery of the execution. (*f*) But a mere agreement to assign without any delivery, actual or symbolical, of the writing evidencing the debt; or an indorsement upon the instrument directing the debtor to pay a portion of the amount due, to a third person, such indorsement being notified to the debtor, but the writing remaining in the hands of the creditor, does not constitute a sufficient assignment. (*g*) (*x*)

The assignment of a debt may now be by parol, and may be inferred from the conduct and acts of the party. (*gg*)

(*d*) *Perkins v. Parker*, 1 Mass. 117; *Wood v. Partridge*, 11 id. 488.

(*e*) "There are cases in the old books which show that debts and even deeds may be assigned by parol; and we are satisfied that there is no sensible ground upon which a writing shall be held necessary to prove an assignment of a contract, which assignment has been executed by delivery, any more than in the assignment of a personal chattel." Per *Parker*, C. J., *Jones v. Witter*, 13 Mass. 304. See also *Dunn v. Snell*, 15 Mass. 481; *Palmer*

v. Merrill, 6 Cush. 292; *Vose v. Handy*, 2 Greenl. 322, 334; *Robbins v. Bacon*, 3 id. 346; *Porter v. Ballard*, 26 Me. 448; *Prescott v. Hull*, 17 Johns. 284, 292; *Ford v. Stuart*, 19 Johns. 342; *Thompson v. Emery*, 7 Foster (N. H.), 269; *Tibbits v. George*, 5 A. & E. 107; *Heath v. Hall*, 4 Taunt. 326.

(*f*) *Dunn v. Snell*, 15 Mass. 481.

(*g*) *Whittle v. Skinner*, 23 Vt. 531; *Palmer v. Merrill*, 6 Cush. 282.

(*gg*) *Gurnsey v. Gardner*, 49 Me. 167.

out of reprisals made by the former upon the latter, or out of a fund set apart by the former for the purpose, in accordance with a treaty by which it has renounced all claims of its citizens upon the latter, is an interest legally capable of being assigned by such owner, even before his own government has taken any steps toward securing to him an indemnity for his loss. *Leonard v. Nye*, 125 Mass. 455; *Jones v. Dexter*, 125 Mass. 469. See also *Williams v. Heard*, 140 U. S. 529; *Butler v. Gorely*, 146 U. S. 303. — K.

¹ An oral assignment of an account, or a portion of it, for a valid consideration, is good, and vests in the assignee the right to collect the debt in his own name. *Risley v. Phenix Bank*, 82 N. Y. 318. See also *Switzer v. Smith*, 35 Iowa, 269. — K.

(*x*) An assignment of a certificate of stock signed in blank enables the holder to make the assignment to himself, to present it to the corporation for record, and to receive a new certificate in his own

name; and a power of attorney to transfer, signed in blank, is also valid. *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109; *Taft v. Church*, 162 Mass. 526, 39 N. E. 283.

An order or draft upon a particular fund, purporting to appropriate that fund to its payment, or directly implying this, is, after notice, an equitable assignment of the fund, and needs no acceptance to have this effect. (*gh*)

The cause of action which a buyer of land has against the seller for his misrepresentation, is personal, and does not pass by an assignment of the contract. (*gi*) A holder of a debt or claim, assigning it for valuable consideration, warrants its genuineness and legal force, unless he communicates all the facts bearing upon the case, when the buyer takes the risk. (*gj*)

SECTION III.

OF THE EQUITABLE DEFENCES.

We have seen that an assignee of a chose in action takes it subject to all the equities of defence which exist between the assignor and the debtor. (*h*) The assignee does not take a legal interest, nor hold what he takes by a legal title; but he holds by an equitable title an equitable interest; and this interest courts of law will protect only so far as the equities of the case permit; and any subsequent assignee is subject to the same equities as his assignor. (*i*) But these equities must be those subsisting at the time when the debtor receives notice of the assignment; for the assignment, with notice, imposes upon the debtor an equitable and moral obligation to pay the money to the assignee. (*j*)¹

* 230 Moreover, the assignee ought, especially if *required, to exhibit the assignment, or satisfactory evidence of it, to the debtor, to make his right certain; although it is enough, if the debtor be in good faith informed of it, and has no reason to doubt it. (*k*) And if after the assignment, and previous to such a notice

(*gh*) *Shuttleworth v. Bruce*, 7 Rob. 160.

(*gi*) *Collins v. Suau*, 7 Rob. 623.

(*gj*) *Flynn v. Allen*, 57 Penn. St. 482.

(*h*) See *supra*, note (*g*), p. * 227. And see *Spain v. Hamilton*, 1 Wallace, 604.

(*i*) *Willis v. Twambly*, 13 Mass. 204; *Stocks v. Dobson*, 19 E. L. & E. 96; *Bush v. Lathrop*, 22 N. Y. (8 Smith) 535.

(*j*) *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v. Todd*, 12 id. 281; *Jones v. Witter*, 13 id. 304; *Fay v. Jones*, 18

Barb. 340; *Risley v. Risley*, 11 Rob. (La.) 298; *Small v. Browder*, 11 B. Mon. 212; *Clodfelter v. Cox*, 1 Sneed, 330; *Myers v. The United Guarantee, &c. Co.*, 31 E. L. & E. 538; *Fanton v. Fairfield County Bank*, 23 Conn. 485. See also *supra*, note (*g*), p. * 227.

(*k*) *Davenport v. Woodbridge*, 8 Greenl. 17; *Bean v. Simpson*, 16 Me. 49; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Anderson v. Van Alen*, 12 Johns. 343.

¹ Notice, not the assignment, fixes the rights of the parties. *Miller v. Kreiter*, 76 Penn. St. 78. — As to third persons, the assignment of a chose in action is valid without notice to the debtor. *Thayer v. Daniels*, 113 Mass. 129. — K.

of it, the debtor pays the debt to the assignor, he shall be discharged, because he shall not suffer by the negligence or fault of the assignee. (*l*)¹

If, after the assignment and notice, the debtor pays the debt to the assignor, and is discharged by him, and the assignee recovers judgment against the assignor for the consideration paid him for the assignment, the assignee may still recover of the debtor the debt assigned, deducting what he actually recovers from the assignor. (*m*) Nor can the debtor set off any demand against the assignor which accrues to him after such assignment and notice, (*n*) but he may any which existed at or before the assignment and notice. (*o*)

In New York and in some other States, the assignee of a chose in action, may now bring an action upon it, in his own name, by statutory provision. But this change is only in the form of the action and not in its effect. The assignee is still subject to the same equities of defence as before. That is, if the defendant can show that he, in good faith, paid the debt, or a part of the debt, to the assignor, before the assignment, or before he had any knowledge of the assignment, the defence is as effectual as if the action were in the name of the assignor.

It has been held in New York that an assignment of a thing in action is presumed to have been upon sufficient consideration, unless the contrary appear, and in such case no trust results therefrom for the benefit of the assignor. (*p*)

* SECTION IV.

* 231

COVENANTS ANNEXED TO LAND.

A covenant affecting real property, made with a covenantee who possesses a transferable interest therein, is annexed to the estate, and is transferable at law, passing with the interest in the realty

(*l*) *Jones v. Witter*, 13 Mass. 304; *Lewiston*, 18 Penn. St. 394; *Conant v. Stocks v. Dobson*, 19 E. L. & E. 96. *Seneca County Bank*, 1 Ohio St. 298.
 (*m*) *Jones v. Witter*, 13 Mass. 304. (*o*) *Ainslie v. Boynton*, 2 Barb. 258;
 (*n*) *Goodwin v. Cunningham*, 12 Mass. 193; *Green v. Hatch*, *id.* 195; *Jenkins v. Sanborn v. Little*, 3 N. H. 539.
 Brewster, 14 *id.* 291; *Phillips v. Bank of* (*p*) *Eno v. Crooke*, 10 N. Y. (6 Seld.) 60.

¹ Notice is equally necessary to protect the assignee against such payment by the debtor to the assignor. *Heermans v. Ellsworth*, 64 N. Y. 159. — The assignee of a judgment takes it subject to equities between the original parties and to any payments by the judgment debtor before notice of the assignment. *Noble v. Thompson Oil Co.*, 79 Penn. St. 354. — K.

to which it is annexed; (*q*) and it is often called a "covenant running with the land." If such covenants be made by the owner of land who conveys his entire interest to the covenantee, they are annexed to the estate, and the assignee of that estate may bring his action on the covenants in his own name. (*r*) But the assignee must take the estate which the covenantee has in the land, and no other; nor can he sue upon the covenants if he takes a different estate. (*s*) But it is said that the assignee cannot sue upon the covenants unless the estate passes to him; and

therefore cannot sue upon the covenants that the grantor * 232 is lawfully seized of the land, and has a good * right to convey; for if these be broken, no estate passes to the assignee, and being broken before the assignment, they have become personal choses in action and so not assignable. (*t*)

The right to sue for existing breaches does not pass to the assignee, — being mere personal choses in action, (*u*) — unless they be continuing breaches. As if there be a covenant to repair, which is broken and the need of repair remains, and the assignee takes the property in that condition, he may sue on the cove-

(*q*) "A covenant is real when it doth run in the realty so with the land that he that hath the one, hath or is subject to the other, and so a warranty is called a real covenant." Shep. Touch. 161.

(*r*) Thus if A, seized of land in fee, conveys it by deed to B, and covenants with B, his heirs, and assigns, for further assurance, and then B conveys to C, and C to D, D may require A to make further assurance to him according to the covenant, and on refusal, may maintain an action against him by the common law. *Meddlemore v. Goodale*, 1 Rol. Abr. 521. See also *Campbell v. Lewis*, 3 B. & Ald. 392.

(*s*) He is not in fact an assignee of the covenantee unless he takes the same estate; for an assignment, by the very definition of the word, is "a transfer, or making over to another, of one's whole interest, whatever that interest may be; and an assignment for his life or years differs from a lease only in this, that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with his whole property, and the assignee consequently stands in the place of the assignor." 1 Steph. Com. 485. There is a difference, however, in this respect, between the estate or interest in the land and the land itself. "It is to be observed," says Coke, "that an assignee of part of the land shall vouch

as assignee. As if a man makes a feoffment in fee of two acres to one, with warranty to him, his heirs and assigns, if he make a feoffment of one acre, that feoffee shall vouch as assignee, for there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part." As if a man hath a warranty to him, his heirs and assigns, and he makes a lease for life, or a gift in tail, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee-simple whereunto the warranty is annexed." Co. Litt. 385, a. See also *Holford v. Hatch*, Dougl. 183; *Palmer v. Edwards*, id. 187, n; *Van Rensselaer v. Gallup*, 5 Denio, 454; *Astor v. Miller*, 2 Paige, 68, 78; *Van Horne v. Crain*, 1 Paige, 455.

(*t*) This is the established doctrine in this country, and it seems to accord with the older English authorities. Shep. Touch. 170; *Greenby v. Wilcocks*, 2 Johns. 1; *Mitchell v. Warner*, 5 Conn. 497; *Marston v. Hobbs*, 2 Mass. 439; *Ross v. Turner*, 2 Eng. (Ark.) 132; *Fowler v. Poling*, 2 Barb. 300; *Ballard v. Child*, 34 Me. 355; *Thayer v. Clemence*, 22 Pick. 490, 4 Kent Com. 471. The case of *Kingdon v. Nottle* was condemned in *Mitchell v. Warner*, 5 Conn. 497, and it cannot be considered as law in this country.

(*u*) *St. Saviour's Churchwardens v. Smith*, 3 Burr. 1271; *Tillotson v. Boyd*, 4 Sandf. 516.

nant. (*v*) But if there be arrearages of rent, the breaches of the covenant to pay are each entire, giving a distinct right of action, and on the death of the landlord these arrearages go to the personal representative and not to the heir. (*w*)

Covenants between landlord and tenant, lessee and reversioner, run with the land. If one who owns in fee conveys to another a less estate, such as a term of years, and enters into covenants with the grantee, which relate to the use and value of the property granted, the right of action for a breach of these covenants which the grantee has, passes to his assignee, so long as this less estate continues. (*x*) Such are covenants to repair, to grant estovers for repair or for firewood, to keep watercourses * in * 233 good order, (*y*) or to supply with water; (*z*) also covenants for renewal, (*a*) for quiet enjoyment, (*b*) and the usual warranties for quiet possession. (*c*) But if one having no estate in the land grants with covenants of warranty, as no estate passes, and nothing except by estoppel, the assignee cannot sue on these covenants, for a lessee by estoppel cannot pass anything over. (*d*)

(*v*) *Mascal's Case*, Moore, 242, 1 Leon. 62; *Vivian v. Campion*, 1 Salk. 141, Lord Raym. 1125; *Sprague v. Baker*, 17 Mass. 586.

(*w*) *Anon. Skin.* 367; *Midgley v. Love-lace*, Carth. 289, 12 Mod. 46.

(*x*) *Spencer's Case*, 5 Rep. 17 b.

(*y*) *Holmes v. Buckley*, Prec. Ch. 39, 1 Eq. Ca. Abr. 27, pl. 4.

(*z*) *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*a*) *Roe v. Hayley*, 12 East, 464.

(*b*) *Noke v. Awder*, Cro. E. 436.

(*c*) *Campbell v. Lewis*, 3 B. & Ald. 392.

(*d*) *Noke v. Awder*, Cro. E. 436; *Whitten v. Peacock*, 2 Bing. N. C. 411.

* CHAPTER XV.

OF GIFTS ; OR VOLUNTARY ASSIGNMENTS OF CHATTELS.

THE word "gift" is often introduced into deeds of land ; but by gifts are usually meant transfers of chattels, which are wholly voluntary, or without any pecuniary or good consideration. They are usually distinguished into gifts *inter vivos* and gifts *causa mortis*. (x)

SECTION I.

OF GIFTS INTER VIVOS.

Any person competent to transact ordinary business may give whatever he or she owns, to any other person. The usual incapacities for legal action apply here. A gift by a minor, a married woman, (y) an insane person, or a person under guardianship, or under duress, would be void or voidable according to the circumstances of the case.

Gifts by persons competent to give, of property which they had a right to give, to persons competent to receive, and which are completed by transfer of possession, however voluntary they may have been, are regarded by the law as executed contracts, founded upon mutual consent. It is essential, however, that there should be such a change of possession as to put it out of the

(x) A gift does not, like a simple contract, require a consideration, and is not defeated because induced by illicit relations. *Frank v. Morley's Estate*, 106 Mich. 635, 64 N. W. 577.

A simple gift by the Legislature to an individual is an invalid appropriation of public funds to private uses ; but it can devote money to private persons who have no previous claim to it, such as the widow, heirs, or representatives of those dying in office. *Opinion of Justices*, 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564.

(y) At common law a husband is free to give away his personal estate without

his wife's consent, at least when he has no immediate expectation of death. *Lines v. Lines*, 142 Penn. St. 149, 21 Atl. 809, 24 Am. St. Rep. 487, 490 n. In Massachusetts, a gift of personality from husband to wife, except as to wearing apparel and similar articles, is still invalid. *Stimpson v. Achorn*, 158 Mass. 342, 33 N. E. 518. But such a gift, though revocable during his life, is so far valid as to give her a valid title after his death, as against his heirs or executor, but not against his creditors. *Ibid.* ; *Brown v. Brown*, 174 Mass. 197, 54 N. E. 532.

power of the giver to repossess himself of the thing given. (y) And gifts to persons holding somewhat of a fiduciary relation, as to attorney from client, to parent from child, (x) to guardian from ward, to trustee from *cestui que trust*, are scrutinized by courts of law as well as equity with great care, even if not held presumptively void. (z) ¹

It is essential to a gift, that it goes into effect at once, and completely. If it regards the future, it is but a promise; and being a promise without consideration, it cannot be enforced and has no legal validity. Hence delivery is essential to the validity of every gift; (a) for not even a court of equity will * interfere to enforce a merely intended or promised * 235 gift. (b) (y) There is, it is true, some authority for suppos-

(y) *Little v. Willetts*, 55 Barb. 125, 37 Howard (N. Y.), 481.

(z) *Garvin v. Williams*, 44 Mo. 465.

(a) *Bryson v. Brownrigg*, 9 Ves. 1; *Antrobus v. Smith*, 12 Ves. 39; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Noble v. Smith*, 2 Johns. 52; *Hooper v. Goodwin*, 1 Swanst. 485; *Adams v. Hayes*, 2 Ired L. 366; *Sims v. Sims*, 2 Ala. 117; *Allen v. Polereczky*, 31 Me. 338; *Withers v.*

Weaver, 10 Barr, 391; *Dole v. Lincoln*, 31 Me. 422; *Carpenter v. Dodge*, 20 Vt. 595; *Huntington v. Gilmore*, 14 Barb. 243; *Hunter v. Hunter*, 19 Barb. 631; *Brown v. Brown*, 23 Barb. 565; *Hitch v. Davis*, 3 Md. Ch. 266; *People v. Johnson*, 14 Ill. 342; *Craig v. Kittredge*, 46 N. H. 57; *Irish v. Nutting*, 47 Barb. 37.

(b) *Pennington v. Gittings*, 2 G. & J. 208. See *Antrobus v. Smith*, 12 Ves. 39.

¹ See *Mitchell v. Homfray*, 8 Q. B. D. 587; *Tyars v. Alsop*, 61 L. T. R. 8; *Hall v. Knappenberger*, 97 Mo. 509; *Wilkinson v. Sherman*, 45 N. J. Eq. 413; *Parker's Adm. v. Parker's Adm.*, 45 N. J. Eq. 224; *In re Wormley's Est.*, 137 Pa. St. 101. — W.

(x) When a gift is claimed by a child from its parent, change of possession is not sufficient, the presumption being that the use and possession are permissive. *Geer v. Goudy*, 174 Ill. 514, 524, 51 N. E. 623. A gift of a child's property to its parent will also be carefully scrutinized. *Towson v. Moore*, 173 U. S. 17, 19 S. Ct. 332, 43 L. Ed. 597. An infant's gifts, like his contracts, may undoubtedly be avoided by him on the ground of infancy. *Craig v. Van Bibber* (100 Mo. 584), 18 Am. St. Rep. 569, 628 n.

A gift *inter vivos* of all the donor's personal estate, as it deprives him of support, is, unlike a similar gift *causa mortis*, held to be invalid. *Boggs v. Hays*, 44 La. Ann. 859; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848; and see 37 Am. L. Reg. N. S. 73.

(y) Delivery is essential to the validity of a gift *inter vivos*, or *causa mortis*; it must be made with the intention of passing title, and of parting with the control and dominion. *Beaver v. Beaver*, 117 N. Y. 421, 428, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403; *Pickslay v. Starr*, 149 N. Y. 432, 44 N. E. 163; *Gannon v.*

McGuire, 160 N. Y. 476, 55 N. E. 7; *Guy v. Langdon*, 84 Hun (N. Y.), 218; *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250; *Morse v. Meston*, 152 Mass. 5, 24 N. E. 916; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168; *Buswell v. Fuller*, 156 Mass. 309, 31 N. E. 294. The delivery may arise from implication; it may precede or follow the gift, and is not dependent upon manual transmission; and though a present gift, it may be upon condition. *Anderson v. Peel*, 64 L. T. 645; *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *In re Schnadhorst, Sandhuhl v. Schnadhorst*, [1901] 2 Ch. 338; *Bishop v. McClelland*, 44 N. J. Eq. 450, 16 Atl. 1; *Corle v. Monkhouse*, 50 id. 537, 25 Atl. 157; *Keepers v. Fidelity Title Co.*, 56 N. J. L. 302, 28 Atl. 585; *Tyndale v. Randall*, 154 Mass. 103, 27 N. E. 882; *Matson v. Abbey*, 24 N. Y. S. 284; *Johnson v. Eaton*, 51 Kan. 708, 33 Pac. 597; *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504; 34 Sol. J. 452; 29 Am. L. Rev. 364; 32 Cent. L. J. 6.

Delivery may be made to a third person for the donee's benefit. *Bump v. Pratt*,

ing that a gift *inter vivos* may be valid without delivery, if there be a distinct acceptance. (c) But this is not the law. Nor will transfer by writing alone satisfy the requirement of delivery. (d) The delivery may be constructive; for it may be any such delivery as the nature of the thing and its actual position require; as a delivery of a part for the whole, or of a key, (dd) (x) or of a cumbrous mass by taking the donee near it, and

(c) *Comyns*, in his Digest, *Biens* D. 2, under "Property of goods, how vested," says that "if a man grant all his goods, the property vests in the grantee, and the grant may be without deed." This is asserted in *London & B. Railway Co. v. Fairclough*, 2 Man. & G. 691, n. (a), and the distinction made, on this point, between gifts *inter vivos* and gifts *causâ mortis*.

(d) *Cotteen v. Missing*, 1 Madd. Ch. 176; *Caswell v. Ware*, 30 Ga. 267; *Evans v. Lipscomb*, 31 Ga. 71; *Gammon Seminary v. Robbins*, 128 Ind. 85. And so long as money delivered by A to B, for

C, as a voluntary gift from A to C, is in the hands of B, A may revoke the gift, and reclaim the money from B. See *Lyte v. Perry*, *Dyer*, 49 a, and *Connor v. Tra- wick*, 37 Ala. 289. But in *Cranz v. Kroger*, 22 Ill. 74, it was said that if the gift be evidenced by writing, it cannot be resumed. *Held*, also, in same case, that a parent may resume a gift made to a child, without the consent of the child.

(dd) *Marsh v. Fuller*, 18 N. H. 360. A gift of a pocket was held to carry its contents, in *Allerton v. Lang*, 10 Bosw. 362; *Cooper v. Burr*, 45 Barb. 9.

84 Hun (N. Y.), 201. A gift so made by a husband for his wife is valid, but he cannot make the gift to her directly. *Brown v. Brown*, 174 Mass. 197, 54 N. E. 532. When the delivery is made to a trustee for the donee, and it is beneficial to the latter, his acceptance is presumed. *Beaver v. Beaver*, 117 N. Y. 421, 429, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403; *Telford v. Patton*, 144 Ill. 611, 621, 33 N. E. 1119.

A delivery which, though symbolical, as in the case of a transferred bank book, enables the donee to draw the money, is sufficient. *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 49 Am. St. Rep. 641, 32 L. R. A. 373; *Schwind v. Ibert*, 69 N. Y. S. 921, 60 App. Div. 378; *In re Dillon*, 44 Ch. D. 76; *Scrivens v. North Eastern Sav. Bank*, 166 Mass. 255, 44 N. E. 251; *Cogswell v. Newburyport Inst'n for Savings*, 165 Mass. 524, 43 N. E. 296; *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; *Cassidy v. Belfast Banking Co.*, 22 L. R. Ir. 68; *Farman v. Smith*, 57 L. J. Ch. 637; *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63; *Schollmier v. Schoendelen*, 78 Iowa, 426, 43 N. W. 282; *Jones v. Weakley*, 99 Ala. 441, 12 So. 420; *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246; *Crook v. First Nat. Bank*, 83 Wis. 31, 35 Am. St. Rep. 1, 26; *In re Weston*, [1902] 1 Ch. 680; 36 Cent. L. J. 354.

A deposit in a savings bank in another's

name is not alone sufficient to prove a gift. *Booth v. Bristol County S. Bank*, 162 Mass. 455, 38 N. E. 1120. See *Alger v. North End S. Bank*, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; *Welch v. Henshaw*, 170 Mass. 409, 49 N. E. 659, 64 Am. St. Rep. 309; *Krummel v. Thomas*, 25 N. Y. S. 833; *Cooney v. Ryter*, 46 La. An. 883, 15 So. 382. Such a deposit, made in trust for the donor, or another person, is not conclusive of the existence of a trust, but it may be a valid gift when known and assented to by the donee. *Miller v. Clark*, 40 Fed. 15; *McDonald v. Donaldson*, 47 Fed. 765; *Parkman v. Suffolk S. Bank*, 151 Mass. 218, 24 N. E. 43; *Kendrick v. Ray*, 173 Mass. 305, 53 N. E. 823; *Murphy v. Bordwell*, 83 Minn. 54, 85 N. W. 915, 85 Am. St. Rep. 454; *Cunningham v. Davenport*, 74 Hun (N. Y.), 53; *Patterson's Appeal*, 128 Penn. St. 269; *Re Atkinson*, 16 R. I. 413, 16 Atl. 712; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119.

(x) The mere delivery of a key to a trunk or to a safe-deposit box, not taken possession of during the donor's life, is not valid as a *donatio mortis causâ*. *Goulding v. Horbury*, 85 Me. 227; *Fearing v. Jones*, 149 Mass. 12, 20 N. E. 199, 14 Am. St. Rep. 392; *Morse v. Weston*, 152 Mass. 5, 24 N. E. 916; *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *Phipard v. Phipard*, 55 Hun (N. Y.), 433; *Re Somerville*, 20 N. Y. S. 76; *Yancey v. Field*, 85 Va. 756, 8 S. E. 721;

pointing it out, with words of gift, or by an order on a bailee. But in this last instance, we should say that the gift did not become complete until the order was presented and accepted, or performed. (e)¹

(e) Carradine v. Collins, 7 Sm. & M. 428; Blakey v. Blakey, 9 Ala. 391; Pope v. Randolph, 13 Ala. 214; Hillebrant v. Brewer, 6 Tex. 45; Anderson v. Baker, 1 Ga. 595; Donnell v. Donnell, 1 Head, 267.

¹ In England it is now settled by Cochrane v. Moore, 25 Q. B. D. 57, following Irons v. Smallpiece, 2 B. & Ald. 551, and discrediting certain criticisms of the latter case in more recent decisions, that a gift of a chattel, capable of delivery, *per verba de presenti* by a donor to a donee, and assented to by the donee, does not pass the property in the chattel without delivery. — W.

In this country delivery is universally held to be essential. Brantley v. Cameron, 78 Ala. 72; Nolen v. Harden, 43 Ark. 307; Evans v. Lipscomb, 31 Ga. 71; Roberts v. Draper, 18 Ill. App. 167; Gammon Seminary v. Robbins, 128 Ind. 85; Donover v. Argo, 79 Iowa, 574; Augusta Savings Bank v. Fogg, 82 Me. 538; Coleman v. Parker, 114 Mass. 330; Love v. Francis, 63 Mich. 181; Wheatley v. Abbott, 32 Miss. 343; Reed v. Spaulding, 42 N. H. 114; Diltz v. Stevenson, 17 N. J. Eq. 407; Beaver v. Beaver, 117 N. Y. 421; Flanders v. Blandy, 45 Ohio St. 108; Scott v. Lauman, 104 Pa. 593; Taylor v. Staples, 8 R. I. 170; Bennett v. Cook, 28 S. C. 353; Hubbard v.

Corle v. Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157; Keepers v. Fidelity Trust Co., 56 N. J. L. 302, 28 Atl. 585.

An oral gift of incorporeal personal property, such as a trade-mark or equitable interest, is valid, although delivery is not made, that being impossible from the nature of the case. Smith's Estate, 144 Penn. St. 428; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068; Bennett v. Littlefield, 177 Mass. 294, 58 N. E. 1011.

Where a promissory note is regarded as the debt, or as its representative, the delivery thereof by the holder to the maker with the intention of transferring to him the title, though without indorsement, extinguishes the note and discharges the obligation to pay it. Clement v. Cheesman, 27 Ch. D. 631; Hopkins v. Manchester, 16 R. I. 663; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168; Buswell v. Fuller, 156 Mass. 309, and 161 Mass. 220, 31 N. E. 294; see Bartlett, petitioner, 163 Mass. 509, 40 N. E. 899; Wing v. Merchant, 57 Me. 383; Westerlo v. De Witt, 36 N. Y. 340; Reed v. Spaulding, 42 N. H. 114. But the decisions are by no means harmonious on this question. See Clement v. Cheesman, 27 Ch. D. 631; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Hopkins v. Manchester, 16 R. I. 663, 19 Atl. 243; Buie v. Buie, 67 Miss. 456; Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608; Gammon Theological Seminary v. Robbins, 128 Ind. 85, 92, 27 N. E. 341; Pickslay v. Starr, 76 Hun (N. Y.), 10; Langworthy v. Crissey,

31 N. Y. S. 85; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8. There is only a *prima facie* presumption that a promissory note in the maker's possession after the payee's decease has been paid. Parks v. Smith, 155 Mass. 26, 28 N. E. 1044. A deed, or other writing, when necessary to perfect the gift, must itself be delivered. Wadd v. Hazelton, 137 N. Y. 215, 33 N. E. 143; Daggett v. Simonds, 173 Mass. 340, 53 N. E. 907; Wylie v. Charlton, 43 Neb. 840, 62 N. W. 220; Roberts v. Mullinder, 94 Ga. 493, 20 S. E. 350.

A promissory note signed and delivered by a testator as a gift *inter vivos*, being without consideration, cannot be enforced against the maker. Bartlett, petitioner, 163 Mass. 509, 515, 40 N. E. 899. But see Jennings v. Neville, 180 Ill. 270, 54 N. E. 202; Royston v. McCulley (Tenn.), 59 S. W. 725, 52 L. R. A. 899; *In re Griffin*, [1899] 1 Ch. 408. Nor can such gift, though made *causa mortis*, be enforced against his estate after his death. *Ibid.*; Hamer v. Sidway, 57 Hun (N. Y.), 229; Holmes v. Roper, 141 N. Y. 64; Morse v. Meston, *supra*. A gift, like a deed or will, may be set aside in equity; the donor's representatives may recover it though the donee was not a fiduciary. James v. Kerr, 40 Ch. D. 449; Morley v. Loughnan, [1891] 1 Ch. 736; Lewis v. Merritt, 113 N. Y. 386; Sass v. McCormack, 52 Minn. 234, 64 N. W. 385; Lane v. Moore, 151 Mass. 87, 23 N. E. 828; *Re Wormley*, 137 Penn. St. 101; *Re Corson*, *id.* 146.

A gift, by a competent party, made perfect by delivery and acceptance, is then irrevocable by the donor.¹ But if it be prejudicial to existing creditors, it is, as a transfer without considera-

Cox, 76 Tex. 239; Pope v. Burlington Savings Bank, 56 Vt. 284; Ewing v. Ewing, 2 Leigh, 337; Henschel v. Maurer, 69 Wis. 576.

In *Wheeler v. Wheeler*, 43 Conn. 503, the purchase of a horse by a husband with the expressed intention of making an immediate gift to his wife and the keeping it in his stable was held a sufficient delivery. But merely pointing out an animal with the words "That is your property, I give it to you," is insufficient, *Brewer v. Harvey*, 72 N. C. 176. Delivery of the key of a box in a safety-deposit vault with intent to give the contents is a sufficient delivery. *Pink v. Church*, 14 N. Y. Supp. 337, 60 Hun, 580. Delivery of a negotiable bond with intent to give is effectual. *Matthews v. Hoagland*, 48 N. J. Eq. 455. Likewise a gift of non-negotiable securities as shares of stock, *Commonwealth v. Crompton*, 137 Pa. 138; or an undorsed note, *Letts v. Letts*, 73 Mich. 138; *Hopkins v. Manchester*, 16 R. I. 663; or a policy of insurance, *Crittenden v. Phoenix, &c. Ins. Co.*, 41 Mich. 442. The delivery of a savings-bank book with an order for the payment of the whole deposit for the purpose of transferring the money to the donee is a valid gift, and is effectual although the book and order are not presented to the bank until after the donor's death. *Kimball v. Leland*, 110 Mass. 325; *Davis v. Ney*, 125 Mass. 590. See also *Schollmeyer v. Schoendelen*, 78 Iowa, 426. So of a delivery of the book alone. *Camp's Appeal*, 36 Conn. 88; *Ridden v. Thrall*, 125 N. Y. 572. See also *Minor v. Rogers*, 40 Conn. 512; *Kerrigan v. Rautigan*, 43 Conn. 17; *Taylor v. Henry*, 48 Md. 550; *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; *Beaver v. Beaver*, 117 N. Y. 421. But delivery of the donor's check or draft payable after his death does not constitute a valid gift. *Curry v. Powers*, 70 N. Y. 212. *Appeal of Waynesburg College*, 111 Pa. 130. And death operates as a revocation of a check payable on demand delivered with the intention of making a gift of the fund on which it was drawn, if payment is not obtained before the drawer's death. *Simmons v. Cincinnati Savings Soc.*, 31 Ohio St. 457. If stock is transferred to the name of another as a gift without the latter's knowledge, the gift is effectual and cannot be revoked. *Standing v. Bowring*, 31 Ch. D. 282. But merely registering bonds in the name of an intended donee will not have a like effect. *In re Crawford*, 113 N. Y. 560. And a writing purporting to give a note therein described, the note not being delivered is ineffectual. *Gammon Seminary v. Robbins*, 128 Ind. 85. Nor is delivery of possession enough unless accompanied by an intention to make an immediate and final gift. *Jones v. Lock*, L. R. 1 Ch. 25. See also *Walsh's Appeal*, 122 Pa. 177. If the subject of the intended gift is already in the possession of the donee, no further delivery is needed. *Winter v. Winter*, 9 W. R. 747; *Prov. Inst. for Savings v. Taft*, 14 R. I. 502; *Miller v. Neff's Adm.*, 33 W. Va. 197. But see *Drew v. Hagerty*, 81 Me. 231. So if the donee obtains possession before the uncompleted gift is revoked, it is as valid as if delivery had been simultaneous with the expression of intent on the part of the donor. *Carradine v. Carradine*, 58 Miss. 286; *Whiting v. Barrett*, 7 Lansing, 106. The delivery may be with the understanding that the property shall be held by the donee for his own benefit only on the happening of a contingency, as the donor's death. *Tyndale v. Randall*, 154 Mass. 103. Redelivery of the subject of the gift by the donee to the donor does not revest the property in the latter. *Ivey's Adm. v. Owens*, 23 Ala. 641; *Ector v. Welsh*, 29 Ga. 443. Even if the intent is that the title shall revest in a certain contingency, provided the contingency never takes place. *Marston v. Marston*, 64 N. H. 146. Whether delivery to a third person inures to the benefit of the intended donee depends upon the character in which the third person acts. If he is merely the donor's agent, as his authority is revocable the gift is not complete. *Barnum v. Reed*, 136 Ill. 388; *Smith v. Ferguson*, 90 Ind. 229; *Augusta Savings Bank v. Fogg*, 82 Me. 538; *Sessions v. Mosely*, 4 Cush. 87; *Scott v. Lauman*, 104 Pa. 593; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Wells v. Collins*, 74 Wis. 341. If, however, he takes as trustee for the donee, the gift is complete. *In re Richards*, 36 Ch. D. 541; *Devol v. Dye*, 123 Ind. 321; *Frazier v. Perkins*, 62 N. H. 69. See also *Woodburn v. Woodburn*, 123 Ill. 608; *Stephenson's Adm. v. King*, 81 Ky. 425; *Dunbar v. Dunbar*, 80 Me. 152; *Williams v. Guile*, 117 N. Y. 343; *Gano v. Fisk*, 43 Ohio St. 462. — W.

¹ *Monatt v. Parker*, 30 La. Ann. 585; *Stewart v. Hidden*, 13 Minn. 43; *Walker v. Joseph Dixon Crucible Co.*, 47 N. J. Eq. 342; *Bedell v. Carll*, 33 N. Y. 581; *Kellogg v. Adams*, 51 Wis. 138. — W.

tion, void as to them. It is not, however, void as to subsequent creditors, unless made under actual or expected insolvency, or with a fraudulent purpose as to future creditors; in either case, gifts, or voluntary transfers or settlements (all of which are regarded by the law as gifts), are void. (*f*)

* From the established principles in regard to promises *236 without consideration, and the necessity of delivery and acceptance, it may be inferred, that if a gift, *inter vivos*, be made by a note or promise, not under seal, it may be avoided by the donor, for it is not a present gift, but a promise without consideration.¹ If it be by a check, or order, or draft, then it can be revoked, and payment or acceptance stopped. If paid in good faith and before revocation, it becomes a completed and irrevocable gift; so if so accepted as to bind the acceptor. On the other hand, if a legal consideration enters into a transaction which is called a gift, it changes it at once into a sale or barter, (*x*) if delivery be made; otherwise into an executory and enforceable contract.

SECTION II.

OF GIFTS CAUSA MORTIS.

These gifts can be made only by a person by whom death is believed, on reasonable grounds, to be very near, and who makes the gift in view of, and because of, his approaching death. (*ff*)²

(*f*) For American cases in which this question is considered, see Thomson v. Dougherty, 12 S. & R. 448; Hanson v. Buckner, 4 Dana, 251; Hudnal v. Wilder, 4 McCord, 294; Sexton v. Wheaton, 8 Wheat. 229; Gannard v. Eslava, 20 Ala. 732; Clark v. Depew, 25 Penn. St. 509; Trimble v. Ratcliffe, 9 B. Mon. 511; Hawkins v. Moffit, 10 B. Mon. 81.

(*ff*) Knott v. Hogan, 4 Met. (Ky.) 99; Champney v. Blanchard, 39 N. Y. 111.

¹ Williams v. Forbes, 114 Ill. 167. But if under seal such a note or promise is binding. Krell v. Codman, 154 Mass. 454; Ross's Appeal, 127 Pa. St. 4. — W.

² In Gourley v. Linsenbigler, 51 Pa. St. 345, 350, it is said: "It is evident that the language used by the authorities in speaking of — in contemplation of death — in expectation of death — or — in apprehension of death — applies to the cases of illness ending in death, the last illness which makes it a death-bed disposition." *Dicta* of similar import may be found in other cases. But see 2 Kent's Com. *444. And in Ridden v. Thrall, 125 N. Y. 572, 24 Abb. N. C. 52, a gift made under apprehension of death from an impending surgical operation was supported, though the donor in fact died from another cause before he had fully recovered from the effects of the operation. The court intimate, however, that had the donor recovered from the effects of the operation, before he was attacked by the disease which proved fatal, the gift could not have been supported. — W.

(*x*) That which is in effect a gift will not make the donee a purchaser for value because a nominal consideration is mentioned in the conveyance. Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; Brown v. Whaley, 58 Ohio St. 654, 49 N. E. 479, 65 Am. St. Rep. 793.

Much that was said of gifts *inter vivos* applies equally to gifts *causâ mortis*. There must be delivery to the donee; and while it need not be strictly actual, it must be as near an actual delivery to the donee, as the circumstances of the case and the nature and actual position of the thing given, will permit. (g) ¹(x) And it is said that no mere possession, whether it be subsequent or previous and continued, will supply the want of delivery; (h) but we * 237 should doubt whether this can be regarded * as a universal rule. The law watches, however, this kind of transfer jealously, and is unwilling that it should take the place of wills, and make them unnecessary; because, while it is much less troublesome, it is open to those objections of uncertainty which the law seeks to avoid, in reference to wills, by its precautions and provisions as to their execution. Hence it is the prevailing rule, that the donor's own note, or his own check or draft not accepted

(g) *Jones v. Selby*, Prec. Ch. 300; *Drury v. Smith*, 1 P. Wms. 404; *Snellgrove v. Bailey*, 3 Atk. 214; *Lawson v. Lawson*, 1 P. Wms. 441; *Miller v. Miller*, 3 P. Wms. 356; *Ward v. Turner*, 2 Ves. 431. There seems to be no limit in law to the extent of a *donatio causâ mortis*. *Meach v. Meach*, 24 Vt. 591; *Dresser v. Dresser*, 46 Me. 48. But see *Headley v. Kirby*, 18 Penn. St. 326.

(h) *Dole v. Lincoln*, 31 Me. 422; *Huntington v. Gilmore*, 14 Barb. 243; *Drew v. Hagerty*, 81 Me. 231. In England, the law seems not to be settled on this point. *Moore v. Dalton*, 7 E. L. & E. 134, differs from the cases first cited; while *Gough v. Findon*, 7 Exch. 48, 8 E. L. & E. 507, confirms them. See note, *ante*, p. * 235.

¹ See cases cited in note 1, *ante*, p. * 235. Also *Rowland v. Phillips*, 13 South-western Rep. 1101 (Ark.); *Daniel v. Smith*, 75 Cal. 548; *Fearing v. Jones*, 149 Mass. 12; *Shackelford v. Brown*, 89 Mo. 546; *Trenholm v. Morgan*, 28 S. C. 268; *Yancey v. Field*, 85 Va. 756. But see *Ellis v. Secor*, 31 Mich. 185.

(x) See *supra*, p. * 235 n.; *In re Hughes*, 59 L. T. 586; *Gason v. Rich*, 19 L. R. Ir. 391; *Harmon v. Osgood*, 151 Mass. 501, 504, 24 N. E. 401; *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *Scollard v. Brooks*, 170 Mass. 445, 49 N. E. 741; *Pluche v. Jones*, 54 Fed. 860; *Nelson v. Sudiek*, 40 Mo. App. 341; 32 Cent. L. J. 27. A gift made unconditionally by one *in extremis* may be effective as a gift *inter vivos*. *Henschel v. Maurer*, 69 Wis. 576. So the fact that delivery was made shortly before the donor's death, and when he was unconscious, is immaterial if it was made under his previous direction to deliver, given when he was conscious, and for the purpose of consummating the gift. *King v. Smith*, 110 Fed. 95. If the donor does not die, the gift is inoperative. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848. See *Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783; *Crue v. Caldwell*, 52 N. J. L. 215, 19 Atl. 188. It may be

revoked by a subsequent will. *Marston v. Marston*, 64 N. H. 146; *Walsh's Appeal*, 122 Penn. St. 177, 9 Am. St. Rep. 83; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *Marshall v. Russell*, 93 Tenn. 261, 25 S. W. 1070; *Vaughn v. Moore*, 89 Va. 925, 17 S. E. 326; *Walker v. Joseph Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885; *Kirk v. McCusker*, 22 N. Y. S. 780; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929. It may also be set aside by the donor's creditors. *Wetmore v. Brooks*, 18 N. Y. S. 852; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139.

A gift, which is an attempt to make a testamentary disposition without observing the forms of law, is void under the statute of wills. *Alger v. North End Savings Bank*, 146 Mass. 418, 421, 15 N. E. 916, 3 Am. St. Rep. 334; *Williamson v. Yager* (91 Ky. 282), 34 Am. St. Rep. 184, 224 n.

or paid before his death, does not pass by gift *causâ mortis*.¹ Delivery by a dying husband of the book of a savings bank showing deposits by a deceased wife, with a verbal gift thereof, passed to the donee the moneys so deposited. (*hh*) And bank-notes, certainly, (*i*) and perhaps the notes, bonds, and other written promises of others than the donor, may be the subject of a valid *donatio causâ mortis*, although the rule on this subject can hardly be considered as completely settled. (*j*)

It is held in New York, rightly we think, that a valid gift, *causâ mortis*, of corporate stocks, may be made by simple delivery of the certificates with intent to transfer the stock, although the certificates contain a restriction on the method of transfer. (*jj*) (*x*)

In a recent English case, a voluntary deed of gift of all her personal property was made by one who soon after died. Then the donee died. Among his effects were promissory notes which had belonged to the donor, but were not indorsed, and there was no evidence of their delivery to him. But it was held that the deed of gift was a complete declaration of trust and carried all her personal property to the donee. (*jl*) There have been some cases arising from gifts made by soldiers before joining the army, in the late war. Where the gift was made to take effect "if he did not come back," it was held not valid, because not a present

(*hh*) Tillinghast v. Wheaton, 8 R. I. 536; Pierce v. Boston Savings Bank, 129 Mass. 425.

(*i*) Hill v. Chapman, 2 Bro. Ch. 612. This has not been recently doubted.

(*j*) See Miller v. Miller, 3 P. Wms. 356; Bradley v. Hunt, 5 G. & J. 54. These cases seem to hold that, if the notes were payable to bearer, the donation would be valid, thus putting such a note on the footing of bank bills. This distinction may be extended to all notes indorsed in blank. See Parish v. Stone, 14 Pick. 207, which asserts the law as stated in the text. See also Harris v. Clark, 2 Barb. 56, 94, and 3 Comst. 93; Flint v. Pattee,

33 N. H. 520. But it also seems that the note of a third person may be a valid *donatio causâ mortis*, although not made transferable by delivery by blank indorsement; and in that case the executor or administrator of the deceased must indorse it. Brown v. Brown, 18 Conn. 410. See also Sessions v. Moseley, 4 Cush. 87, and Smith v. Kittredge, 21 Vt. 238; Veal v. Veal, 27 Beav. 303; Rankin v. Weguelin, 27 Beav. 309; Drake v. Heiken, 61 Cal. 346.

(*jj*) Walsh v. Sexton, 55 Barb. 251.

(*jl*) Richardson v. Richardson, L. R. 3 Eq. 686. See Morgan v. Malleson, L. R. 10 Eq. 475.

¹ Basket v. Haskell, 107 U. S. 602, 615; Smith v. Smith's Adm., 30 N. J. Eq. 564; Sanborn v. Sanborn, 65 N. H. 172. See Burke v. Bishop, 27 La. An. 465; although accompanied by a delivery of his banker's pass-book. Beak v. Beak, L. R. 13 Eq. 489. But a certificate of deposit may be the subject of a *donatio mortis causa*, Basket v. Haskell, 107 U. S. 602; Conner v. Root, 11 Col. 183. And none the less so because the donor also gives with it a check for the amount of the certificate. *In re Dillon*, 44 Ch. D. 76. See also Rolls v. Pearce, 5 Ch. D. 730. — W.

(*x*) So in Virginia the gift is valid, though the donee acquires only an equitable title. First Nat. Bank v. Holland, 99 Va. 495, 39 S. E. 126.

absolute gift. (*jm*) But in another case, where the same contingency existed, it was held valid. (*jn*)

The donor, during his life, may at any time revoke any donation *causâ mortis*, even if it be completed by delivery and acceptance. Such a gift is as revocable as a will. The authorities agree that he may do this if he recovers, because the death, which has not taken place, was the *cause* of the gift. (*k*)

Gifts *causâ mortis* are wholly void as against existing creditors. (*l*) A court of equity will sometimes compel a party to complete and execute a gift, which, at law, would be wholly in the power of the donor. (*m*)¹ (*x*)

(*jm*) *Linsenbigler v. Gourley*, 66 Penn. St. 166. [See also *Walsh's Appeal*, 122 Pa. 177, as to the necessity of an intention to make an immediate gift.]

(*jn*) *Virgin v. Gaither*, 42 Ill. 39.

(*k*) In *Jones v. Selby*, Prec. Ch. 300, a *donatio causâ mortis* was put on the same footing as a will, in this respect, — that it

could, as certainly, be revoked by the donor, at any time during his life. See *Jayne v. Murphy*, 31 Ill. App. 28; *Crue v. Caldwell*, 52 N. J. L. 215.

(*l*) See cases cited in note (*f*), p. *235.

(*m*) See *post*, Chap. on Specific Performance, sect. 2.

¹ And gifts made with a view of depriving the donor's wife of her share of his estate were held invalid in *Manikee's Adm. v. Beard*, 85 Ky. 20. — W.

(*x*) In some cases, equity has perfected a gift, either *inter vivos* or *causâ mortis*, by declaring the donor's executor to be a trustee. *In re Dillon*, 44 Ch. D. 76;

Wylie v. Charlton, 43 Neb. 840, 62 N. W. 220; *Smith's Estate*, 144 Penn. St. 428. See *In re Rose*, 71 N. Y. S. 172.

* CHAPTER XVI.

* 238

NEW PARTIES BY INDORSEMENT, OR OF NEGOTIABLE BILLS AND NOTES.

SECT. I.—*Of the Nature and Effect of Indorsement.*

By the ancient rules of law we have seen that the transfer of *simple* contracts was entirely forbidden. It is usually expressed by the phrase, that a chose in action is not assignable. But bills of exchange and promissory notes, made payable to order, called negotiable paper, may be transferred by indorsement; the holder can sue in his own name, and equitable defences existing between the promisor and the original promisee are cut off.

The law of bills and notes is said to be exceptional; as choses in action, by the policy of the law merchant, and to satisfy the necessities of trade and business, they may be assigned as other choses in action cannot be. But the law of negotiable paper rests on other grounds also. If A owes B one hundred dollars, and gives him a promissory note wherein he promises to pay that sum to him (without any words extending the promise to another), this note is not negotiable; and if it be assigned, it is so under the general rule of law, and is subject in the hands of the assignee to all equitable defences. But if A in his note promises to pay B *or his order*, then the original promise is in the alternative, and it is this which makes the note negotiable. (a) The promise is to pay either B or some one else to whom B shall direct the payment to be made. And when B orders the payment to be made to C, then C may demand it under the original promise. He may say that the promise was made to B, but it was a promise *to pay C * 239 as soon as he should come within the condition; that is, as soon as he should become the payee by order of B. And then the law merchant extends this somewhat, by saying that the original promise was in fact to pay either to B or to C, if B shall order payment made to him, or to any person to whom C shall order payment made after B has ordered the payment made to C. For B has the right of not merely ordering payment to be made

(a) Reed v. Murphy, 1 Ga. 236.

to C, but to C or his order; and C has then the same right, and by the continued exercise of this right the transfer may be made to any number of assignees successively, and the last party to whom the note is thus transferred, or the final holder, becomes the person to whom A promised B to pay the money, and such holder may sue in his own name upon this promise. And not only are words "or order" unnecessary in the indorsement, but it is held that if the indorsement be expressly restrictive, as if made to A only, its negotiability remains unaffected. (b) It is said, however, that this does not apply to notes indorsed after maturity. (c)

We may find the reasons of the law of negotiable bills and notes in their origin and purpose. Very early money was invented as the representative of all property, as facilitating the exchange of all property in place of barter, and as measuring its convertible value; and when more was needed negotiable paper, first bills of exchange and then promissory notes, were introduced into mercantile use, as the representative of money. It was possible to make exchanges of large quantities of bulky articles, by the use of money, without much inconvenience; and it was possible for him who wished to part with what he had, to acquire in its stead by * 240 selling it for money, an article * in which the value of all that he parted with was securely vested, until he had such opportunity as he might wish to place this value in other property, which he did by buying. But as coin did not represent *credit*, negotiable paper was introduced, as representing not property directly, but money. And as in one form it represents the money into which it is convertible at the pleasure of the holder, so in another form it represents a future payment of money, and then it represents credit. And as names in any number may be written on one instrument, that instrument represents and embodies the credit of one man or the aggregated credit of many. Thus, by this invention, vast amounts of value may change ownership at any distance, and be transmitted as easily as a single coin could be sent. And by the same invention, while property is used in commercial intercourse, the credit which springs from and is due to the possession of that property may also be used at the same time and in the same way. All this is possible because negotiable paper is the adequate representative of money, and of actual credit, in the transaction of business; but it is possible only while this paper is such representative; and the whole system of the

(b) *Walker v. Macdonald*, 2 Exch. 527.(c) *Leavitt v. Putnam*, 1 Sandf. 199.

law of negotiable paper has for its object to make this paper safe and convertible.

If a note be surrendered to the maker from a mistaken belief that it has been paid, he is still liable for the balance due upon it. (*cd*)

By the practice of merchants, the transfer of negotiable paper is made by indorsements. (*x*) The payee writes his name (*d*) on * the back of the bill or note, or, as it has been held, * 241 something which is the equivalent of his name and is intended as a substitute for it, (*e*) and delivers the paper to the purchaser, (*f*)¹ and is then called an indorser; and it has been held that if a payee writes his name on any part of the paper with intent to indorse it, this is an indorsement. (*ff*) (*y*) The purchaser

(*cd*) *Banks v. Marshall*, 23 Cal. 223.

(*d*) There can be no indorsement without a signing of the name. *Vincent v. Horlock*, 1 Camp. 442. In *Fenn v. Harrison*, 3 T. R. 761, *Buller, J.*, says: "In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself, — the acceptor, the drawer, and the indorsers, are all liable in their turns; but they are only liable *because they have written their names on the bill.*"

(*e*) The figures 128 were held sufficient in *Butchers and Drovers Bank v. Brown*, 6 Hill (N. Y.), 443.

(*f*) In order to a valid indorsement, the payee or holder must not only write his name on the back, but must deliver the bill to the indorsee. *Emmett v. Tottenham*, 20 E. L. & E. 348; *Sainsbury v. Parkinson*, id. 361. See also *Hall v. Wilson*, 16 Barb. 548.

(*ff*) *Haines v. Dubois*, 1 Vroom, 259.

¹ "I this day sold and delivered" to A the within note, signed by the payee, was held an indorsement in *Adams v. Blethen*, 66 Me. 19, and other decisions giving words of assignment the legal effect of an indorsement, are *Henderson v. Ackelmire*, 59 Ind. 540; *Sears v. Lantz*, 47 Iowa, 658; *Marks v. Herman*, 24 La. An. 335; *Maine, &c. Co. v. Butler*, 45 Minn. 506; *Duffy's Adm. v. O'Connor*, 7 Baxter, 498. But *Marston, J.*, in *Aniba v. Yeomans*, 39 Mich. 171, said: "The indorsement upon a negotiable promissory note is something more than the mere transfer of the interest of the payee therein. It includes also the personal undertaking of the indorser that if the note is not paid at maturity, upon notice of that fact he will pay the same." See also *Hatch v. Barrett*, 34 Kan. 223; *Lyons v. Divelbis*, 22 Pa. St. 185; *Hall v. Toby*, 110 Pa. St. 318; *Crosby v. Roub*, 16 Wis. 616.

A statement on the back of the note signed by the payee, stating how much he is worth, is not an indorsement. *Pickering v. Cording*, 92 Ind. 306; and see *Clark v. Whiting*, 45 Conn. 149. *Contra* is *Dunning v. Hiller*, 103 Pa. 269. Where the payee of a note, a married woman, wrote on the back of the note for the accommodation of the maker, "I hereby charge my separate estate with the amount of this note," and signed her name, it was held that she was liable as an indorser. *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898 — W.

(*x*) The local law as to negotiable paper is not so far a part of the law merchant as to be presumed, as to all its details, to be everywhere accepted. *Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845.

As to what is a promissory note, and non-negotiable notes, see *Chapman v. Wight*, 79 Maine, 595; *Moore v. Edwards*, 167 Mass. 74, 44 N. E. 1070;

Roberts v. Smith, 58 Vt. 492; *Hudson v. Emmons*, 107 Mich. 549, 65 N. W. 542; *Lee v. Bascom*, 9 Col. 216; *McClellan v. Coffin*, 93 Ind. 456; *Louisville, &c. Ry. Co. v. Caldwell*, 98 Ind. 245; *McComas v. Haas*, 107 Ind. 512; *Dowie v. Joyner*, 25 S. C. 123; *Dalcour v. McCan*, 37 La. Ann. 7.

(*y*) Both as a general rule of law, and under § 3110 of the Cal. Civil Code, one to

of the note may then write over this indorsement an order to pay the note to him or to his order, if the payee has not already written this. The purchaser thus becomes an indorsee. When the name only is written it is called an indorsement in blank, and the holder may transfer it by delivery, and it may thus pass through many hands, the final holder who demands payment writing over the name indorsed an order to pay to him. Whenever this order is written by an indorser, whether a first or later indorser, it is an indorsement in full, and the indorsee cannot transfer the note except by his indorsement, which again may be in full or in blank. It is now settled that the executor or administrator of a deceased payee may indorse the note of his testator, (*g*) (*x*) but he has no right to *deliver* to the indorsee a note which was indorsed by the deceased, but never delivered by him. (*h*) The same rule holds also in the case of an assignee of an insolvent payee. (*i*)

The indorsement of a blank note binds the indorser to any terms as to amount and time of payment which the party to whom he intrusts the paper inserts. (*j*) (*y*) If the note be originally

(*g*) *Rawlinson v. Stone*, 3 Wils. 1. See *Watkins v. Maule*, 2 Jac. & W. 237, 243; *Shaw, C. J., Rand v. Hubbard*, 4 Met. 252, 258; *Malbon v. Southard*, 36 Me. 147; *Dwight v. Newell*, 15 Ill. 333.

(*h*) *Bromage v. Lloyd*, 1 Exch. 31; *Clark v. Sigourney*, 17 Conn. 511; *Clark v. Boyd*, 2 Hamm. 279.

(*i*) *Pinkerton v. Marshall*, 2 H. Bl. 334; *Thomason v. Frere*, 10 East, 418.

(*j*) *Montague v. Perkins*, 22 E. L. & E. 516; *Russel v. Langstaffe*, Dougl. 514; *Violett v. Patton*, 5 Cranch, 142, 151; *Johnson v. Blasdale* 1 Sm. & M. 1; *Torrey v. Fisk*, 10 Sm. & M. 590; *Smith v. Wyckoff*, 3 Sandf. Ch. 77, 90; *Fullerton v. Sturges*, 4 Ohio St. 529; *Young v. Ward*, 21 Ill. 223.

whom a note is assigned without indorsement, by a separate instrument, is not an indorsee or holder for value, against whom the maker is estopped to set up a failure of consideration. *Hays v. Plummer*, 126 Cal. 107, 58 Pac. 447.

The negotiability of a note, and the question whether one who indorsed a note before delivery is a joint maker, are determined by the law of the State where it was made. *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; *Barger v. Farnham*, 128 Mich. , 90 N. W. 281; *Limerick Nat. Bank v. Howard* (N. H.), 51 Atl. 641. Yet the questions "whether the cause or action is barred by the statutes of limitation; whether a party can maintain an action in his own name or is obliged to use that of another; whether a contract is negotiable," &c., are usually held to affect only the remedy, and to be governed by the law of the forum. *Baxter Nat. Bank v. Talbot*, *supra*. *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 448,

450 n., 25 L. R. A. 178; *McGarry v. Nicklin*, 110 Ala. 559, 17 So. 726, 55 Am. St. Rep. 40, 44 n.

An assignment of a note takes effect as an indorsement only when it purports to transfer the entire note and interest. *Coddington Sav. Bank v. Anderson*, 63 Neb. , 89 N. W. 787.

(*x*) Although the law does not know the estate of a deceased person as a contractor, yet, as one who does not purport to be a party to negotiable paper, is not a party to it, an indorsement "Estate of A., B., Executor" does not make B. a party to the contract. *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067; see *Hadlock v. Brooks*, 178 Mass. 425, 438, 59 N. E. 1009. An executor's indorsement of a note with his name followed by the word "Executor," or by no word at all, or with his name "trustee of the Estate of B.," passes his title to the note as executor. *Ward v. Venner*, 173 Mass. 210, 53 N. E. 395.

(*y*) But the paper must be actually in-

* made payable to "bearer," it is negotiated or transferred * 242 by delivery only, and needs no indorsement, (*k*) any person bearing or presenting the note becoming in that case the party to whom the maker of the note promises to pay it.

If a note, whether indorsed in blank or made payable to bearer, be transferred by delivery, the transferrer is not liable as an indorser, nor as a guarantor, nor is he, in general, liable in any way.¹ (*x*) But if the paper be wholly worthless, as by the forgery

(*k*) *Wilbour v. Turner*, 5 Pick. 526; so, although it be under seal. *Porter v. Dole v. Weeks*, 4 Mass. 451. And this is *McCullum*, 15 Ga. 528.

¹ Such a transferrer impliedly warrants the genuineness of the instrument in every material part, *Bankhead v. Owen*, 60 Ala. 457; *Snyder v. Reno*, 38 Iowa, 329; *Smith v. McNair*, 19 Kan. 330; *Hurst v. Chambers*, 12 Bush, 155; *Worthington v. Cowles*, 112 Mass. 30; *Boyd v. Mexico Southern Bank*, 67 Mo. 537; *Whitney v. Potsdam Bank*, 45 N. Y. 303; *Swanzy v. Parker*, 50 Pa. 441; *Allen v. Clark*, 49 Vt. 390; *Giffert v. West*, 33 Wis. 617, 37 Wis. 115. See also *Allen v. Sharpe*, 37 Ind. 67. *Baxter v. Duren*, 29 Me. 434, *contra*, has been substantially overruled by *Milliken v. Chapman*, 75 Me. 306, 309. And that he gives the transferee a good title to the instrument. *Otis v. Cullum* 92, U. S. 447; *Hecht v. Batcheller*, 147 Mass. 335, 339; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298, and cases above cited. Further, if the holder knows of any defence to the instrument or that the parties to it were insolvent, it is a fraud to transfer it to one who is ignorant thereof, and such a transfer may be avoided or damages recovered. *Brown v. Montgomery*, 20 N. Y. 287; *Littauer v. Goldman*, 72 N. Y. 506; *Mandeville v. Newton*, 119 N. Y. 10; cf. *People's Bank v. Bogart*, 81 N. Y. 101. It is generally held also that the transferrer impliedly warrants the competency of the parties to the instrument and its legal validity. *Lobdell v. Baker*, 3 Metc. 469, 472; *Thrall v. Newell*, 19 Vt. 202; *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 474. See also *Hussey v. Sibley*, 66 Me. 192. But see *Otis v. Cullum*, 92 U. S. 447; *Littauer v. Goldman*, 72 N. Y. 506.

There is much authority to the effect that if the principal party to a bill or note was actually insolvent at the time of the transfer, the transaction may be avoided, though the transferrer was ignorant of the insolvency. *Harris v. Hanover Nat. Bank*, 15 Fed. Rep. 786; *Fogg v. Sawyer*, 9 N. H. 365; *Lightbody v. Ontario Bank*, 11 Wend. 9; 13 Wend. 101; *Roberts v. Fisher*, 43 N. Y. 159 (see also *Thomas v. Board of Supervisors*, 115 N. Y. 47, 54); *Wainwright v. Webster*, 11 Vt. 576; *Townsend v. Bank of Racine*, 7 Wis. 185. But all these cases except *Harris v. Hanover Nat. Bank* and *Roberts v. Fisher*, related to bank notes, which may properly be distinguished. They are used as a substitute for money, and a warranty that they are redeemable at the time of transfer may well be implied. See Vol. II. p. * 622. As to other negotiable paper, the better view is that the risk of past as well as future insolvency of the parties to the instrument rests with the transferee. *Milliken v. Chapman*, 75 Me. 306; *Hecht v. Batcheller*, 147 Mass. 335; *Bicknall v. Waterman*, 5 R. I. 43; *Barton v. Trent*, 3 Head, 167.

If the transferrer expressly refuses to warrant, no warranty is implied. *Bell v. Dagg*, 60 N. Y. 528. So, if the purchaser agrees "to take his chances." *Beal v. Roberts*, 113 Mass. 525. — W.

trusted and delivered, and not purloined. *Baxendale v. Bennett*, 3 Q. B. D. 525, 4 English Ruling Cas. 637; *Salley v. Terrell*, 95 Me. 553, 50 Atl. 896, 85 Am. St. Rep. 433.

(*x*) As an indorser always warrants the existence and legality of the note, he is estopped to deny its validity, irrespective of the question whether it can be enforced by the payee against the maker. *First Nat.*

Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289; *Strauss v. Hensley*, 7 App. D. C. 289, 36 L. R. A. 92; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909. Such warranty applies to the existence and capacity of a corporation when it is the maker of a note. *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103. An indorsement without recourse warrants the validity of the

of the principal names, or for any similar reasons, the transferrer may be held to repay the money paid him for it, on the ground of failure of consideration. (*l*)

The holder of negotiable paper, indorsed in blank or made payable to bearer, is presumed to be the owner for consideration. If circumstances cast suspicion on his ownership, as if it came to him from or through one who had stolen it, then he must prove that he gave value for it; and on such proof will be entitled to it, unless it is shown that he was cognizant of the want of title, or had such notice or means of knowledge as made his negligence equivalent to fraud. (*m*) (*x*) If one signs a note on condition that a certain other person sign it also, and that other person does not

(*l*) *Gurney v. Womersley*, 4 E. & B. 133.

(*m*) *Miller v. Race*, 1 Burr. 452; *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, Dougl. 633; *Collins v. Martin*, 1 B. & P. 648; *Lawson v. Weston*, 4 Esp. 56; *King v. Milsom*, 2 Camp. 5; *Solomons v. Bank of England*, 13 East, 135, n.; *Paterson v. Hardacre*, 4 Taunt. 114; *Hatch v. Searles*, 31 E. L. & E. 219; *Judson v. Holmes*, 9 La. An. 20; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, 3 Johns. Cas. 259; *Thurston v. McKown*, 6 Mass. 428; *Munroe v. Cooper*, 5 Pick. 412; *Wheeler v. Guild*, 20 Pick. 545; *Aldrich v. Warren*, 16 Me. 465. It is now well settled, overruling the earlier cases, that if the defendant proves a note fraudulent or illegal in its inception, this

throws the burden on the plaintiff of proving that he paid value. *Smith v. Braine*, 3 E. L. & E. 379; *Bailey v. Bidwell*, 13 M. & W. 73; *Tatam v. Haslar*, 23 Q. B. D. 345; *Case v. Mechanics Banking Association*, 4 Comst. 166; *Canajoharie Bank v. Diefendorf*, 123 N. Y. 191. It is otherwise if the defendant merely show a want of consideration when the note was given. *Middleton Bank v. Jerome*, 18 Conn. 443; *Ellicott v. Martin*, 6 Md. 509; *Thompson v. Shepherd*, 12 Met. 311. Where a bill or note is indorsed in blank, and is transferred by the indorsee by delivery only, without any fresh indorsement, the transferee takes, as against the acceptor, any title which the intermediate indorsee possessed. *Fairclough v. Pavia*, 25 E. L. & E. 533.

note. *Drennan v. Dunn*, 124 Ill. 175, 7 Am. St. Rep. 354, 365 n. See *Bigelow on Bills and Notes* (2d ed.), 16, 87 n.

The law as to the delivery of deeds in escrow is now generally held applicable to promissory notes, and properly so. *Daggett v. Simonds*, 173 Mass. 340, 348, 53 N. E. 907; *Graff v. Logue*, 61 Iowa, 704.

(*x*) As to the presumption of consideration for a promissory note, and for indorsements like the above, see *Fulton Bank v. Gosline*, 168 Mass. 86, 46 N. E. 406; *Holden v. Phoenix Ratten Co.*, 168 Mass. 570, 47 N. E. 241; *Poole v. Nye*, 170 Mass. 308, 49 N. E. 623; *Shattuck v. Eldredge*, 173 Mass. 165, 53 N. E. 377; 37 Am. L. Reg. n. s. 337. The title to commercial paper, purchased in good faith and before its maturity, is not affected by suspicious circumstances that might put the purchaser on inquiry; but subsequently acquired rights in mortgage notes on real estate, though bought as commercial paper, will not, when inequitable, supplant rights previously ac-

quired. *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29; *Sheffield v. London Joint Stock Bank*, 13 A. C. 333, 3 English Ruling Cas. 660, 678 n.

The provision of the statute of New York (3 Heydecker's Gen. Laws (2d ed.), p. 4087, § 330), of Tennessee, and other States, requiring negotiable instruments to contain the words "given for a patent right," when that is the consideration, and making such instruments open to defences, does not impair the title or rights of a holder for value before maturity, and without notice, when such words are omitted. *Herdic v. Roessler*, 109 N. Y. 127; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 4 N. Y. S. 262; *Paddock v. Coates*, 44 N. Y. S. 334; *First Nat. Bank v. Stockwell*, 92 Tenn. 252, 20 L. R. A. 605.

An English patent under the Great Seal is a valid consideration for a note, though invalid for want of novelty. *Chemical Electric Light Co. v. Howard*, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168.

sign it, it is said that the signer is not liable to an indorsee; but this must not be extended to an innocent indorsee for value. (*n*)

* A distinction of this kind has been made. If an * 243 indorser shows that the paper was issued for an illegal consideration, it may be no defence against an innocent holder, who must, however, prove value paid; but if he only shows that the consideration was void, the presumption of value is in favor of the indorsee, and the defendant must prove that the plaintiff holds it not for value. (*o*) A note given in renewal of a note made for an illegal consideration, is open to the same defence as the original note. (*oo*)

All the payees must join in the indorsement, (*p*) and strictly speaking, only a payee, or one made payee by a subsequent indorsement, can become himself an indorser. It is not enough that a name is written on the back of a note or bill, for although this is, literally speaking, an indorsement, whether it be so or not by law and the usage of merchants must depend upon the character of the signer. The effect of a simple signature, without any other words, on the back of a note, by one not the payee has been much considered and variously decided. From the authorities which we deem entitled to most respect upon this question, and from general principles, we come to these conclusions: If any one not the payee of a negotiable note, or in the case of a note not negotiable, if any party, writes his name on the back of the note at or sufficiently near the time it is made, his signature binds him in the same way as if it was on the face of the note and below that of the maker, that is to say, he is held as a joint maker, or as a joint and several maker according to the form of the note. (*q*) If the signature be at a distinctly later

(*n*) *Awde v. Dixon*, 5 E. L. & E. 512; s. c. 6 Exch. 869; *Evans v. Bremmer*, 35 E. L. & E. 397; *Prentiss v. Graves*, 33 Barb. 621.

(*o*) *Fitch v. Jones*, 5 E. & B. 238. See, for effect of illegality of consideration, *Brown v. Tarkington*, 3 Wallace, 377; and *Clubb v. Hutson*, 18 C. B. (N. S.) 414.

(*oo*) *Nat. Bank v. Lewis*, 75 N. Y. 524; *Scudder v. Thomas*, 35 Ga. 364; *Holden v. Cosgrove*, 12 Gray, 216; *Sawyer v. Wiswell*, 9 Allen, 39; *Hunt v. Rumsey*, 83 Mich. 136; *Union Nat. Bank v. Fraser*, 63 Miss. 231; *Schutt v. Evans*, 109 Pa. 627; *Mason v. Jordan*, 13 R. I. 193; *Wegner v. Biering*, 65 Tex. 511; *Bank v. Lockwood*, 13 W. Va. 392.

(*p*) *Dwight v. Pease*, 3 McLean, 94. But see, for a disregard of this rule in reference to a payee whose name was left in the note by mistake, *Pease v. Dwight*, 6 How. 190.

(*q*) *Campbell v. Butler*, 14 Johns. 349; *Dean v. Hall*, 17 Wend. 214; *Sampson v. Thornton*, 3 Met. 275; *Union Bank v. Willis*, 8 id. 504; *Austin v. Boyd*, 24 Pick. 64; *Bryant v. Eastman*, 7 Cush. 111; *Adams v. Hardy*, 32 Me. 339; *Martin v. Boyd*, 11 N. H. 385; *Flint v. Day*, 9 Vt. 345; *Bright v. Carpenter*, 9 Hamm. 139; *Carroll v. Weld*, 13 Ill. 682. See also *Ellis v. Brown*, 6 Barb. 282; *Malbon v. Southard*, 36 Me. 147; *Partridge v. Colby*, 19 Barb. 258; *Schneider v. Schiffman*, 20 Mo. 571; *Greenough v. Smead*,

* 244 period *after the making and delivery of the note, the signer, as to the payee, is not a maker but a guarantor. (r) His promise is void if without consideration, but the consideration may be the original consideration for the note, if the note was received at his request and upon his promise to guarantee the same, or perhaps, if the note was made at his request alone, without the promise, and more certainly if the note was given for his benefit; or the consideration for the guaranty may be a new one moving in some way from the holder. In the last case, if the note is not negotiable, the party indorsing can be held only as maker or as guarantor, but if the note be negotiable, the question might arise whether, although the party signing is only a guarantor as to the payee or party receiving the note from him, he may not be liable to subsequent parties as indorser. For if he be only a guarantor he may make the defence of a want of consideration against any holder, but if an indorser, only against his immediate indorsee. This question we should answer by saying, that if the payee writes his name over the name of the other, thus making him to all appearances a second indorser, he might be held as such by any subsequent ignorant holder for value, because he has enabled the payee to give his signature this appearance and therefore this effect. And we should go further and consider that he would be liable to any holder even with full notice, because he wrote his name for the purpose of giving the payee his credit, and therefore impliedly authorized the payee to give his suretyship any character perfectly compatible with the manner and place of his signature, so that unless there was a special agreement between the parties that this should not be done, which was also known to the holder, the payee might transfer the note, making the signer a second indorser, and liable as such. (s) It has been held in England, that one sued as in-

3 Ohio St. 415; *Seabury v. Hungerford*, 2 Hill (N. Y.), 84; *Cottrell v. Conklin*, 4 Duer, 45; *Brown v. Curtiss*, 2 Comst. 225; *Sylvester v. Downer*, 20 Vt. 355; *McGuire v. Bosworth*, 1 La. An. 248; *Penny v. Parham*, 1 La. An. 274; *Collins v. Everett*, 4 Ga. 266; *Robinson v. Abell*, 17 Ohio, 36; *Webster v. Cobb*, 17 Ill. 459; *Goode v. Jones*, 9 Mo. 876; *Lewis v. Harvey*, 18 Mo. 74; *Wilson v. Foot*, 11 Met. 285; *Lowell v. Gage*, 38 Me. 35; *Carpenter v. Oaks*, 10 Rich. L. 17; *Higgins v. Watson*, 1 Mann. (Mich.) 428; *Cecil v. Mix*, 6 Port. (Ind.) 478; *Cook v. Southwick*, 9 Tex. 615; *Branch Bank v.*

James, 9 Ala. 949; *Essex Company v. Edmonds*, 12 Gray, 273; *Gorman v. Ketchum*, 33 Wis. 427. For cases in which such signer is held only as guarantor or indorser, see *Blatchford v. Milliken*, 35 Ill. 434; *Van Doren v. Tjader*, 1 Nev. 380; *Price v. Lavender*, 38 Ala. 389.

(r) *Id.*; *Tenney v. Prince*, 4 Pick. 385; *Sampson v. Thornton*, 3 Met. 275; *Hammond v. Chamberlain*, 26 Vt. 406.

(s) *Crozer v. Chambers*, 1 Spencer, 256; *Riley v. Gerrish*, 9 Cush. 106; *Moies v. Bird*, 11 Mass. 440. See *post*, Sect. III. p. * 250.

dorser cannot plead in defence that the note was not indorsed to him. (t) ¹

(t) *McGregor v. Rhodes*, 6 E. & B. 266.

¹ Indorsement of negotiable paper naturally implies both a transfer by the indorser and an obligation assumed by him. One who is not a holder of the legal title of a bill or note cannot indorse it in this complete sense; but though such a person cannot by writing his name on the back of the paper transfer title, there is no reason why he should not be held to have incurred thereby the same obligation as a true indorser to one who takes the instrument subsequently. Nor is there any reason why the payee should not have the benefit of this obligation if the indorsement was made before delivery. It is conceived that this^{*} is the understanding of business men, — is, in short, the custom of merchants. The courts have not, however, generally given effect to this understanding, but have adopted various discordant views and multiplied fine distinctions in regard to them. That such an anomalous indorsement made before delivery to the payee, gives the latter some right against the former, is almost universally held.

In the following cases it was held that the anomalous indorser would be presumed to be a co-maker. *Good v. Martin*, 95 U. S. 90; *Heise v. Bumpass*, 40 Ark. 545; *Kiskaden v. Allen*, 7 Col. 206; *Gilpin v. Marley*, 4 Houst. 284; *Melton v. Brown*, 25 Fla. 461; *Stevens v. Parsons*, 80 Me. 351; *Schroeder v. Turner*, 68 Md. 506; *Dubois v. Mason*, 127 Mass. 37; *Cook v. Brown*, 62 Mich. 473; *Sweet v. Woodin*, 72 Mich. 393; *Robinson v. Bartlett*, 11 Minn. 410 (cf. *Buck v. Hutchins*, 45 Minn. 270); *Polkinghorne v. Hendricks*, 61 Miss. 366; *Faulkner v. Faulkner*, 73 Mo. 327; *McMullen v. Rafferty*, 89 N. Y. 456 (non-negotiable note); *Baker v. Robinson*, 63 N. C. 191; (see also *Southerland v. Fremont*, 107 N. C. 565; *Hoffman v. Moore*, 82 N. C. 313); *Seymour v. Mickey*, 15 Ohio St. 515; *Barr v. Mitchell*, 7 Ore. 346 (non-negotiable note); *Carpenter v. McLaughlin*, 12 R. I. 270; *McCreary v. Bird*, 12 Rich. 554; *Carr's Ex. v. Rowland*, 14 Tex. 275; *McGee v. Connor*, 1 Utah, 92; *National Bank of Bellows Falls v. Dorset Marble Co.*, 61 Vt. 106; *Com. v. Powell*, 11 Gratt. 822, 828; *Burton v. Hansford*, 10 W. Va. 470.

In other jurisdictions the anomalous indorser is presumptively a surety to the maker. *Eppens v. Forbes*, 82 Ga. 748; *O'Leary v. Martin*, 21 La. An. 389.

In other jurisdictions the anomalous indorser is presumed to have incurred the liability of guarantor. *DeWitt County Nat. Bank v. Nixon*, 125 Ill. 615; *Witters v. Berry*, 25 Kan. 373; *Talley v. Burtis*, 45 Kan. 147; *Arnold v. Bryant*, 8 Bush, 668 (statutory); *Van Doren v. Tjader*, 1 Nev. 380; *Harding v. Waters*, 6 Lea, 324.

In Connecticut he is presumed to guarantee the collectibility at maturity by the use of due diligence (including legal process unless the maker is insolvent). *Rhodes v. Seymour*, 36 Conn. 1.

In many States the courts, refusing to make such arbitrary presumptions as are enumerated above, and holding that only the payee of a bill or note can be the first indorser, have decided that the anomalous indorser incurs the liability of second indorser. *Collins v. Everett*, 4 Ga. 266; *Knopf v. Morel*, 111 Ind. 570 (see also *DePauw v. Bank of Salem*, 126 Ind. 553); *Needhams v. Page*, 3 B. Mon. 465; *Thomas v. Jennings*, 13 Miss. 627; *Jennings v. Thomas*, 21 Miss. 617; *Hayden v. Weldon*, 43 N. J. L. 128 (cf. *Building Society v. Leeds*, 50 N. J. L. 399); *Phelps v. Vischer*, 50 N. Y. 69; *Deering v. Creighton*, 19 Ore. 118; *Central Nat. Bank v. Dreydoppel*, 134 Pa. 499; *King v. Ritchie*, 18 Wis. 554; *Blakeslee v. Hewett*, 76 Wis. 341.

In New York, and perhaps in Oregon, and Wisconsin, however, if the indorsement was intended for his security, the payee may write an indorsement without recourse to the anomalous indorser over the indorsement of the latter, and may then in the character of second indorsee maintain an action against the anomalous indorser. See cases above cited.

In Alabama and California, the liability to the payee is that of an indorser. *Price v. Lavender*, 38 Ala. 389; *Hooks v. Anderson*, 58 Ala. 238; *Fessenden v. Summers*, 62 Cal. 484.

There is also the utmost confusion in the law as to how far parol evidence is admissible to show what liability was intended by the parties in a particular case. Generally such evidence is admitted, and in this way the injustice of arbitrary presumptions is often prevented. See cases above cited.

In England, it seems, the anomalous indorser is never liable to the payee as such.

* 245 It is held in many States that one who indorses * a note in blank at any time before it is indorsed by the payee may be held as an original promisor. (u) And it has been held that this is a conclusive presumption of law, and cannot be rebutted by evidence showing a different agreement. (v) In Louisiana, it is held that a person who is not a party, putting his name to a note, is presumed to be a surety. (vv)

Whether two persons who indorse a bill or note at the same time are joint indorsers, or first and second indorsers, is open to evidence as between the two; and one who indorses at the request of another and for the same purpose is not a joint indorser with him. (vw) It is indeed a general rule, that as between drawer acceptor, and indorsers, their relation and responsibility may be explained by evidence. (vx)

Notes and bills are usually considered together; the law respecting them being in most respects the same. The maker of a note being liable, generally, in the same way as the acceptor of a bill. And if an instrument be so far ambiguous, that it may be doubted whether it is a bill or a note, it seems that the holder may treat it as either, at his election. (w)

Among the points of difference, it has sometimes been supposed that a bill drawn on the credit of goods operates as a bill of sale of the goods, and passes the property in them to one who discounts or buys the bill. This is not quite so. A bill drawn by a consignor or a consignee of goods, may stand on the credit of those goods, and those goods may be given as security for the bill to one who discounts it; but it seems settled that the mere drawing of the bill, and selling it or offering it for discount, has not the

(u) *Irish v. Cutter*, 31 Me. 536; *Riley v. Gerrish*, 9 Cush. 104; *Schneider v. Schiffman*, 20 Mo. 571; *Orrick v. Colston*, 7 Gratt. 189; *Carroll v. Weld*, 13 Ill. 682; *Riggs v. Waldo*, 2 Cal. 485. See *ante*, p. * 243, note (q).

(v) *Essex Company v. Edmonds*, 12 Gray, 273.

(vv) *Collins v. Trist*, 20 La. An. 348.

(vw) *Shaw v. Knox*, 98 Mass. 214.

(vx) *Lewis v. Williams*, 4 Bush, 678.

(w) *Lloyd v. Oliver*, 12 E. L. & E. 424; s. c. 18 Q. B. 471.

LeCaen v. Kirkman, 6 Jurist, N. s. 17; *Gwinnell v. Herbert*, 5 A. & E. 436; *Steele v. McKinlay*, 5 App. Cas. 754; 2 Ames B. & N. 839.

Attempts have been made to correct the law by statute. In Massachusetts it is enacted in Pub. Stat. c. 77, § 15, that "Every person becoming a party to a promissory note payable on time by a signature in blank on the back thereof shall be entitled to notice of non-payment the same as an indorser." Under this statute an anomalous indorser of a demand note or of any bill of exchange and, except as regards notice, an anomalous indorser of notes payable on time, it may be inferred, is still to be treated as a co-maker. See *Hitchings v. Edmonds*, 132 Mass. 338; *Lanahan v. Porter*, 148 Mass. 596. A happier piece of legislation, which if generally copied would, it is believed, harmonise the law with the custom of merchants, is found in the Civil Code of California. § 3117, "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." See also *post*, p. * 250. — W.

effect of transferring the goods. (x) But where the bill of lading was attached to the bill of exchange, and the bill discounted by a bank on the credit of the bill of lading, and the consignee on whom the bill was drawn, refused acceptance, it was held that the bank took the goods by discounting the bill. (xa)

SECTION II.

OF THE ESSENTIALS OF NEGOTIABLE NOTES AND BILLS.

Promissory notes were made negotiable in England by the statute of III. & IV. Anne; but it has been doubted there whether a note, payable to the maker's own order, was a negotiable note. (y)¹ (xx) In this country it is so undoubtedly.

In New York * it is provided by statute, that a promissory * 246 note "made payable to the order of the maker thereof, or to the order of a fictitious * person, shall, if negotiated by * 247 the maker, have the same effect, and be of the same validity, as against the maker, and all persons having knowledge of the facts, as if payable to bearer." (z)

In some of our States there are statutory provisions permitting negotiable paper to be under seal.² (yy)

(x) *Marine & F. Ins. Bank v. Jauncey*, 3 Sandf. 257; *Wheeler v. Stone*, 4 Gill, 38; *Hopkins v. Beebe*, 26 Penn. St. 85; *Sands v. Matthews*, 27 Ala. 399.

(xa) *The Davenport Nat. Bank v. Hommeyer*, 42 Mo. 145.

(y) Written securities, in the form of promissory notes, made payable to the maker or his order, and by him indorsed, are irregular, though common, instruments, which have grown into use among merchants, since the statute of Anne. When they first came into use, and what occa-

sion gave rise to them, it is impossible to say. See *Hooper v. Williams*, 2 Exch. 21; *Brown v. DeWinton*, 6 C. B. 342; *Flight v. Maclean*, 16 M. & W. 51; *Wood v. Mytton*, 10 Q. B. 805; *Gay v. Lander*, 6 C. B. 336; *Absolon v. Marks*, 11 Q. B. 19. See also *Edie v. East India Co.*, 2 Burr. 1216; *Woods v. Ridley*, 11 Humph. 194; *Wardens, &c. of St. James Church v. Moore*, 1 Cart. (Ind.) 289.

(z) 1 N. Y. R. S. 768, § 5. See *Central Bank of Brooklyn v. Lang*, 1 Bosw. (N. Y.) 202.

¹ See *Goodwin v. Roberts*, L. R. 10 Ex. 337, for a history of negotiable securities, in the judgment of *Cockburn*, C. J. — K.

² Colorado, Dakota, Florida, Georgia, Illinois, Kansas, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee. In general, however, a bill or note under seal is not negotiable. (z) See *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374. *Muse v. Dantzer*, 85 Ala. 359; *Conine v. Junction, &c. R. Co.*, 3 Houst. 288; *Rawson*

(xx) See *infra*, p. * 250, n. (x). A bill made payable to "——— order" is payable to the drawer's order, and is a valid bill of exchange under the Bills of Exchange Act, 1882, § 2. *Chamberlain v. Young*, [1893] 2 Q. B. 206. The maker of a note to his own order does not, upon

indorsing it, become legally an indorser, or contract other liability than that of maker. *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 35 L. R. A. 786, 60 Am. St. Rep. 719.

(yy) See *Buckingham v. Orr*, 6 Col. 587; *McLaughlin v. Braddy*, 63 S. C. 443, 41

In Virginia every promissory note or check payable at a particular bank (*x*) or banking-office, and every inland bill payable in the State, is negotiable by statute. In Kentucky the words * 248 * "or order" are not necessary. (*a*) In Ohio a power of attorney to confess judgment may be inserted in a negotiable note. (*b*)¹(*y*) And a certificate of deposit in a bank has been

(*a*) *Maxwell v. Goodrum*, 10 B. Mon. 282, 285; *Cross v. Moffatt*, 11 Col. 210. 286. But see *contra*, *Richards v. Barlow*, 140

(*b*) *Osborn v. Hawley*, 19 Ohio, 130; Mass. 218; *Overton v. Tyler*, 3 Pa. St. Clement *v. Hull*, 35 Ohio St. 141. See 346; *Sweeney v. Thickstun*, 77 Pa. 134. also *Nat. Bank v. Gary*, 18 S. C. N. S.

v. Davidson, 49 Mich. 607; *Osborne v. Hubbard*, 20 Ore. 318; *Clegg v. Le Messurier*, 15 Gratt. 108; *Laidley's Adm., v. Bright's Adm.*, 17 W. Va. 779. But it was held otherwise in regard to the notes of a corporation in *Stevens v. Phila. Ball Club*, 142 Pa. St. 52. — W.

¹ A stipulation for the payment of expenses of collection and attorney's fees by the maker in case the note is not paid at maturity is also frequently added to notes. It is held that such a stipulation is valid and the note negotiable in *Montgomery v. Crosthwait*, 90 Ala. 553; *Nickerson v. Sheldon*, 33 Ill. 372; *Price v. Jones*, 105 Ind. 543; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433; *Dietrich v. Bayhi*, 23 La. An. 767; *Meacham v. Pinson*, 60 Miss. 226; *Hamilton, &c. Co. v. Sinker*, 74 Tex. 52.

In other jurisdictions it is held that the stipulation is valid, but that it makes the note uncertain in amount and thereby destroys its negotiability. *Adams v. Seaman*, 82 Cal. 637; *Garretson v. Purdy*, 3 Dak. 178; *Maryland, &c. Co. v. Newman*, 60 Md. 584; *Bowie v. Hall*, 69 Md. 434; *Jones v. Radatz*, 27 Minn. 240; *Johnston Co. v. Clark*, 30 Minn. 308; *McCoy v. Green*, 83 Mo. 626; *First Nat. Bank v. Bynum*, 84 N. C. 24; *Johnson v. Spear*, 92 Pa. 227; *Carroll County Savings Bank v. Strother*, 28 S. C. 504; *Peterson v. Stoughton Bank*, 78 Wis. 113. And see *Riker v. Sprague Co.*, 14 R. I. 402, 405.

A third view, taken by some courts, is that the stipulation is penal and being, therefore, void does not destroy the negotiability of the note. *Boozey v. Anderson*, 42 Ark. 167; *Gaar v. Louisville, &c. Co.*, 11 Bush. 180; *Witherspoon v. Musselman*, 14 Bush. 214; *Dow v. Updike*, 11 Neb. 95. (See *Roberts v. Snow*, 27 Neb. 425.) *Kimball v. Moir*, 15 Ore. 427.

In Michigan, though the stipulation is void, *Wright v. Traver*, 73 Mich. 493, the negotiability of the note is destroyed. *Altman v. Fowler*, 70 Mich. 57; *Second Bank v. Wheeler*, 75 Mich. 546.

A statement in a note that it was given in payment for a specified chattel, the title to which is to remain in the payee until the note is paid, is held not to destroy negotiability in *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268; *Howard v. Simpkins*, 69 Ga. 773; *Newton Co. v. Diers*, 10 Neb. 284; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133. But *contra* are *South Bend Works v. Paddock*, 37 Kan. 510; *Sloan v. McCarty*, 134 Mass. 245; *Bannister v. Rouss*, 44 Mich. 428. See also *Baldwin v. Crow*, 86 Ky. 679; *Monaghan v. Longfellow*, 82 Me. 419; *Chemical Co. v. Johnson*, 98 N. C. 123.

A memorandum on a note stating that it was given as collateral security has been held to destroy negotiability. *Costelo v. Crowell*, 127 Mass. 293; *American Nat. Bank v. Sprague*, 14 R. I. 410. See also *Gibson v. Hawkins*, 69 Ga. 354. — W.

S. E. 523. The addition of a corporate seal to the corporation's negotiable paper does not affect its negotiability. *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605 and note.

(*z*) In *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582, it was held that a note made payable

and negotiable at a particular bank, is negotiable elsewhere.

(*u*) In Iowa, as a note which authorizes any attorney to appear and confess judgment, is held illegal, such a provision does not make uncertain the time of payment. *Tolman v. Janson*, 106 Iowa, 455, 76 N. W. 732; see *Sclauch v. O'Hare*, 22 Penn. Co. Ct. 384.

held negotiable by our highest authority. (c) (x) The word "negotiable," however, has been held not to make a note negotiable, though it may show an intention that it should be so. (d)

It is sufficient in law if the maker's name appears in the note; as, "I, A., promise," etc. But signature at the bottom is so usual, that the want of it would taint the note with suspicion. (e) Signature of a note, as of other instruments, is often made by a mark, which is properly attested. But it is held that a signature by a mark not attested is valid, and evidence may establish it as a signature. (ee) ¹

As the negotiable bill or note is intended to represent and take the place of money, it must be payable in money, and not in goods; (f) and although it has been held in this country that it

(c) *Miller v. Austen*, 13 How. 218. See also *Poorman v. Mills*, 35 Cal. 118. And for many other cases see 2 Daniel, *Negot. Inst.* § 1703.

(d) *Carruth v. Walker*, 8 Cal. 252.

(e) *Taylor v. Dobbins*, 1 Stra. 399; *Elliot v. Cooper*, 2 Ld. Raym. 1376.

(ee) *Willoughby v. Moulton*, 47 N. H. 205.

(f) *Jerome v. Whitney*, 7 Johns. 321; *Thomas v. Roosa*, 7 Johns. 461; *Peay v. Pickett*, 1 Nott & McC. 254; *Rhodes v. Lindley*, 3 Hamm. 51; *Atkinson v. Manks*, 1 Cowen, 691, 707; *Clark v. King*, 2 Mass. 524; *Bunker v. Athearn*, 35 Me. 364; *Wingo v. McDowell*, 8 Rich. L. 446. So the bill or note, in order to be negotiable, must contain a promise for the payment of money *only*, and not for the payment of money and the performance of some other act. *Austin v. Burns*, 16 Barb. 643. Therefore, where a note contained a promise to deliver up horses and a wharf, and also to pay money at a particular day, it was held not to be within

the statute. *Martin v. Chauntry*, 2 Stra. 1271. A note, however, need not contain the words, "*promise to pay*," in order to come within the statute; it is sufficient if it contain words which, upon a reasonable construction, import a *promise to pay*. Therefore, where a note contained a promise by the maker to be *accountable* to A or order for £100, it was held to be within the statute. *Morris v. Lee*, 2 Ld. Raym. 1396, 8 Mod. 362, 1 Stra. 629. And so where the note set forth in the declaration was, "I acknowledge myself to be indebted to A in £—, *to be paid on demand for value received*;" on demurrer to the declaration, the court, after solemn argument, held that this was a good note within the statute, the words "*to be paid*," amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent. *Casborne v. Dutton*, Selw. N. P. 395. See also *Hyne v. Dewdney*, 11 E. L. & E. 400 n.; 2 Foster (N. H.), 183.

¹ The signature to a note may be made with a printed *fac-simile*. *Pennington v. Baehr*, 48 Cal. 565. In *Brook v. Hook*, L. R. 6 Ex. 89, it was declared, by a divided court, that a forged signature cannot be ratified. To the same effect are *Henry v. Heeb*, 114 Ind. 275; *Smith v. Tramel*, 68 Iowa, 488; *Wilson v. Hayes*, 40 Minn. 531; *Workman v. Wright*, 33 Ohio St. 405; *Shisler v. Vandike*, 92 Pa. 447. *Contra* are *Wellington v. Jackson*, 121 Mass. 157; *Hefner v. Vandolah*, 62 Ill. 483. One inducing another, by admitting his signature, to take a bill of exchange, cannot show it to be a forgery. *Continental Bank v. Commonwealth Bank*, 50 N. Y. 575; *Henry v. Heeb and Workman v. Wright*, above cited. — W.

(x) See *Mereness v. First Nat. Bank* (Iowa), 51 L. R. A. 410; *First Nat. Bank v. Security Nat. Bank* (Neb.), 15 L. R. A. 386; *Kirkwood v. First Nat. Bank*, 40 Neb. 482, 58 N. W. 1016, 24 L. R. A. 445, 42 Am. St. Rep. 683; *Towle v. Starz*, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463; *Bank of Saginaw v. Title &*

Trust Co., 105 Fed. 491; *Auten v. Crahan*, 81 Ill. App. 502; 3 Kent Com. (14th ed.), 89, n. (y). A certificate of deposit, or a note, made payable "in current funds," is also negotiable. *Hatch v. First Nat. Bank*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.

might be made payable in bank-bills which were at the time the note was made universally current as cash, (g) the weight of authority and reason is against this, and in favor of the English rule which requires them to be payable in money. (h)¹(x)

(g) *Keith v. Jones*, 9 Johns. 120; *Judah v. Harris*, 19 Johns. 144; *Swetland v. Creigh*, 15 Ohio, 118; *Williams v. Sims*, 22 Ala. 512; *Barnes v. Gorman*, 9 Rich. L. 297; *Butler v. Paine*, 8 Minn. 324. In Iowa, a note payable in articles of personal property is negotiable by statute. See *Riggs v. Price*, 3 Greene (Iowa), 334.

(h) *McCormick v. Trotter*, 10 S. & R. 94; *Gray v. Donahoe*, 4 Watts, 400; *Hasbrook v. Palmer*, 2 McLean, 10; *Fry v. Rousseau*, 3 McLean, 106; *Smith v. Philadelphia Bank*, 14 Penn. St. 525; *Lowe v.*

Bliss, 34 Ill. 168; 3 Kent, Com. 75; *Daniel, Negot. Inst.*, § 56. But an instrument promising to pay a sum of money, to one or order, with interest, as per interest warrants attached, or upon its surrender before due, to issue stock in exchange therefor, has been held to be a negotiable note. *Hodges v. Shuler*, 22 N. Y. (8 Smith) 114. See also *London S. F. Society v. Hagerstown Savings Bank*, 36 Penn. St. 489, where a certificate of deposit, payable in currency, was held not to be negotiable.

¹ A bill of exchange drawn in Canada and payable in New York in "gold dollars," is negotiable. *Chrysler v. Renois*, 43 N. Y. 209. And in *Black v. Ward*, 27 Mich. 191, it was held that a note made and indorsed in Michigan and payable in Canada, "in Canada currency," was negotiable. In Iowa and Missouri, by statute, promises to pay in goods may be negotiable. *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104; *Spears v. Bond*, 79 Mo. 467. — W.

(x) See *Powers v. Manning*, 154 Mass. 370, 28 N. E. 290; *Moore v. Edwards*, 167 Mass. 74, 44 N. E. 1070. There must also be an express promise to pay money on the face of the instrument, a promise implied by law not being sufficient; and hence an I. O. U. is a due bill only. *Gay v. Rooke*, 151 Mass. 115, 23 N. E. 835, 7 L. R. A. 392. But in Illinois (Rev. Stats. c. 98, § 3), Indiana (Rev. Stats. 1881, § 5501), Iowa (Code 1873, § 2085), Colorado (Gen. Stats. 1883, c. 9, § 3), and Mississippi (Rev. Code 1880, §§ 1123, 1124), all written acknowledgments of indebtedness are by statute included among negotiable instruments. See *Hickok v. Bunting*, 73 N. Y. S. 967.

A recital in a note of collateral security deposited to secure it, or in the margin that it is secured by a mortgage of real estate, does not affect its negotiability. *Branning v. Markham*, 12 Allen (Mass.), 454; *Towne v. Rice*, 122 Mass. 67; *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 28 N. E. 281.

A provision for current exchange at another place than that named for payment, does not impair the negotiability of the note. *Clark v. Skeen*, 61 Kansas, 526, 60 Pac. 327, 78 Am. St. Rep. 337; *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968, 21 L. R. A. 178; *Flagg v. School District*, 4 N. Dak. 30, 58 N. W. 499, 25 L. R. A. 363; see 35 Am. L. Reg. N. s. 592, 595, 597, 735. It has, however, often been held that the words

"with exchange" destroy the negotiability of a draft or note. See *Culbertson v. Nelson*, 93 Iowa, 187, 27 L. R. A. 223 and note.

A provision for a contingent attorney's fee, by the apparent weight of authority, makes a note non-negotiable. See *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582; *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 161; *De Jarnatt v. Marquez*, 127 Cal. 558, 78 Am. St. Rep. 90; *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 308, 37 L. R. A. 86; *Salisbury v. Stewart*, 15 Utah, 308, 49 Pac. 777. But a stipulation in a note binding the maker to pay unascertained assessments, taxes, insurance, and waste makes it non-negotiable. *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779.

A note reading "Six months after date, if elected county commissioner, I promise to pay," is not negotiable. *Specht v. Beindorf*, 56 Neb. 553, 76 N. W. 1059, 42 L. R. A. 429. If made payable "on or before" a named date, it is negotiable. *Gill v. First Nat. Bank* (Tex. Cir. App.), 47 S. W. 751; *First Nat. Bank v. Skeen*, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; *Chicago Trust & Sav. Bank v. Chicago Title & Trust Co.*, 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138. And so is a note made "payable within one year after date." *Leader v. Plante*, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415.

The * payment must not rest upon any contingency or * 249 uncertain event. (i) Hence a draft on a public officer, as such, is not negotiable, because it is presumably drawn against a contingent public fund. (j) But if the event must happen, an uncertainty as to the time of its happening does not prevent the bill or note from being negotiable. (k) ¹ (x) And if the bill direct

(i) *Alexander v. Thomas*, 2 E. L. & E. 286; *Storm v. Stirling*, 28 E. L. & E. 108; *Austin v. Burns*, 16 Barb. 643; *Dawkes v. Lord Lorane*, 3 Wils. 207; *Beardesley v. Baldwin*, 2 Stra. 1151; *Roberts v. Peake*, 1 Burr. 323; *Cook v. Satterlee*, 6 Cowen, 108; *Van Vacter v. Flack*, 1 Sm. & M. 393; *Palmer v. Pratt*, 9 J. B. Moore, 358; *Dodge v. Emerson*, 34 Me. 96.

(j) *Reeside v. Knox*, 2 Whart. 233; *Dyer v. Covington*, 19 Penn. St. 200; *Raigauel v. Ayliff*, 16 Ark. 594; *West v. Foreman*, 21 Ala. 400; *Kinney v. Lee*, 10 Tex. 155.

(k) *Cooke v. Colehan*, 2 Stra. 1217;

Andrews v. Franklin, 1 Stra. 24; *Evans v. Underwood*, 1 Wils. 262; *Dawkes v. Lord Lorane*, 3 Wils. 207, 213; *Washington County Mutual Insurance Company v. Miller*, 26 Vt. 77. In *Seacord v. Burling*, 5 Denio, 444, a written promise to pay another a sum of money on demand with interest, adding *but no demand is to be made as long as the interest is paid*, was held not a promissory note. And see *Richardson v. Martyr*, 30 E. L. & E. 365; *Kelley v. Hemmingway*, 13 Ill. 604. In *Gaines v. Dorset*, 18 La. An. 583, it was held that a note payable "one day after the tetry of peas," matured at the end of the war.

¹ A note payable at, or a certain time after, the death of the maker is held to be negotiable. (y) *Cooke v. Colehan*, 2 Stra. 1217; *Colehan v. Cooke*, Willes, 393; *Conn v. Thornton*, 49 Ala. 587; *Price v. Jones*, 105 Ind. 543; *Mortee v. Edwards*, 20 La. An. 236; *Cartwright v. Gray*, 127 N. Y. 92; *Hegeman v. Moon*, 131 N. Y. 462. A note payable at a future day certain, or earlier, is generally held to be negotiable whether the option is with the holder or the maker. *Cook v. Horn*, 29 L. T. 369; *Ackley School District v. Hall*, 113 U. S. 135; *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268; *Cisne v. Chidester*, 85 Ill. 523; *Walker v. Woollen*, 54 Ind. 164; *Charlton v. Reed*, 61 Iowa, 166; *Mattison v. Marks*, 31 Mich. 421; *First Nat. Bank v. Skeen*, 101 Mo. 683; *Curtis v. Horn*, 78 N. H. 504; *Ernst v. Steckman*, 74 Pa. 13; *Bates v. Leclair*, 49 Vt. 229. The contrary decisions in *Stults v. Silva*, 119 Mass. 137; *Mahoney v. Fitzpatrick*, 133 Mass. 151; *Richards v. Barlow*, 140 Mass. 218, have been nullified by statute. Acts of 1888, c. 329. Though the option was with the payee, it was held that notes were uncertain and not negotiable, in *First Nat. Bank v. Bynum*, 84 N. C. 24, and *Smith v. Marland*, 59 Iowa, 645.

A note payable in instalments with a provision that if any instalment is unpaid the whole amount shall become due is negotiable. *White v. Smith*, 77 Ill. 351; *Roberts v. Snow*, 27 Neb. 425. But see *W. W. Kimball Co. v. Mellon*, 80 Wis. 133. A note containing a provision that the holder may extend the time of payment indefinitely is not negotiable. *Glidden v. Henry*, 104 Ind. 278; *Woodbury v. Roberts*, 59 Iowa, 348; *Smith v. Van Blarcom*, 45 Mich. 371. So a note containing an agreement to renew it at maturity. *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194.

By construing an apparently indefinite time expressed in a note as equivalent to a reasonable time, it has been held that notes were negotiable when made payable "as soon as collected." *Ubsdell v. Cunningham*, 22 Mo. 124; "one year from date, and if there is not enough realized by good management in one year to have more time to

(x) See *Carlos v. Fancourt* (5 T. R. 482), 4 English Ruling Cas. 180, 191, 192 n.; *In re Boyce*, 33 Ch. D. 612; *Mortgage Ins. Co. v. Inland Revenue Com'rs*, 21 Q. B. D. 352; *Iron City N. Bank v. McCord*, 139 Penn. St. 52, 21 Atl. 143; *Post v. Kinzua Hemlock Ry. Co.*, 171 Penn. St. 615; 33 Atl. 362; *Stapleton v. Louisville B. Co. (Ga.)*, 23 S. E. 81. The time of payment may be left to future agreement, and a note made pay-

able "when payor and payee mutually agree," is payable on demand. Page v. Cook, 164 Mass. 116, 41 N. E. 115.

(y) *Durland v. Durland*, 83 Hun (N. Y.), 174; *Root v. Strang*, 77 id. 14; *Carnwright v. Gray*, 127 N. Y. 92, 12 L. R. A. 845; *Bradt v. Krank*, 164 N. Y. 515, 58 N. E. 657; *Randall v. Grant*, 69 N. Y. S. 221; *Price v. Jones*, 105 Ind. 543; *Garrigus v. Home Miss. Society*, 3 Ind. App. 91.

the drawee to *credit* the payee with so much cash, it is a good bill. (*l*)

While it is essential to a bill of exchange that it be an order or positive direction to the drawee to make the payment, it is sufficient if it be substantially so; and the use of the word, "please," or any equivalent expression, does not alter the character of the instrument. (*m*)¹

If the amount is expressed in the usual way, by figures in the corner or at the bottom, and is also written in words in the body of the note, the written words not only prevail over the written figures, but are said to do this so conclusively, that evidence is not admissible to show that the figures were right, and that the words were omitted by mistake from the body of the note. (*n*)

Usually bills and notes express the consideration by saying "for value received;" but where this is not expressed, it is implied by law, both as to the makers and the acceptors or indorsers of negotiable bills and notes, and this presumption must be rebutted by evidence if the defence rests on want of * 250 * consideration. (*o*)² (*x*) And the presumption is so far rebutted as to cast the burden of proof on the holder, by evidence making the consideration doubtful. (*p*) The defence of illegal consideration is not generally valid if it be not illegal in the State where the note is payable and the action brought. (*pp*) (*y*) But as to the question of usury, the note is governed by the laws of the State where it was made. (*pq*)

(*l*) *Ellison v. Collingridge*, 9 C. B. 570; *Lloyd v. Oliver*, 12 E. L. & E. 424; s. c. 18 Q. B. 471.

(*m*) *Wheatley v. Strobe*, 12 Cal. 92.

(*n*) *Saunderson v. Piper*, 5 Bing. N. C. 425; *Riley v. Dickens*, 19 Ill. 30; *Payne v. Clark*, 19 Mo. 152; *Mears v. Graham*, 23 Neb. 728. And see *Garrard v. Lewis*, 10 Q. B. D. 30; *Smith v. Smith*, 1 R. I. 398.

(*o*) *Hatch v. Traves*, 11 A. & E. 702; *Grant v. Da Costa*, 3 M. & Sel. 351; *Benjamin v. Tillman*, 2 McLean, 213; *Bristol v. Warner*, 19 Conn. 7; *Poplewell v. Wilson*, 1 Stra. 264; *Lines v. Smith*, 4 Fla. 47; *Clark v. Schneider*, 17 Mo. 295.

(*p*) *Delano v. Bartlett*, 6 Cush. 364. But see *Fitch v. Redding*, 4 Sandf. 130.

(*pp*) *Backman v. Jenks*, 55 Barb. 468.

(*pq*) *Hull v. Augustine*, 23 Wis. 383.

pay." *Capron v. Capron*, 44 Va. 410. And see *Works v. Hershey*, 35 Iowa, 340; *Crooker v. Holmes*, 65 Me. 195. Against such forced construction see *Nunez v. Dautel*, 19 Wall. 560; *Gillespie v. Mather*, 10 Pa. 28. — W.

¹ Thus "On demand, with interest, please pay J. S. or order, fifty-five dollars," is a promissory note. *Almy v. Winslow*, 126 Mass. 42. — K.

² A reference to the consideration in a note does not affect its negotiability. *Clanin v. Esterly Co.*, 118 Ind. 373; *Siegel v. Chicago Bank*, 131 Ill. 569; *Taylor v. Curry*, 109 Mass. 36; *Collins v. Bradbury*, 64 Me. 37; *Hillstrom v. Anderson*, 49 Northwestern Rep. 187 (Minn.); *Garrett v. Interstate Bank*, 79 Tex. 133. In Missouri, by statute, the words "for value received" must be inserted, to make a note negotiable. *Bailey v. Smock*, 61 Mo. 213. — W.

(*x*) *In re Whitaker*, 42 Ch. D. 119, 4 10 Q. B. 525), 4 English Ruling Cas. 287. English Ruling Cas. 307, 315. 304, 306.

(*y*) See *Rouquette v. Overmann* (L. R.

To a note there need be but two original parties, a maker and a payee; and these must be sufficiently certain. Thus, no action can be maintained on a note payable "to the heirs, executors, or assigns of A." (q)(x) To a bill there are three parties, drawer, drawee and payee. The drawee is not bound until acceptance; and then having become the acceptor, he is regarded as primarily the promisor, and the drawer only collaterally; (r) and the drawer is therefore liable in very much the same way as the indorser of a note. And as with a note so with a bill of exchange, the payee must be sufficiently certain, that is, a person capable of being ascertained at the time the instrument is drawn. (s) ¹

So too the payer should be certain; and generally if one who is guardian or trustee or the holder of some office, signs with his name, adding thereto the name of his function or office, with

(q) *Bennington v. Dinsmore*, 2 Gill, 348. See also as to necessary certainty of the payee, *Cowie v. Stirling*, 6 E. & B. 333.

(r) *Attenborough v. Mackenzie*, 36 E. L. & E. 562; *Blair v. Bank of Tennessee*, 11 Humph. 84. But a drawee

who is only an accommodation acceptor, is but a surety for the drawer for most purposes. *Parks v. Ingram*, 2 Foster (N. H.), 283; *Steman v. Harrison*, 42 Penn. St. 49.

(s) *Yates v. Nash*, 98 Eng. C. L. 581; 1 Parsons, Notes and Bills, 61.

¹ A note payable to "the secretary for the time being" of an association has been held not to designate the payee with sufficient certainty. *Cowie v. Stirling*, 6 E. & B. 333. And see *Yates v. Nash*, 8 C. B. N. S. 581; *King v. Box*, 6 Taunt. 325. So a note to "J. P. Treasurer, or his successor." *Patton v. Melville*, 21 Up. Can. Q. B. 263. But similar notes were sustained in *Tainter v. Winter*, 53 Me. 348; *McDonald v. Laughlin*, 74 Me. 480; *Fisher v. Ellis*, 3 Pick. 321. A note made payable to "the trustees of Wesleyan Chapel or their treasurer for the time being" is sufficiently certain, the trustees being the payees and the treasurer merely their agent to receive payment. *Holmes v. Jaques*, L. R. 1 Q. B. 376; *Noxon v. Smith*, 127 Mass. 489. And notes made payable to an officer of a corporation by the name of his office, as to the "Cashier of The First Bank," have been held negotiable, though the person holding the office might change, as being payable to the corporation itself by the name of its officer. *Nave v. Hadley*, 74 Ind. 155; *Nave v. First Nat. Bank*, 87 Ind. 204; *First Nat. Bank v. Hall*, 44 N. Y. 395. A note payable to "A or B" is uncertain. *Blanckenhagen v. Blundell*, 2 B. & Ald. 417; *Carpenter v. Farnsworth*, 106 Mass. 561. But now in England a note may be made payable to two or more persons alternatively or to the holder of an office for the time being. Bills of Exchange Act, § 7, (2).

A note payable to the "estate of A" is in effect payable to his personal representatives, and as it is enough to describe the payee without naming him, is good in form. *M'Kinney v. Harter*, 7 Blackf. 385; *Shaw v. Smith*, 150 Mass. 166; *Peltier v. Babilion*, 45 Mich. 384. *Contra* *Tittle v. Thomas*, 30 Miss. 122; *Lyon v. Marshall*, 11 Barb. 241. — W.

(x) An instrument made payable "to the order of the estate of" a deceased person is a promissory note payable to a fictitious person within that provision of the New York Rev. Stats. (8th ed. p. 2499, § 5), making notes to "fictitious persons" of the same effect as if payable to bearer. *Lewinsohn v. Kent & Stanley Co.*, 33 N. Y. S. 326, 87 Hun, 257. See *supra*, p. * 246; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 6 L. R. A. 625, and note; *Weihl v.*

Robertson, 97 Tenn. 458, 37 S. W. 274, 39 L. R. A. 423, 425 n. Under the English Bills of Exchange Act, 1882, § 7, sub-sec. 3, a "fictitious or non-existing" payee includes both a real person who has no right to the paper, and one non-existing but believed to be a real person. *Bank of England v. Vagliano*, [1891] A. C. 107; *Clutton v. Attenborough*, [1897] A. C. 90, [1895] 2 Q. B. 707.

intent to make himself liable only in that capacity, such addition will generally be held only as words of description, and he will be personally liable on the note. (ss) (x) This question has been considered in the chapter on Agents, and the section on the Signature of an Agent.

If the payee be a fictitious person, an innocent indorsee may sue the drawer or maker; but as to the acceptor it has been held that he is answerable only if he knew that the payee was fictitious. But we should have some doubts of this. (t) ¹

(ss) *Foster v. Fuller*, 6 Mass. 58; *Fiske Munet v. Gibson*, 3 T. R. 481. See *v. Eldridge*, 12 Gray, 474. *Stevens v. Strang*, 2 Sandf. 138.

(t) *Collis v. Ematt*, 1 H. Bl. 313;

¹ In *Bank of England v. Vagliano*, 22 Q. B. D. 103, 23 Q. B. D. 243, [1891] A. C., the defendants' clerk G. forged letters of advice and bills of exchange, writing the letters and drawing the bills in the name of a customer who had unlimited credit. G. was able by his position to have the forged letters and bills put before one of the defendants who, believing them to be genuine, accepted the bills, which were all payable to P. & Co., an actual firm well known to the defendants. G. secured the bills when accepted, wrote an indorsement in the name of P. & Co., and discounted them with the plaintiff bank, which debited the amount of the bills to the defendants' account. It was held by the House of Lords, reversing the decision of both courts below, that the defendants were liable on their acceptances, and the bank might charge them with the bills.

In *Shipman v. Bank of New York*, 126 N. Y. 318, the plaintiffs, a firm of lawyers, having a real estate department, received money from clients and invested it in mortgages. A clerk, B., had charge of this business. B. made fictitious mortgages, which he delivered to the lenders, and in accordance with data furnished by B., the cashier of the firm wrote checks payable to the order of the supposed borrower, and a member of the firm then signed them. Some of the payees named were real persons, some were not. B., having obtained possession of the checks, indorsed the name of the payee named in each case, and the defendant bank paid them and debited the firm's account with the amount of them. It was held that the bank was not discharged by such payment.

In England the Bills of Exchange Act, § 7, (3), provides that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

In New York, by statute, notes made payable to the order of a fictitious person have, if negotiated by the maker, the same validity "as against the maker, and all persons having knowledge of the facts as if payable to bearer." 1 R. S. 768.

In *Armstrong v. National Bank*, 46 Ohio St. 512, the plaintiff drew a check on the defendant bank payable to the order of B., and delivered it to G. in exchange for a note purporting to be made by B., whose agent G. represented himself to be. B. was a fictitious person, and G., after writing B.'s name on the back of the check, collected the amount from the defendant. Held, that the defendant could not charge the plaintiff's account with the amount of the check, cf. *Blodgett v. Jackson*, 40 N. H. 21; *Bull's Head Bank v. McFeeters*, 41 N. Y. Super. 215.

If the drawer or maker of a bill or note intends to make it payable to a particular person, who is impersonating another, and the bill or note is drawn payable to him in his assumed name, he may by indorsing his assumed name transfer title. *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360; *Robertson v. Coleman*, 141 Mass. 231. See also *Dodge v. Nat. Exchange Bank*, 20 Ohio St. 234, 30 Ohio St. 1. — W.

(x) The negotiability of a note is not affected by the addition of the word "trustee" to the payee's name in its body, nor is an indorser's liability changed by such addition. *Fox v. Citizens' Bank & Trust Co.* (Tenn. Ch. App.), 37 S. W. 1102, 35 L. R. A. 678 and note; *Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830; *Central State Bank v. Spurlin*, 111 Iowa, 187, 82 N. W. 493, 49 L. R. A. 661.

Where instruments are not negotiable, third parties may become interested; but, if they are to be regarded as new parties at all, it is only with much qualification.

SECTION III.

WHO MAY INDORSE.

Only negotiable paper can be indorsed, in the technical and legal sense of this word; and an indorsement can be made only by the original payee or by some one who is made payee by indorsement to him. But not unfrequently a stranger to the note writes his name on the back, and then the question arises what is his relation to the note. On this point we have already stated that there is a singular diversity in the decisions of different States.¹ In some he is held as a joint promisor (x) or surety, (tt)²

(tt) In Massachusetts, *Baker v. Briggs*, 385; *Austin v. Boyd*, 24 id. 64; *Hawkes* 8 Pick. 122, 130; *Tenny v. Prince*, 4 id. *v. Phillips*, 7 Gray, 284; *Draper v. Weld*, 13

¹ See note 1, *ante*, *244.

² But the rule of *Union Bank v. Willis*, *supra*, does not apply where the note is payable to the maker's own order, and there can be only a promise to pay such person,

(x) Under the Massachusetts statute entitling an indorser before delivery to notice like an ordinary indorser, he is a co-maker, and cannot claim, as a set off, a debt due to himself alone. *Brooks v. Stackpole*, 168 Mass. 537, 47 N. E. 419. In New York such an indorser is not a joint maker or guarantor, and is bound only by proper demand and notice made within a reasonable time. *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 740; *Davis v. Bly*, 164 N. Y. 527, 58 N. E. 648, 79 Am. St. Rep. 670. The views entertained as to indorsements before delivery are carefully reviewed, as to each State and jurisdiction, in the note to Cadwallader v. Hirshfeld (62 N. J. L. 671), 72 Am. St. Rep. 671, 676. See also *Jenkins v. Comber*, [1898] 2 Q. B. 168; *Merchants' Trust Co. v. Jones*, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 606, 45 N. E. 1094, 35 L. R. A. 786; *Phipps v. Harding*, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; and as to Pennsylvania, see 38 Am. L. Reg. N. s. 235.

As to who is an indorser, see also *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117 n.; *Fiske v. Pratt*, 154 Mass. 367, 28 N. E. 282; *Bowler v. Braun*, 63 Minn. 32, 65 N. W. 124; *Mad-*

dox v. Duncan, 143 Mo. 613, 45 S. W. 688, 41 L. R. A. 581, 65 Am. St. Rep. 678; *Bigelow on Bills & Notes* (2d ed.), 84. Money paid by an indorser upon an instrument erroneously supposed to be a promissory note cannot be recovered back; nor can he hold prior indorsers for his payment thereof when he is not duly notified of dishonor. *Alton v. First Nat. Bank*, 157 Mass. 341, 32 N. E. 228; *Turner v. Leach*, 4 B. & Ald. 451, 4 English Ruling Cas. 523, 525; *London & River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7; *Lacave & Co. v. Credit Lyonnais*, [1897] 1 Q. B. 148; *Deutsche Bank v. Beriro*, 73 L. T. 669. But the purchaser of a void note may recover what he has been fraudulently induced to pay for it by the maker, though he might also, as a holder for value, collect the note from him. *Evans v. Stuhrberg*, 78 Mich. 145, 43 N. W. 1046, 6 L. R. A. 501.

The indorsement and delivery of an un-negotiable instrument can have effect only as an assignment, open to defences. *Whitwell v. Winslow*, 134 Mass. 343; *Kendall v. Parker*, 103 Cal. 319; *Merchants' Nat. Bank v. Gregg*, 107 Mich. 146, 64 N. W. 1052; *Hill v. Alexander* (Kansas), 41 Pac. 1066. And so of a note marked "non-negotiable" on its face. *Barker v. Barth*,

in others as a guarantor, (*tu*) in others as an indorser. (*tv*) In most of the States the effect of such indorsement depends on the

id. 580; *Union Bank v. Willis*, 8 Met. 504. See in Maine, *Irish v. Cutter*, 31 Me. 536; *Leonard v. Wildes*, 36 id. 265; *Malbon v. Southard*, id. 147; *Childs v. Wyman*, 44 id. 433; *Adams v. Hardy*, 32 id. 339. Vermont, *Nash v. Skinner*, 12 Vt. 219; *Sylvester v. Downer*, 20 id. 355. New Hampshire, *Martin v. Boyd*, 11 N. H. 385. Missouri, *Powell v. Thomas*, 7 Mo. 440; *Lewis v. Harvey*, 18 id. 74; *Perry v. Barret*, id. 140; *Schneider v. Schiffman*, 20 id. 571. South Carolina, *Stoney v. Beaubien*, 2 McMullen, 313; *Baker v. Scott*, 5 Rich. 305; *Carpenter v. Oaks*, 10 id. 17. In Louisiana, such party is regarded as a surety. *McGuire v. Bosworth*, 1 La. An. 248; *Penny v. Parham*, id. 274. The principle upon which one not the payee signing negotiable paper in blank upon the back of it is charged as a promisor, if he does this at the time the note is made, is stated by Mr. Justice *Parker*, in *Moies v. Bird*, 11 Mass. 436, 440.

(*tu*) As in Illinois, *Webster v. Cobb*, 17 Ill. 459; *Klein v. Currier*, 14 id. 237; *Carroll v. Weld*, 13 id. 682; *Camden v. McKoy*, 3 Scam. 437; *Cushman v. Dement*, id. 497; *Smith v. Finch*, 2 id. 321. In Ohio, *Robinson v. Abell*, 17 Ohio, 36; *Greenough v. Smead*, 3 Ohio St. 415. In Kansas, *Firman v. Blood*, 2 Kan. 496. In Texas, *Carr v. Rowland*, 14 Tex. 275; *Cook v. Southwick*, 9 id. 615. In Virginia, *Watson v. Hurt*, 6 Gratt. 633. In Connecticut, see *Clark v. Merriam*, 25 Conn. 576; *Beckwith v. Angell*, 6 id. 315; *Perkins v. Catlin*, 11 id. 213; *Ranson v. Sherwood*, 26 id. 437; holding that such indorsement in blank *prima facie* implies a contract on the part of the indorser that the note is due and payable according to its tenor, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by the use of due diligence. In Pennsylvania, it is held, that, where a negotiable note is endorsed by one not a party to it, the presumption from the paper is, that he indorsed as

second indorser for the accommodation of the prior parties, and no liability would attach to him so long as the note remains in the hands of the payee; but when made at the request of the payee, who acts upon the faith of it, it imparts a guaranty. *Schollenberger v. Nehf*, 28 Penn. St. 189. The rule adopted in Ohio differs from that which prevails in Massachusetts in this, that in the former State a stranger indorsing in blank is presumed to be a guarantor; in the latter State he is presumed to be an original promisor. But in Ohio such person may be charged as maker upon proof that his indorsement was made at the time of execution by the other party, or if afterward, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution. In Massachusetts, the indorsement is presumed to have been made at the time of the execution of the note; so that the difference in fact is only one as to the presumption of the time of the indorsement, though it has not been so stated in the Ohio decision. See *Greenough v. Smead*, *supra*.

(*tv*) As in New York, *Spies v. Gilmore*, 1 Comst. 321; *Ellis v. Brown*, 6 Barb. 282; *Waterbury v. Sinclair*, 26 id. 455; *Cottrell v. Conklin*, 4 Duer, 45. These decisions overrule the earlier ones in this State, holding such indorser liable as an original promisor. See *Herrick v. Carman*, 12 Johns. 159; *Campbell v. Butler*, 14 id. 349. In Indiana, *Wells v. Jackson*, 6 Blackf. 40; *Cecil v. Mix*, 6 Ind. 478; *Vore v. Hurst*, 13 id. 551. In Tennessee, *Camparee v. Brockway*, 11 Humph. 355; *Clouston v. Barbiere*, 4 Sneed, 336. In Iowa, *Fear v. Dunlap*, 1 Greene, 331. In California, such party is called a guarantor, but his liability is the same as that of an indorser. *Riggs v. Waldo*, 2 Cal. 485; *Pierce v. Kennedy*, 5 id. 138. Mississippi, *Jennings v. Thomas*, 13 S. & M. 617, 5 id. 627.

as the maker himself makes the bearer or indorsee, *Stoddard v. Penniman*, 108 Mass. 366, 370; or if when negotiated the maker's name appears first on the back of the note, *Dubois v. Mason*, 127 Mass. 37. — K.

88 Ill. App. 23. See *Great Western Ry. Co. v. London & County Banking Co.*, [1901] A. C. 414.

In England, a note, though not invalid because it also contains a pledge of collat-

eral, with authority to sell or dispose thereof (Bills of Exchange Act, 1882, § 83), is not a valid promissory note if it contains more than this. *Kirkwood v. Smith*, [1896] 1 Q. B. 582.

intention of the parties, which may be shown by evidence; (*tw*) but in Massachusetts the presumption that he intended to be an original promisor seems to be conclusive. (*tx*) (*x*)

The indorsement of a bill or note passes no property, unless the indorser had at the time a legal property in the note. (*u*)

(*tw*) *Clark v. Merriam*, 25 Conn. 576; *Schollenberger v. Nehf*, 28 Penn. St. 189; *Carroll v. Weld*, 13 Ill. 682; *Cottrell v. Conklin*, 4 Duer, 45; *Lewis v. Harvey*, 18 Mo. 74; *Barrows v. Lane*, 5 Vt. 161; *Knapp v. Parker*, 6 id. 642; *Sandford v. Norton*, 14 id. 228; *Flint v. Day*, 9 id. 345; *Sylvester v. Downer*, 20 id. 355; *Beckwith v. Angell*, 6 Conn. 315; *Perkins v. Catlin*, 11 id. 213; *Champion v. Griffith*, 13 Ohio, 228; *Robinson v. Abell*, 17 id. 36; *Greenough v. Smead*, 3 Ohio St. 415; *Jennings v. Thomas*, 13 S. & M. 617, 5 id. 627; *Fear v. Dunlap*, 1 Greene, Iowa, 331; *Patterson v. Todd*, 18 Penn. St. 426. In *Perkins v. Catlin*, 11 Conn. 213, *Huntington, J.*, said: "The indorsement is not controlled by the oral testimony, but completed according to the manifest intention of the parties. The evidence is offered in conformity with the familiar rule, that the law does not imply a contract where an express one has been made." See *Cooke v. Nathan*, 16 Barb. 343; and the remarks of *Waite, J.*, in *Castle v. Candee*, 16 Conn. 223.

(*x*) In Maine and Massachusetts, parol evidence is admissible to prove that, as between themselves, successive indorsers intended to be, and were, co-sureties, entitled to contribution from each other. When the directors of a corporation indorse its notes, their intent to be co-sureties need not be shown by express contract, but may be implied from their intention and understanding, and the statute of frauds does not prevent contribution between them. *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223; *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157; and see *Hoffman v. Habighorst* (Oregon), 53 L. R. A. 908.

So, generally, a special agreement may create a different liability, as to negotiable paper, from that which the law would otherwise impose. *Mulcare v. Welch*, 160 Mass. 58, 61, 35 N. E. 97; *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150; *Abrey v. Crux*, L. R. 5 C. P. 37, 4 English Ruling Cas. 194, 205, 207 n.; *Macdonald v. Whitfield* (8 A. C. 733), id. 530, 548; *Adrian v. McCaskill* (103 N. C. 181), 14 Am. St. Rep. 788, 793 n.; *Kulenkamp v. Groff* (71 Mich. 675), 15 id. 283, 287 n.; *Harris v. Murphy* (119 N. C.

(*tx*) *Wright v. Morse*, 9 Gray, 337. See also *Essex Co. v. Edmands*, 12 Gray, 273.

(*u*) *Mead v. Young*, 4 T. R. 28. In this case it was held that in an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A, or order," it is competent for the defendant to give in evidence that the person who indorsed to the plaintiff was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill. The indorsement and delivery must both be made by the person then having the legal interest in the note; and if a note is indorsed by the payee, and retained in his possession, and after his death is delivered by his executor to the person to whom it was indorsed, the title to the note is not thus transferred. *Bromage v. Lloyd*, 1 Exch. 31; *Lloyd v. Howard*, 1 E. L. & E. 227 n.; *Awde v. Dixon*, 5 E. L. & E. 512; s. c. 6 Exch. 869; *Prescott v. Brinsley*, 6 Cush. 233; *Clark v. Boyd*, 2 Hamm. 56; *Clark v. Sigourney*, 17

34), 56 id. 656, 668. When the maker is payee and indorses the note above others who indorse before delivery, they are successive indorsers, in the absence of any special agreement. *Lewis v. Monahan, supra*. The *lex loci contractus* governs these questions. *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 23 N. E. 163. But an agreement not to enforce a note according to its tenor, when made upon its delivery, contradicts the writing, and cannot be proved in an action on the note. *Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305. So an indorser's private understanding will not be permitted to change the normal meaning and character of the writing. *Equitable Marine Ins. Co. v. Adams*, 173 Mass. 436, 53 N. E. 883; *Northern Nat. Bank v. Hoopes*, 98 Fed. 935; *Washington Sav. Bank v. Ferguson*, 59 N. Y. S. 295; *Andrus v. Blazzard* (Utah), 54 L. R. A. 354. So a contemporaneous promise to renew a note or to pay it by future discounts, cannot vary its express terms to pay at maturity. *Hall v. First Nat. Bank*, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255; *Kelley v. Thompson*, 175 Mass. 427, 56 N. E. 713.

* 251 * And therefore a married woman cannot at common law, indorse a note made payable to her before or during her coverture, unless by force of some statutory provision. (v)¹ (xx) Nor does the property in a note pass by indorsement, if the indorsee knew at the time he received it that the indorser had no right to make the transfer. (w) A party receiving a bill or note as agent, or for any particular purpose, and exceeding his authority or violating his duty, may nevertheless pass the property in the note to a *bonâ fide* holder. (x) But no assignee, even for

* 252 * good consideration, can hold the bill or note, if he knew or had direct and sufficient means of knowing that the transfer of the same to him was wrongful or unauthorized. The assignor may have held the bill or note by indorsement to him; and as an indorsement may always be restricted or conditioned at the pleasure of the indorser, the assignor was bound to obey such restriction; and an assignee by indorsement, who knows that the indorsement to him was made in disregard of such restriction, has no property in the bill or note. (y) (yy) If a negotiable bill or note be indorsed for consideration, so that the whole property passes to the indorsee, its negotiable quality passes with it; and it may be

Conn. 511. See also *Bay v. Coddington*, 5 Johns. Ch. 54; *Lawrence v. Stonington Bank*, 6 Conn. 521.

(v) *Savage v. King*, 17 Me. 301. See *Barlow v. Bishop*, 1 East, 432; *Commonwealth v. Manley*, 12 Pick. 173.

(w) See *Roberts v. Eden*, 1 B. & P. 398; *Stoddard v. Kimball*, 6 Cush. 470.

(x) Thus where the drawer of a bill of exchange which had been accepted, wrote his name across the back of it, and delivered it to A to get it discounted, and A, while the bill was yet running, deposited it with B, as security for money advanced to himself, but

without any fraud in B, this was held to be a valid indorsement from the drawer to B. *Palmer v. Richards*, 1 E. L. & E. 529. See also *Marston v. Allen*, 8 M. & W. 494; *Andrews v. Bond*, 16 Barb. 633; *Smith v. Braine*, 3 E. L. & E. 379; *Moody v. Threlkeld*, 13 Ga. 555; *Stoddard v. Kimball*, 6 Cush. 469.

(y) *Ancher v. Bank of England*, Dougl. 637; *Sigourney v. Lloyd*, 8 B. & C. 622; s. c. 3 Mo. & P. 229, 5 Bing. 525; *Robertson v. Kensington*, 4 Taunt. 30. See also *Bolton v. Fuller*, 1 B. & P. 539; *Ramsbottom v. Cator*, 1 Stark. 228; *Savage v. Aldren*, 2 Stark. 232.

¹ But one who makes a note payable to a married woman is estopped to deny her capacity to indorse. *Smith v. Marsack*, 6 C. B. 486; *Cowton v. Wickersham*, 54 Pa. St. 302, 304; *Castor v. Peterson*, 2 Wash. 204. And, in general, "The execution of a negotiable note estops the maker to deny the existing capacity of the payee to indorse the paper." *Bigelow on Estoppel* (5th ed.), 495; *Wolke v. Kuhne*, 109 Ind. 313. — W.

(xx) When husband and wife are successive indorsers, and she indorses under his direction, the indorsee takes a good title, and if he takes a note indorsed by them in blank, relying on the wife's indorsement, there is a sufficient consideration as against her. *Foster v. Leach*, 160 Mass. 418, 36 N. E. 69.

(yy) *Edie v. East India Co.* (2 Burr. 1216), 4 English Ruling Cas. 343, 363;

National Bank v. Silke, [1891] 1 Q. B. 435, 4 English Ruling Cas. 436, 440, 444. Indorsement of a note can be made on a separate paper only when the back of the note is already filled up, or it is in any way impossible to indorse it; a transfer by a separate instrument can, at most, amount to no more than an assignment. *Bishop v. Chase*, 156 Mo. 158; 56 S. W. 1080, 79 Am. St. Rep. 515.

doubted whether this negotiability can be restrained by the indorsement. (z) But where the indorsement is without consideration, and is intended merely to give the indorsee authority to receive money for the indorser, there the restriction operates;¹ (x) and if such

(z) See *ante*, p. * 239.

¹ Thus an indorsement "for collection" is held to transfer a bare legal title only or to give a mere authority to receive payment. *Claffin v. Wilson*, 51 Iowa, 15; *Wilson v. Tolson*, 79 Ga. 137; *Tyson v. Western Nat. Bank*, 26 Atlantic Rep. 520 (Md.); *Freeman's Bank v. Nat. Tube Works*, 151 Mass. 413; *Wintermute v. Torrent*, 83 Mich. 555; *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643; *Rook Co. Nat. Bank v. Hollister*, 21 Minn. 385; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; *Nat. Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384. See also *St. Louis, &c. Ry. Co. v. Johnston*, 133 U. S. 566. — W.

(x) The deposit of a check, indorsed by the payee, with his bank is taken generally by the bank as the depositor's agent, and the title thereto does not pass to the bank; but an indorsement "for deposit" passes the title to and control of the check. *National Commercial Bank v. Miller & Co.*, 77 Ala. 168, 54 Am. Rep. 50; *Ditch v. Western Nat. Bank*, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375. When the bank permits a depositor to draw against a check before it receives through the clearing-house notice that it is dishonored, the bank becomes a holder for value. *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; *Shawmut Nat. Bank v. Manson*, 168 Mass. 425, 47 N. E. 196; *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. But the mere credit of a check upon the books of a bank, which may be cancelled at any time, does not make the bank a purchaser for value. *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 14 S. Ct. 94, 37 L. Ed. 1063. See *Clarke v. London County Banking Co.*, [1897] 1 Q. B. 552; *Green v. Purcell Nat. Bank (Ind. Terr.)*, 37 S. W. 50.

An indorsement "for collection" by one not the payee warrants the genuineness of the preceding indorsers' names, but not that of the drawee. *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584; *People's & Drovers' Bank v. Craig*, 63 Ohio St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639. If an indorsement for collection be cancelled, this restores the negotiability of the note. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762. As to the bank's negligence in collecting, and its responsibility for its correspondents, see *Wilson v. Carlinville Nat. Bank*, *supra*; *Second Nat. Bank (Ky.)*, 55 L. R. A. 273.

Want of consideration for a note, when

not accompanied by proof of taking it before maturity, for value and in good faith, is not a defence to an action thereon. *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 1102; *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, 1 Am. St. Rep. 123.

A transferee after maturity and without consideration may sue in the right of the transferor, if he was a holder for value before maturity. *Edgerly v. Lawson*, 176 Mass. 551, 57 N. E. 1020. In general, an indorsee cannot sue in the payee's name, at least without his consent. *Cotting v. Foster*, 178 Mass. 564, 60 N. E. 386. An indorsement promised or intended, but not made in fact, is effective only as an assignment. See *Whistler v. Forster* (14 C. B. n. s. 248), 4 English Ruling Cas. 332, 335, 337; *Harrop v. Fisher* (10 C. B. n. s. 196), *id.* 338. But a holder for value may sue, in the payee's name, upon an unindorsed note, even without the latter's consent, and this right is not affected by an indorsement after suit begun. *Troeder v. Hyams*, 153 Mass. 536, 27 N. E. 775. See *State Trust Co. v. Owen Paper Co.*, 162 Mass. 156, 38 N. E. 438. One who indorses a guaranty upon a note cannot be sued as an indorser, and can be sued only in the name of the person to whom the promise was made. *Edgerly v. Lawson*, 176 Mass. 551, 57 N. E. 1020.

An executory agreement that a promissory note of earlier date shall be taken in payment *pro tanto* for stock then agreed to be bought, is not a defence to an action on the note. *Hayes v. Allen*, 160 Mass. 286, 35 N. E. 852. There can be no recoupment in an action on a note for such an agreement, which the plaintiff has not performed, though it was part of the consideration of the note. *Isenburger v. Hotel Reynolds Co.*, 177 Mass. 455, 59 N. E. 120.

indorsee again indorses it over, the second indorsee cannot hold it, because the first indorsement gave him notice that the first indorsee had no power to transfer the note. (a)

If a note is once indorsed in blank it is thereafter transferable by mere delivery so long as the indorsement continues blank, and its negotiability cannot be restricted by subsequent special indorsements, but the holder may strike them all out and recover under the blank indorsement, by filling that so as to make the note payable to himself. (b) Where one has acquired a bill by indorsement, *bonâ fide*, he may hold it and recover upon it, although earlier parties knew that it was transferred wrongfully or without authority. (c)

* 253 * If a negotiable bill or note which is open to any defence that can be made only against a holder with knowledge or notice, pass by indorsement, for consideration, to a holder without knowledge or notice, against whom the defence cannot be made, and this holder indorse it over for consideration to a party who has knowledge or notice of the defence, such indorsee may nevertheless recover on the note, because he stands on the right of his indorser. The party bound to pay it to the holder without notice is not injured by being bound to pay it to his indorsee; and the innocent holder has not only the right of enforcing payment, but of transferring the note by indorsement; and with it all his rights. (d)

No party can be at once plaintiff and defendant; hence a firm which is promisee of a note, cannot sue a firm that is promisor, if any person is a member of both firms; and a note signed by several makers and payable to one of them, cannot be sued by him. But if any such note passes by indorsement into the hands of a third party, he may sue all the parties to the note. (e)

Any person may accept or indorse a bill, or sign or indorse a note, as agent for another; and the principal is held and not the agent, if there was sufficient authority for the act, and the act itself

(a) *Edie v. East India Co.*, 2 Burr. 1216, per *Wilmut, J.*; *Wilson v. Holmes*, 5 Mass. 543; *Power v. Finnie*, 4 Call, 411, per *Roane, J.*

(b) *Smith v. Clarke*, 1 Esp. 180, Peake Cas. 225, per Lord *Kenyon*; *Mitchell v. Fuller*, 15 Penn. St. 268.

(c) And this although his indorser acquired the bill or note by fraud. *Saltmarsh v. Tuthill*, 13 Ala. 390. See also *Haly v. Lane*, 2 Atk. 181, where Lord *Hardwicke* said: "Where there is a negotiable note, and it comes into the hands of a third or fourth indorsee, though some

of the former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him, unless there should be some fraud or equity against him appearing in the case."

(d) *Hascall v. Whitmore*, 19 Me. 102; *Thomas v. Newton*, 2 C. & P. 606; *Solomons v. Bank of England*, 13 East, 135; *Smith v. Hiscock*, 14 Me. 449; *Chalmers v. Lanion*, 1 Camp. 383.

(e) *Heywood v. Wingate*, 14 N. H. 73. See *ante*, p. * 165.

was properly done. (x) A general authority to transact business, however wide in its terms, is seldom construed to include the power of making or indorsing negotiable paper. (ee) (y) But an authority from a payee to indorse a note payable to his order, is not to be inferred from the mere act of delivery. (f) And when authorized the agent should show unequivocally that he acts only as agent, if he intends not to bind himself; and he seems to be held to this obligation more strictly in England, (g) than in this country. (h)

* SECTION IV.

* 254

OF INDORSEMENT AFTER MATURITY.

Notes and bills are usually transferred by indorsement before they are due. But they may be so transferred after they are due, and before they are paid. There is, however, a very important difference between the effect of the transfer of a bill or note before its maturity, and that of such transfer when the bill or note is overdue. The *bonâ fide* holder of a note by indorsement before maturity takes it subject to no equities existing between his assignor and the promisor which are not indicated on the face of the note, (i) and to none which do not exist at the time of the transfer. (j) It was once much questioned whether he who received a note under circumstances of suspicion was not bound

(ee) *Lawrence v. Gebhard*, 41 Barb. 575, is an interesting case on this question.

(f) *Harrop v. Fisher*, 100 Eng. C. L. 196; s. c. 10 J. Scott, 196.

(g) *Nicholls v. Diamond*, 24 E. L. & E. 403; *Mare v. Charles*, 34 E. L. & E. 138; s. c. 5 E. & B. 978.

(h) *Hicks v. Hinde*, 9 Barb. 528; *Babcock v. Beman*, 1 Kern, 200; *De Witt v. Walton*, 5 Seld. 571. See *ante*, p. * 52.

(i) *Brown v. Davies*, 3 T. R. 82, per

Buller, J.; *Hall v. Wilson*, 16 Barb. 548; *Fletcher v. Gushee*, 32 Me. 587; *Walker v. Davis*, 33 id. 516; *Gwynn v. Lee*, 9 Gill, 138; *Kohlman v. Ludwig*, 5 La. An. 33. And the doctrine of *lis pendens* is that whoever purchases property which is at that time in litigation, takes it subject to any decree or judgment made in respect to it in the pending suit, is held not to apply to negotiable notes. *Winston v. Westfeldt*, 22 Ala. 760.

(j) *Furniss v. Gilchrist*, 1 Sandf. 53.

(x) See *Fort Dearborn Nat. Bank v. Carter, Rice & Co.*, 152 Mass. 34, 25 N. E. 27; *Steele v. M'Kinlay* (5 A. C. 754), 4 English Ruling Cas. 218, 239, 242 n.; *Dutton v. Marsh* (L. R. 6 Q. B. 361), id. 278, 283; *Attwood v. Munnings* (7 B. & C. 278), id. 364, 570. A corporation note, signed "A., President," may by parol be shown to be the note of the company. *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581, 58 N. E. 833, 52 L. R. A.

307; *First Nat. Bank v. Midland Steel Co.*, 157 Ind. 702.

(y) As to agents see *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915, 919 n. As to corporations, especially as to their right to execute accommodation paper, see *In re Assignment Mutual Guaranty F. Ins. Co.*, 107 Iowa, 143, 55 Am. St. Rep. 149, 164 n. As to municipal corporations, see *Jones v. Camden* (44 S. C. 319), 51 Am. St. Rep. 819, 830 n.

to ascertain for himself, and at his own peril, that the note came rightfully into his hands; (x) and therefore a promisor might defend against the note, by showing that he had lost it, or that it was stolen from him, or by any other similar defence, showing also that this might have been ascertained by the holder before receiving the note. (k) But the weight of recent authority favors

the rule that such holder is entitled to the benefit of the * 255 note, unless * he is a wilful party to the wrong by which it comes into his hands, or, perhaps, has been guilty of such negligence as amounts to [clear evidence of actual] fraud; (l)¹ for even gross negligence alone would not deprive him of his right. (m)² But the authorities on this subject are not in entire agreement. The law is certainly otherwise, however, if the bill or note were transferred to him when overdue. (n) (y) It

(k) In *Gill v. Cubitt*, 3 B. & C. 466, where a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning by a person whose features were known, but whose name was unknown to the broker, and the latter, being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it; it was held that, in an action on the bill by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man; and they having found for the defendant, the court refused to disturb the verdict. *Down v. Halling*, 4 B. & C. 330; *Smith v. Mechanics & Traders' Bank*, 6 La. An. 610.

(l) *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56; *Goodman v. Harvey*, 6 Nev. & M. 372; *Cone v. Baldwin*, 12 Pick. 545; *Matthews v. Poythress*, 4 Ga. 287; *Raphael v. Bank of England*, 33 E. L. & E. 276, 17 C. B. 161; *Magee v. Badger*, 30 Barb. 246. See *contra*, *Nutter v. Stover*, 48 Me. 163.

(m) "Gross negligence may be evi-

dence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine." Per Lord Denman, *Goodman v. Harvey*, 4 A. & E. 870, 6 Nev. & M. 372. It is a question for the jury whether the party taking the bill was guilty of bad faith. See *Cunliffe v. Booth*, 3 Bing. N. C. 821. In *Crook v. Jadis*, 5 B. & Ad. 909, *Patteson, J.*, says: "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." But the authority of these cases is denied in *Pringle v. Phillips*, 5 Sandf. 157, and an opposite doctrine strongly maintained and decided. So also in *Roth & Co. v. Colvin, Allen & Co.*, 32 Vt. 125, where the law is fully examined by *Poland, J.*, and the doctrine of *Gill v. Cubitt* reaffirmed, and the case of *Pringle v. Phillips* fully approved. And see *Merriam v. Granite Bank*, 8 Gray, 254; and *Crosby v. Grant*, 36 N. H. 273; *Hall v. Hale*, 8 Conn. 336; *Sandford v. Norton*, 14 Vt. 228; *Tutor v. Patton*, 13 La. 213; *Greneaux v. Wheeler*, 6 Tex. 515.

(n) *Chalmers v. Lanion*, 1 Camp. 383; *Thomas v. Newton*, 2 C. & P. 606; *Smith v. Hiscock*, 14 Me. 449; *Hascall v. Whitmore*, 19 id. 102.

¹ Thus, if he purposely refrains from making inquiries because he suspects something may be wrong, he is not protected. *Daniel, Negot. Inst.* § 795 b. — W.

² The numerous cases on this point, showing that the law is now uniformly as stated in the text in England, and in this country except in Kentucky, Tennessee, and Vermont, are collected in *Daniel, Negot. Inst.* §§ 771-775. — W.

(x) See *supra*, p. * 242 n. (v); Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283. When one of several notes secured by the same mortgage is dishonored, a subsequent pur-

chaser of the other notes is put upon inquiry, and they come to him subject to all equities. *Lockwood v. Noble*, 113 Mich. 418, 71 N. W. 856.

(y) *Young Men's C. A. Gymnasium Co.*

comes to him then discredited; he is put upon his guard; and although he pays a full consideration for it, he receives nothing but the title and rights of his assignor. Such a bill or note can no longer represent a distinct and definite credit, or money to be paid at a certain period; and as it no longer answers the purpose or performs the functions of negotiable paper, it no longer shares the privileges of such instruments. And it is therefore said that any defence which might be made against the assignor may be made available against the assignee; (o) (x) and where a note was sold and delivered before maturity but not indorsed until after maturity, it was * held open to * 256 the same defences as if it had been transferred after dis-

(o) *Brown v. Davies*, 3 T. R. 80, per *Buller, J.*; *Beek v. Robley*, 1 H. Bl. 89, n. (d); *Howard v. Ames*, 3 Met. 308; *MacKay v. Holland*, 4 id. 69; *Potter v. Tyler*, 2 id. 58; *McNeil v. McDonald*, 1 Hill (S. C.), 1; *Mosteller v. Bosh*, 7 Ired. Eq. 39; *Connery v. Kendall*, 5 La. An. 515; *Sawyer v. Hoovey*, id. 153; *Lancaster Bank v. Woodward*, 18 Penn. St. 357; *Clay v. Cottrell*, id. 408. — The burden of proving, however, that the note was indorsed after it was overdue, in order to let in his equities, is on the defendant; for the presumption is that the indorsement was made at or soon after the date of the note, or at least before its maturity. *Lewis v. Parker*, 4 A. & E. 838; *New Or-*

leans v. Montgomery, 95 U. S. 18; *Cook v. Norwood*, 106 Ill. 558; *Burnham v. Wood*, 6 N. H. 334; *Burnham v. Webster*, 19 Me. 232; *Ranger v. Carey*, 1 Met. 369; *Cain v. Spann*, 1 McMull. 258; *Washburn v. Ramsdell*, 17 Vt. 299. *Contra* is *Clendenin v. Southerland*, 31 Ark. 20 (statutory). — And this burden is not discharged by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards. *Ranger v. Carey*, 1 Met. 369. — Suspicious circumstances, however, may rebut this presumption. *Snyder v. Riley*, 6 Barr, 165; *Tams v. Way*, 13 Penn. St. 222.

v. Rockford Nat. Bank, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753 and note, 70 Am. St. Rep. 135; *Egderly v. Lawson*, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432; *State Trust Co. v. Turner*, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; *Freeman v. Bailey*, 50 S. C. 241, 27 S. E. 686.

This does not apply to checks; but the acceptance of a check long after its date, though not conclusive, makes it a question for the jury whether the rule is not applicable. *London & C. B. Co. v. Groome*, 8 Q. B. D. 288; see *Bull v. Bank of Kasson*, 123 U. S. 105, 8 S. Ct. 62, 31 L. Ed. 97; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130; *Hamilton v. Winona Co.*, 95 Mich. 436, 54 N. W. 903; *N. W. Coal Co. v. Bowman*, 69 Iowa, 150, 28 N. W. 496; *Wagner v. Crook*, 167 Penn. St. 259, 31 Atl. 576; *First Nat. Bank v. Miller*, 37 Neb. 500, 55 N. W. 1064; *Bowen v. Needles Nat. Bank*, 87 Fed. 430; *Morris v. Enfaula Nat. Bank*, 122 Ala. 580, 25 So. 499, 82 Am. St. Rep. 95. A check is not stale, and open to defences, six days after its date. *Estes v. Lovering*

Shoe Co., 59 Minn. 504, 61 N. W. 574. One to whom a note is transferred after maturity may sue in the right of the transferor when the latter is a *bona fide* holder for value before maturity. *Egderly v. Lawson*, 176 Mass. 51, 57 N. E. 1020, 51 L. R. A. 432.

(x) One who acquires negotiable paper or a negotiable security after its maturity from one who bought it in good faith before maturity has all the rights of his assignor, no matter when the assignment was made. *Ibid.*; *Rondot v. Rogers Tp.*, 99 Fed. 202, 213. This rule does not apply when the transferee is the payee of the note. *Andrews v. Robertson*, 111 Wis. 334, 87 N. W. 190, 54 L. R. A. 673.

A *bona fide* holder of negotiable paper is always entitled to transfer to a third person all the rights with which he is vested, and the title thus acquired is not affected by proof that the indorsee was acquainted with the defences existing against the paper. *Gunnison County Com'rs v. Rollins*, 173 U. S. 255, 275, 19 S. Ct. 390, 43 L. Ed. 689; *Pickens Tp. v. Post*, 99 Fed. 659.

honor. (p) This rule has, however, this important qualification. It is said by high authorities, and on good reason, that the defence must arise from the note itself, or the transaction in which the note originated, and not from any collateral matter. (q)¹

(p) *Southard v. Porter*, 43 N. H. 239.

(q) *Burrough v. Moss*, 10 B. & C. 558; *Whitehead v. Walker*, 10 M. & W. 696; *Carruthers v. West*, 11 Q. B. 143; *Hughes v. Large*, 2 Barr, 103; *Cumberland Bank v. Hann*, 3 Harrison, 223; *Chandler v. Drew*, 6 N. H. 469; *Robinson v. Lyman*, 10 Conn. 31; *Britton v. Bishop*, 11 Vt. 70; *Robertson v. Breedlove*, 7 Port. (Ala.) 541; *Tuscumbia R. R. Co. v. Rhodes*, 8 Ala. 206; *Tinsley v. Beall*, 2 Ga. 134; *Hankins v. Shoup*, 2 Cart. (Ind.) 342; *McAlpin v. Wingard*, 2 Rich. L. 547; *Oulds v. Harrison*, 28 E. L. & E. 524, 10 Exch. 572; *Arnot v. Woodburn*, 35 Mo. 99; *Simpson v. Hall*, 47 Conn. 418; *Elliott v. Deason*, 64 Ga. 63; *Eversole v. Maull*, 50 Md. 96; *Barnes v. McMullin*, 78 Mo. 260; *Trafford v. Hall*, 7 R. I. 104; *Woods v. Viozca*, 26 La. An. 716; *Noyes v. Landon*, 59 Vt. 569; *Davis v. Miller*, 14 Gratt. 8. In [some States, however] all set-offs between the original parties exist-

ing at the time of the transfer of the title are allowed. *Sargent v. Southgate*, 5 Pick. 312; *Nixon v. English*, 3 McCord, 549; *Perry v. Mays*, 2 Bailey, 354; *Cain v. Spann*, 1 McMull, 258; *Burnham v. Tucker*, 18 Me. 179; *Wood v. Warren*, 19 id. 23; *Denning v. Gibson*, 53 Iowa, 517; *Tuttle v. Wilson*, 33 Minn. 423; *Edney v. Willis*, 23 Neb. 56. And see *Ordiorne v. Woodman*, 39 N. H. 544; *Cross v. Brown*, 51 N. H. 486. In New York, the point was considered doubtful in *Miner v. Hoyt*, 4 Hill, 193, 197.—Of these States, in Massachusetts, at least, equities arising between the original parties after the transfer of title, but before notice to the maker, cannot be set off as against the indorsee. *Ranger v. Carey*, 1 Met. 369; *Baxter v. Little*, 6 id. 7. (x) [But in Iowa and Minnesota all set-offs arising before notice of the transfer may be set up by the maker, *Denning v. Gibson*. *Tuttle v. Wilson*, *supra*.]

¹ If a negotiable instrument payable to bearer or indorsed in blank is stolen or lost and is not transferred before maturity to a *bona fide* purchaser for value, the original owner may assert his title against any subsequent transferee, the instrument becoming after maturity like an ordinary chattel, to which a thief or finder cannot give a good title. (y) *Down v. Halling*, 4 B. & C. 330; *Vermilye v. Adams Express Co.*, 21 Wall.

(x) As to set-off in favor of and against the holders of negotiable paper, see the notes to *Amory v. Meryweather* (2 B. & C. 573), 4 English Ruling Cas. 371, 397; *St. Paul & Minn. Trust Co. v. Leck* (57 Minn. 87), 47 Am. St. Rep. 576, 593; *Stadler v. First Nat. Bank* (22 Mont. 190), 74 id. 582, 600; *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212, 23 L. R. A. 313, 319; *Morgan v. Wordell*, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33; *Vann v. Marbury*, 100 Ala. 438, 14 So. 273, 23 L. R. A. 325; *Murphy v. Arkansas & L. Land Co.* 97 Fed. 723, 728; *National Bank of Commerce v. Feeney*, 12 So. Dak. 156, 76 Am. St. Rep. 594; *Tichenor v. Owensboro Sav. Bank* (Ky.), 68 S. W. 127.

(y) Upon negotiable paper, not delivered, but stolen and fraudulently put in circulation, the maker is not liable even to a *bona fide* holder, unless he has been guilty of gross carelessness. *District of Columbia v. Cornell*, 130 U. S. 655, 9 S. Ct. 694, 32 L. Ed. 1041; *Salley v. Terrille*,

95 Me. 553, 50 Atl. 896, 55 L. R. A. 730; *Streissguth v. Kroll* (Minn.), 90 N. W. 577. But an agent, entrusted with a note, may by delivery give it such a legal inception as to make it binding in the hands of a *bona fide* holder. *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605. When a note is fraudulently put in circulation, the holder has the burden of proof to show that he received it in good faith before maturity. See *Bill v. Steward*, 156 Mass. 508, 31 N. E. 386; *Merchants' Bank v. Haverhill Iron Works*, 159 Mass. 158, 34 N. E. 93; *National Revere Bank v. Morse*, 163 Mass. 383, 40 N. E. 180; *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570, 47 N. E. 241; *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307; *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150. And it is held that the note of one who could not read or write, who was informed that he was signing a different agreement, and who has not been negligent is void in

Although paper negotiated when overdue is subject to equitable defences, yet a demand must be made on the acceptor or maker

138 (but see *Nat. Bank v. Texas*, 20 Wall. 72, 88); *Gilbough v. Norfolk, &c. R. R. Co.*, 1 Hughes C. C. 410; *Von Hoffman v. United States*, 18 Ct. of Claims, 386; *Greenwell v. Haydon*, 78 Ky. 332; *First Nat. Bank v. County Commissioners*, 14 Minn. 77; *Wylie v. Speyer*, 62 How. Pr. 107; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221; *Northampton Nat. Bank v. Niles*, 109 N. Y., 628; *Texas Banking and Ins. Co. v. Turnley*, 61 Tex. 365; *Arents v. Commonwealth*, 18 Gratt. 750. And as between the original owner and a holder after maturity, the burden is on the latter to show that the thief or finder transferred the instrument before maturity to him or some *bona fide* purchaser under whom he claims. *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221.

It has been held that the same principle is applicable to a transfer after maturity by an agent in excess of his authority. *Goggerly v. Cuthbert*, 2 B. & P. N. R. 170; *Foley v. Smith*, 6 Wall. 492; *Chase v. Whitmore*, 68 Cal. 545; *Thomas v. Kinsey*, 8 Ga. 421; *McCormick v. Williams*, 54 Iowa, 50; *Wood v. McKean*, 64 Iowa, 16; *Towner v. McClelland*, 110 Ill. 542; *Bird v. Cockrem*, 28 La. An. 70; *Stern v. Germania Nat. Bank*, 34 La. An. 1119; *McKim v. King*, 58 Md. 502; *Church v. Clapp*, 47 Mich. 257; *Emerson v. Crocker*, 5 N. H. 159; *Farrington v. Park Bank*, 39 Barb. 645; *Osborn v. McClelland*, 43 Ohio St. 284; *Walker v. Wilson*, 79 Tex. 185.

But in a few cases it has been held, and it would seem with good reason, that the original owner having entrusted his agent with apparent title to negotiable paper cannot assert his own title against one who has purchased in good faith from the agent, and the ground for estoppel is stronger if the paper was already overdue when entrusted to the agent. *Connell v. Bliss*, 52 Me. 476; *Eversole v. Maull*, 50 Md. 95; *Lee v. Turner*, 89 Mo. 489; *Neuhoff v. O'Reilly*, 93 Mo. 164.

Whether equities (as distinguished from defects in the legal title) in favor of prior holders, or of persons who have never been holders of or parties to the instrument, which exist at or arise after maturity, affect the title of subsequent *bona fide* purchasers for value without notice is not wholly settled. It was decided in the affirmative in *In re European Bank*, L. R. 5 Ch. 358; *Turner v. Hoyle*, 95 Mo. 337; *Kernohan v. Durham*, 48 Ohio St. 1. And see *Wood v. Guarantee Trust Co.*, 128 U. S. 416. But the legal title to negotiable paper should pass after maturity, subject only to such equities as might reasonably be suspected from the fact that the paper was overdue. This fact would give rise to suspicion that the obligors have some reason for resisting payment, and the transferee should therefore take subject to equitable defences of those parties; but there is no reason to suspect that the title of a holder of overdue paper is subject to a secret trust, express or constructive, and it was held that such equities do not follow negotiable paper after maturity in *Crosby v. Tanner*, 40 Iowa, 136; *Blake v. Koons*, 71 Iowa, 356; *Hibernian Bank v. Everman*, 52 Miss. 500. And see *Warren v. Haight*, 65 N. Y. 171; *Hill v. Shields*, 81 N. C. 250.

Whether the maker or other obligor of paper who innocently pays after maturity a holder whose right to the instrument could be defeated for any of the reasons referred to in this note, can be compelled to pay again the original owner is considered in *Hinckley v. Union Pacific R. R. Co.*, 129 Mass. 52, where overdue coupons, cut from stolen bonds, were paid by the defendant to one who in good faith purchased the bonds after the maturity of the coupons in question; it was held that the defendant must pay the original owner. It is certainly a great hardship on the obligor to hold him liable a second time in view of the facts that he usually cannot tell whether there has been a transfer after maturity, and is obliged to pay on presentation or suffer loss of credit. No one need purchase an overdue note, but the maker is bound to pay it when overdue as fully as on the day of maturity. The law merchant should, therefore, protect him as fully when he pays overdue paper as it does when he pays paper

the hands of a *bona fide* holder. *Willard v. Nelson*, 35 Neb. 651, 53 N. W. 572, 37 Am. St. Rep. 455, 458 n.; *Lindley v. Hofman*, 22 Ind. App. 236, 53 N. E. 471. See *Bedell v. Herring* (77 Cal. 572), 11 Am. St. Rep. 307, 309, 320 n.; *Green v. Wilkie* (Iowa), 36 L. R. A. 434 and note; *Walton Guano Co. v. Copelan*, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268; *Lewis v. Clay*, 67 L. J. Q. B. 224, 77 L. T. 653, 46 W. R. 319; *Clutton v. Attenborough*, [1897] A. C. 90; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502; *Butler v. Richmond & Danville R. Co.*, 88 Ga. 594, 15 S. E. 668, 32 Am. L. Reg. N. S. 945 n.; see 36 id. 798; 37 id. 745.

within reasonable time, and reasonable notice must be given to an indorser, or he will be discharged. (r)

As between *the original parties* to negotiable paper the consideration may always be inquired into; and so it may as between indorser and indorsee. (s) But an action by an indorsee against the maker cannot be defeated by showing that no consideration passed to the maker from the payee and indorser, (t) or between any remote parties.

A distinction of this kind is sometimes made. An indorsee * who buys a note for less than its face, can recover from his indorser only what he paid, with interest; but may recover from the maker, the whole amount of the note. (x) This has been held in some cases in New York. (z) See on this subject the chapter on Usury.

On the ground that negotiable paper is intended only for business purposes, and has its peculiar privileges only that it may more perfectly perform this function, it has been held that one who takes a negotiable note, even before its maturity, but only in payment of or as security for an antecedent debt, without

(r) *McKinney v. Crawford*, 8 S. & R. 351; *Dwight v. Emerson*, 2 N. H. 159; *Patterson v. Todd*, 18 Penn. St. 426; *Levy v. Drew*, 14 Ark. 334; *Thayer v. Brackett*, 12 Mass. 465; *Field v. Nickerson*, 13 Mass. 138; *Berry v. Robinson*, 9 Johns. 121.

(s) *De Bras v. Forbes*, 1 Esp. 117; *Lickbarrow v. Mason*, 2 T. R. 71, per *Ashhurst, J.*; *Abbot v. Hendricks*, 1 Man. & G. 791; *Herrick v. Carman*, 10 Johns. 224; *Hill v. Ely*, 5 S. & R. 363; *Clement v. Reppard*, 15 Penn. St. 111; *Johnson v. Martinus*, 4 Halst. 144; *Hill v. Buckminster*, 5 Pick. 391; *Fisher v. Salmon*, 1 Cal. 413; *Fisher v. Leland*, 4 Cush. 456; *Bank of Tennessee v. Johnson*, 1 Swan, 217. It is held in *Starr v. Torrey*,

2 N. J. 190, that failure of consideration known to indorsee, is a defence in a suit by him against maker.

(t) *Perkins v. Challis*, 1 N. H. 254; *Waterman v. Barratt*, 4 Harring. (Del.) 311. See *Klopp & Stump v. Lebanon Valley Bank*, 39 Penn. St. 489, as to incompetency of indorser as a witness to impair the legal effect of the note in the hands of a holder to whom it was regularly negotiated. The Illinois statute, permitting the defence of want or failure of consideration, has changed the common law. *Oertel v. Schroeder*, 48 Ill. 133.

(z) *Ingalls v. Lee*, 9 Barb. 647; *Cram v. Hendricks*, 7 Wend. 569; *Rapelye v. Anderson*, 4 Hill (N. Y.), 472; *Youngs v. Lee*, 18 Barb. 187.

at maturity. The point, though not noticed by the court, was involved in *Cone v. Brown*, 15 Rich. 262; *Lamb v. Matthews*, 41 Vt. 42. See also *King v. Fleece*, 7 Heisk. 273; in all of which cases the payment was held a discharge, and the English Bills of Exchange Act also apparently protects payments made in good faith after maturity, § 59, (1). — W.

(x) The purchaser of a negotiable note or bond before maturity, when he is not personally chargeable with fraud, is usually held entitled to recover its full amount against the maker, though he bought it for less than its par value, whatever its original infirmity may have been, but this does not apply when it is only pledged as collateral

security, and is in the hands of one having notice of such pledge. *Wade v. Chicago, &c. R. Co.*, 149 U. S. 327, 343, 13 S. Ct. 892, 37 L. Ed. 755; *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307, 321, 322 n.; *Moses v. Grainger* (106 Tenn. 7), 53 L. R. A. 357 and note.

giving for it any new consideration, does not take it in the way of business, and is not a *bona fide* holder; and that he therefore holds the note subject to all equitable defences. This doctrine rests upon adjudications of great weight; but it is also denied by very high authorities, indeed by the Supreme Court of the United States, who have decided that a pre-existing debt of itself, and without any strengthening circumstances, is of itself a sufficient consideration. (a) But it has since been held, by courts entitled to great respect, that this doctrine is untenable.¹ (x) * It * 258

(a) *Swift v. Tyson*, 16 Pet. 19.

¹ It is universally admitted that one who takes negotiable paper in absolute payment and discharge of an antecedent debt is a holder for value. And it is generally held that if taken in conditional payment of such a debt, the holder is a purchaser for value. *Poirier v. Morris*, 1 W. R. 349; *Currie v. Misa*, L. R. 10 Ex. 153; *Swift v. Tyson*, 16 Pet. 19; *Reid v. Bank of Mobile*, 70 Ala. 199; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; *Wyman v. Colorado Nat. Bank*, 5 Col. 30; *Roberts v. Hall*, 37 Conn. 205; *Townsend v. France*, 2 Houst. 441; *Meadow v. Bird*, 22 Ga. 246; *Foy v. Blackstone*, 31 Ill. 538; *McKnight v. Knisely*, 25 Ind. 336; *Draper v. Cowles*, 27 Kan. 484; *Greenwell v. Haydon*, 78 Ky. 332; *Mallard v. Aillet*, 6 La. An. 93; *Norton v. Waite*, 20 Me. 175; *Cecil Bank v. Heald*, 25 Md. 562; *Thatcher v. Pray*, 113 Mass. 291; *Stevenson v. Heyland*, 11 Minn. 198; *Fitzgerald v. Barker*, 96 Mo. 661; *Williams v. Little*, 11 N. H. 66; *Armour v. McMichael*, 36 N. J. 92; *Reddick v. Jones*, 6 Ired. 107; *Baily v. Smith*, 14 Ohio St. 404; *Bardsley v. Delp*, 88 Pa. 420; *Charleston Bank v. State Bank*, 13 Rich. 291; *Greeneaux v. Wheeler*, 6 Tex. 515; *Russell v. Splater*, 47 Vt. 273; *Knox v. Clifford*, 38 Wis. 651. Contrary authorities are *Burroughs v. Ploof*, 73 Mich. 604 (cf. *Hanold v. Kays*, 64 Mich. 439); *Stalker v. McDonald*, 6 Hill, 93; *Moore v. Ryder*, 65 N. Y. 438; *Schaeffer v. Fowler*, 111 Pa. 451; *Ferriss v. Tavel*, 87 Tenn. 386.

That one who takes a note as collateral security for an antecedent debt is also a holder for value, is decided in *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 239; *Sackett v. Johnson*, 54 Cal. 107; *Roberts v. Hall*, 37 Conn. 205; *Meadow v. Bird*, 22 Ga. 246; *McIntire v. Yates*, 104 Ill. 491, 501; *Straughan v. Fairchild*, 80 Ind. 598; *Giovanovich v. Citizens' Bank*, 26 La. An. 15; *Maitland v. Citizens' Bank*, 40 Md. 540; *Fisher v. Fisher*, 98 Mass. 303; *Goodwin v. Mass. L. & T. Co.*, 152 Mass. 189, 199; *Boatman's Saving Inst. v. Holland*, 38 Mo. 49 (cf. *Deere v. Marsden*, 88 Mo. 512); *Cobb v. Doyle*, 7 R. I. 550; *Dearman v. Trimmer*, 26 S. C. 506; *Kauffman v. Robey*, 60 Tex. 308; *Atkinson v. Brooks*, 26 Vt. 569 (but see *Austin v. Curtis*, 31 Vt. 64). Contrary decisions are, *Haden v. Lehman*, 83 Ala. 243; *Bertrand v. Barkman*, 13 Ark. 150; *Union Bank v. Baron*, 58 Iowa, 559; *Nutter v. Stover*, 48 Me. 163; *Smith v. Bibber*, 82 Me. 34; *Henriques v. Ypsilanti Savings Bank*, 84 Mich. 168; *First Nat. Bank v. Strauss*, 66 Miss. 479; *Rice v. Raitt*, 17 N. H. 116; *Stalker v. McDonald*, 6 Hill, 93; *Atlantic Bank v. Franklin*, 55 N. Y. 235; *Duncomb v. New York, &c. R. R. Co.*, 84 N. Y. 190; *Roxborough v. Messick*, 6 Ohio St. 448; *Carpenter v. Nat. Bank*, 106 Pa. 170; *Richardson v. Rice*, 9 Baxt. 290; *Prentice v. Zane*, 2 Gratt. 262; (but see *Davis v. Miller*, 14 Gratt. 1, 15.) — W.

(x) One who receives negotiable paper before its maturity, as collateral to a loan made at the same time, is a holder for value, if he has no notice of a lack of consideration. *First Nat. Bank v. Shue*, 119 Mich. 560, 78 N. W. 647. So is a person to whom a note is transferred to secure a pre-existing debt, when the consideration is an extension of time on such debt. *Levy & Cohn Mule Co. v. Kauffman*, 114 Fed. 170; *Louisville Banking Co. v. How-*

ard, 123 Ala. 380, 26 So. 207; *Altoona Second Nat. Bank v. Dunn*, 151 Penn. St. 228, 25 Atl. 80, 31 Am. St. Rep. 742; *Hamilton v. Fowler*, 99 Fed. 18, 22; *Mack v. Prang*, 104 Wis. 1, 79 N. W. 770; 76 Am. St. Rep. 848; *Goodwin v. Mass. Loan & Trust Co.*, 152 Mass. 189, 199, 25 N. E. 100; *Carter v. Odom*, 121 Ala. 162, 25 So. 774; *Merchants' Bank v. Penland*, 101 Tenn. 445, 47 S. W. 693; *Russ Lumber Co. v. Muscupieable Land Co.*, 120 Cal.

has been held that a note indorsed and negotiated on the last day of grace, is subject to the same defences as if indorsed after dishonor. (b)

SECTION V.

OF ACCOMMODATION PAPER.

A party may be willing to lend his credit to another, when he cannot or does not wish to lend him money. He does this by signing or indorsing a note or bill without consideration. Such notes or bills are known as accommodation paper.

It has been sometimes said that the defence of want of consideration is valid against the indorsee when the indorsee took the paper with notice of the want of consideration, or of any circumstances which would have avoided the note in the hands of the indorser. (u) But the case of an accommodation note, * 259 * whether made or indorsed for the benefit of the party to whom the maker or indorser intends to lend his credit, is an exception to this rule. (x) If A makes a note to B or his order, intending to lend B his credit, and gives it to B to raise money

(b) *Pine v. Smith*, 11 Gray, 38; *Crosby v. Grant*, 36 N. H. 273.

(u) *Steers v. Lashley*, 6 T. R. 61; *Wyat v. Bulmer*, 2 Esp. 538; *Perkins v. Challis*, 1 N. H. 254; *Brown v. Davies*, 3

T. R. 80; *Down v. Halling*, 4 B. & C. 330; *Ayer v. Hutchins*, 4 Mass. 370; *Thompson v. Hale*, 6 Pick. 259; *Littell v. Marshall*, 1 Rob. (La.) 51.

521, 52 Pac. 995; *Currie v. Misa*, L. R. 10 Ex. 153, 4 English Ruling Cas. 316, 328, 330. So in New York, by St. 1897, c. 621, § 5. See *Petrie v. Miller*, 67 N. Y. S. 1042.

(x) See *Sheahan v. Davis*, 27 Oregon, 278 Pac. 405, 28 L. R. A. 476; *Altoona Second Nat. Bank v. Dunn*, 151 Penn. St. 228, 25 Atl. 80, 31 Am. St. Rep. 742, 745 n.; *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898; *Usher v. Raymond Skate Co.*, 163 Mass. 1, 39 N. E. 416; *Beacon Trust Co. v. Robbins*, 173 Mass. 261, 53 N. E. 866; *Harrington v. Baker*, 173 Mass. 488, 53 N. E. 903; *Simons v. Fisher*, 55 Fed. 906, 20 L. R. A. 554; *Cook v. Lister*, 13 C. B. N. s. 543, 4 English Ruling Cas. 552, 564; *Philler v. Patterson*, 168 Penn. St. 468, 32 Atl. 26, 47 Am. St. Rep. 896. When a bank is the holder of a note, for value before maturity, neither the fact that the persons from whom payment is sought, were accommodation indorsers receiving no consideration for their signatures, nor the

fact that those for whom they signed had no property, is a defence to a suit on the note. *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912; *Agawam Nat. Bank v. Downing*, 169 Mass. 297, 47 N. E. 1016. In California the makers of an accommodation note given as collateral security are sureties for the principal debtor (*O'Connor v. Braly*, 112 Cal. 31); in Pennsylvania they are discharged only by payment, being there treated as principals. *Delaware County Trust Co. v. Haser*, 199 Penn. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763; see *Egbert v. Hanson*, 70 N. Y. S. 383. In the absence of agreement, successive indorsers for the accommodation of a third person are liable in the same order as indorsers for value. *Moore v. Cushing*, 162 Mass. 594, 39 N. E. 177, 44 Am. St. Rep. 393.

As to the plea of usury to accommodation paper, see *Bank of Newport v. Cook* (60 Ark. 238), 46 Am. St. Rep. 171, 184 n.

on, B cannot sue A on that note (*x*); but if he indorses it to C, who discounts the note in good faith, knowing it however to be an accommodation note and [given] without valuable consideration, C can nevertheless recover [on] the note from A. The maker may therefore have a defence against the payee which he cannot have against an indorsee who has knowledge of that defence. (*v*)¹ (*y*) But this is true only where the consideration paid by the indorsee may be regarded as going to the maker in the same manner as it would if the payee had been promisor, and the maker had signed the note as his surety. The successive indorsers of accommodation paper are not however so far sureties as to have a claim of contribution against each other; for each indorsee has the same claim against earlier indorsers that he would have if it was not accommodation paper, unless it can be shown that there was an agreement between the indorsers that they should be considered, as between themselves, as joint indorsers and sureties. (*w*)² It

(*v*) *Thompson v. Shepherd*, 12 Met. 311; *Smith v. Knox*, 3 Esp. 46; *Brown v. Mott*, 7 Johns. 361; *Grant v. Ellicott*, 7 Wend. 227; *Molson v. Hawley*, 1 Blatch. 409; *Lord v. The Ocean Bank*, 20 Penn. St. 384; *Kemp v. Balls*, 10 Exch. 605.

And this is so, even if the indorsee took the bill after it became due. *Charles v. Marsden*, 1 Taunt. 224; *Carruthers v. West*, 11 Q. B. 143; *Renwick v. Williams*, 2 Md. 356.

(*w*) *Aiken v. Barkley*, 2 Speers, 747,

¹ If an accommodation note is transferred by the accommodated party as collateral security for an antecedent debt, the transferee may enforce it against the accommodating party, even where such a transferee is not ordinarily regarded as a holder for value. *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Nat. Union Bank v. Todd*, 132 Pa. 312. Otherwise if such a note is wrongfully diverted from the purpose of the accommodation. *Continental Nat. Bank v. Bell*, 125 N. Y. 38. — W.

² See *ante*, p. *36, note 1.

(*x*) *Second Nat. Bank v. Howe*, 40 Minn. 390, 12 Am. St. Rep. 744. Exchanged notes of the same amount are a consideration for each other; and, when negotiated, they are converted from accommodation to business paper. *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46; *State Bank v. Smith*, 155 N. Y. 185, 49 N. E. 680; *Mutual Loan Ass'n v. Brandt*, 69 N. Y. S. 652; *Newmarket Savings Bank v. Hanson*, 67 N. H. 501.

(*y*) In general, as to negotiable paper, knowledge is now treated as the same as notice; and a wilful or fraudulent absence of inquiry into circumstances which invite inquiry may, in point of fact, amount to general or implied notice. *Jones v. Gordon*, 2 A. C. 616, 625, 628, 4 English Ruling Cas. 415, 434; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727; *Atlas Nat. Bank v. Holm*, 71 Fed. 489; *Kitchen v. Loudonback*, 48 Ohio St. 177, 26 N. E. 979; *Richards v. Monroe*, 85 Iowa, 359, 52 N. W. 339; *Manufacturers'*

Nat. Bank v. Newell, 71 Wis. 309, 315; *Second Nat. Bank v. Morgan*, 165 Penn. St. 199, 30 Atl. 957; *Rosemond v. Graham*, 54 Minn. 323, 56 N. W. 38; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148. But as to dishonor, mere knowledge of the fact is not sufficient, as the required notice thereof must come from a party entitled to look to the indorser for payment. *Jagger v. National German-American Bank*, 53 Minn. 386, 55 N. W. 545; *Bigelow on Bills and Notes* (2d ed.), 142.

A purchaser who acquires accommodation paper while it is current, and gives the credit intended by it to be promoted, may enforce it, although he knew of its original character. *Israel v. Gale*, 77 Fed. 532, 23 C. C. A. 274; 174 U. S. 391, 19 S. Ct. 768, 4 L. Ed. 1019; *Greenway v. Wm. D. Orthwein Grain Co.*, 85 Fed. 536, 29 C. C. A. 330; *Maffat v. Greene*, 149 Mo. 48, 50 S. W. 809; *Rea v. McDonald*, 68 Minn. 187, 71 N. W. 11.

has been held in England that where A signs with B for B's accommodation, and C takes the note agreeing, when he takes it, to hold A only as surety, and C gives time to B to the injury of A; a plea by A, stating these facts in defence, was good. (x) In general, accommodation notes or bills are now governed by the same rules as negotiable paper for consideration. (y)¹

SECTION VI.

NOTES ON DEMAND.

Notes and bills payable on demand are in one sense always overdue;² they are not, however, so treated until payment has been demanded and refused, [or, in this country, until a reason-

shows that the rule is held as stated in the text, in Massachusetts, New York, Pennsylvania, Virginia, Maryland, Kentucky, Louisiana, and Connecticut, and otherwise only in Ohio and North Carolina. The U. S. Supreme Court held that there was no distinction in this respect between indorsers for value and indorsees for accommodation, in *McDonald v. McGruder*, 3 Pet. 470. And it is so held in Missouri, in *McCune v. Belt*, 45 Mo. 174.

(x) *Pooley v. Harradine*, 7 E. & B. 430. But see *Hansbrough v. Gray*, 3 Gratt. 356.

(y) *Fenton v. Pocock*, 5 Taunt. 192; *Bank of Montgomery v. Walker*, 9 S. & R. 229; *Murray v. Judah*, 6 Cowen, 484; *Clopper v. Union Bank of Maryland*, 7 Har. & J. 92; *Church v. Barlow*, 9 Pick. 547; *Grant v. Ellicott*, 7 Wend. 227; *Marr v. Johnson*, 9 Yerg. 1; per *Wilde, J.*, *Com. Bank v. Cunningham*, 24 Pick. 274; *Far. & M. Bank v. Rathbone*, 26 Vt. 19; *Strong v. Foster*, 33 E. L. & E. 282; s. c. 17 C. B. 201; *Prouty v. Roberts*, 6 Cush. 19. See also *Parks v. Ingram*, 2 Foster (N. H.), 283; *Kirschner v. Conklin*, 40 Conn. 77.

¹ One who has become a party to accommodation paper may, before it has been transferred, revoke the authority to negotiate it. *Second Nat. Bank v. Howe*, 40 Minn. 390; *Smith's Exec. v. Wyckoff*, 3 Sandf. Ch. 77; *Dogan v. Dubois*, 2 Rich. Eq. 85. And his death operates as a revocation of such authority. *Smith's Exec. v. Wyckoff*, *supra*; *Michigan Insurance Co. v. Leavenworth*, 30 Vt. 11. But it has been held that a purchaser for value may enforce the instrument if he purchased in ignorance that it was given for accommodation, though he knew of the death of the accommodating party. *Clark v. Thayer*, 105 Mass. 216. An accommodation indorser may revoke his indorsement after the note has been pledged, on paying the debt himself. *Berkeley v. Tinsley*, 88 Va. 1001.

Though accommodation paper is not transferred till after maturity in England, a purchaser may nevertheless enforce it. *Charles v. Marsden*, 1 Taunt. 224; *Stein v. Yglesias*, 3 Dowl. 252; *Sturtevant v. Ford*, 4 M. & G. 101; *Carruthers v. West*, 11 Q. B. 143; *Parr v. Jewell*, 13 C. B. 909; 16 C. B. 681; *Ex parte Swan*, L. R. 6 Eq. 344. And in accord with the English law are *Miller v. Larned*, 103 Ill. 562; *First Nat. Bank v. Grant*, 71 Me. 374; *Eversole v. Maull*, 50 Md. 95, 105; *Seyfert v. Edison*, 45 N. J. 393; *Davis v. Miller*, 14 Gratt. 1. But generally in this country the law is otherwise. *Battle v. Weems*, 44 Ala. 105; (cf. *Connerly v. Planters', &c. Ins. Co.*, 66 Ala. 432, 442); *Coghlan v. May*, 17 Cal. 515; *McPherson v. Weston*, 85 Cal. 90; *Whitwell v. Crehore*, 8 La. 540; *Kellogg v. Barton*, 12 Allen, 527; *Chester v. Dorr*, 41 N. Y. 279; *Hoffman v. Foster*, 43 Pa. St. 137; *Hart v. U. S. Trust Co.*, 118 Pa. St. 565, 569; *Bacon v. Harris*, 15 R. I. 599. — W.

² Thus an action may be brought immediately, without a demand, against a party primarily liable on such an instrument, and the statute of limitations runs from the date of issue. See Vol. III. *92. — W.

able time from the date of making has elapsed] ; then they become like bills on time which have been dishonored. There is this difference between a note on time and a note on demand: a note on time, after that time has passed, is certainly dishonored, and an indorsee must know it. But there is no time when a note on demand *must* have been dishonored, and none therefore when an indorsee *could not* have received it without that knowledge. Nevertheless it seems reasonable to * say that if a * 260 note which was payable at any day, has not been paid for very many days, it may fairly be presumed to have been dishonored, and an indorsee, after this lapse of time, may be held to have had a sufficient notice of its dishonor; and [the] American authorities hold this view. (c)¹ [In England, the principle that notes payable on demand may become discredited by mere lapse of time is not adopted.]² (x) The law does not presume that they were made

(c) If not negotiated until a *long time* after it is made, it is subject to all the equities in the hands of an indorsee, as it would be in the possession of the payee. *Furman v. Haskin*, 2 Caines, 369; *Hendricks v. Judah*, 1 Johns. 319; and two months and a half after a note was dated was held sufficient to let in the equities of the maker against the payee, in an action by the indorsee. *Losee v. Dunkin*, 7 Johns. 70. Under different circumstances, a period of five months after a note was dated was held not sufficient for this purpose. *Sandford v. Mickles*, 4 Johns. 324. So seven days has been held not to be sufficient. *Thurston v. McKown*, 6 Mass. 428; *Ayer v. Hutchins*, 4 Mass. 370. In this case the rule concerning notes payable on demand was thus laid down by *Parsons*, C. J.: "A note payable on demand is due presently. In

this case the note has been due eight months before it was indorsed, a length of time sufficient to induce suspicions that the promisors would not pay it, and to cause some inquiry to be made, whether it had in fact been dishonored, or why payment had not been made. If there was no other circumstance, this would be a good reason to let the defendants into any defence which could legally be made by them, if Page [the payee and indorser] were the plaintiff." See also *Tomlinson v. Kinsella*, 31 Conn. 268; *Stewart v. Smith*, 28 Ill. 397; *Dennen v. Haskell*, 45 Me. 430; *Birch v. Fisher*, 51 Mich. 36; *La Due v. First Bank*, 31 Minn. 33; *Cross v. Brown*, 51 N. H. 486; *Herrick v. Wolverton*, 41 N. Y. 581; *Atlantic Co. v. Tredick*, 5 R. I. 171; *Morey v. Wakefield*, 41 Vt. 24.

¹ This doctrine does not apply to bank notes. (y) *Bullard v. Bell*, 1 Mas. 243, 252; *Bullard v. Greenbush*, 24 Me. 336, 338; *Fulton Bank v. Phoenix Bank*, 1 Hall, 562, 577; 9 Op. Atty. Gen. 413. Nor to certificates of deposit, *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Pardee v. Fish*, 60 N. Y. 265. *Contra* is *Tripp v. Curtenius*, 36 Mich. 494. See also *Laughlin v. Marshall*, 19 Ill. 390. — W.

² *Brooks v. Mitchell*, 9 M. & W. 15; (z) *Barough v. White*, 4 B. & C. 355; *Gas-*

(x) In England, such notes are payable at once without any demand; under § 62 of the Bills of Exchange Act, 1882, they "mature" as soon as made and delivered to the payee. *Edwards v. Walters*, [1896] 2 Ch. 157, 166. So in New York. *Central Bank v. Kimball*, 76 N. Y. S. 227. In Louisiana the note becomes overdue only upon demand. *Nott v. State Nat. Bank*, 51 La. Ann. 871, 25 So. 475. The Mass. Act of 1898, c. 533, relating to negotiable

instruments, provides by § 7: "An instrument is payable on demand: (1) Where it

(y) Bank notes are cash, and a *bona fide* holder has title thereto, though stolen. *Miller v. Race*, 1 Burr. 452, 1 Smith's Lead. Cas. (9th Am. ed.) 750, 3 English Ruling Cas. 626, 639 n.

(z) See S. C. with notes, in 4 English Ruling Cas. 398, 405, 408.

with the intention of immediate demand and payment. [Therefore, both in England and in this country, presentment for payment within a reasonable time is sufficient (and also necessary) in order to charge indorsers.]¹ And if it provides for interest, this strengthens the probability that the maker was to have a credit of some extent, and the indorser or guarantor will be held liable accordingly. (d) In such cases the note may be regarded as a continuing security, and the indorser would remain liable until an actual demand. Nor would the holder be chargeable with neglect for omitting to make such demand within any particular time. (e)² A note payable generally, but not specifying any time of payment, is due immediately; and a provision that interest is to accrue after a specified contingency, as the decision of a certain suit, does not affect this rule. (f) (x)

(d) *Lockwood v. Crawford*, 18 Conn. 361.

(e) *Merritt v. Todd*, 23 N. Y. 28; 1 Pars. Notes & Bills, 263.

(f) *Holmes v. West*, 17 Cal. 623.

coyne v. Smith, 1 McClel. & Y. 348. If, however, demand is actually made and payment refused, the paper is thereafter dishonored. *Glasscock v. Balls*, 24 Q. B. D. 13, 15; *Dougan v. Small*, 2 Kerr, 89. — W.

¹ *Chartered Mercantile Bank v. Dickson*, L. R. 3 P. C. 574; *Morgan v. United States*, 113 U. S. 476, 501; *Rhodes v. Seymour*, 36 Conn. 1, 6; *Keyes v. Fenstermaker*, 24 Cal. 329; *Laughlin v. Marshall*, 19 Ill. 390; *Thielman v. Guéblé*, 32 La. An. 270; *Nutting v. Burked*, 48 Mich. 241; *Parker v. Reddick*, 65 Miss. 242; *Collingwood v. Merchants' Bank*, 15 Neb. 118, 121; *McMonigal v. Brown*, 45 Ohio St. 499, 504; *Kampmann v. Williams*, 70 Tex. 568, 571. See also *National State Bank v. Weil*, 141 Pa. St. 457. — W.

² This may be called the New York doctrine, the leading case being *Merritt v. Todd*, 23 N. Y. 28, which has been followed in *Pardee v. Fish*, 60 N. Y. 265, and *Parker v. Stroud*, 98 N. Y. 379. See also *Crim v. Starkweather*, 88 N. Y. 339; *Shutts v. Fingar*, 100 N. Y. 539. But in *Thielman v. Guéblé*, 32 La. An. 260, it was held that in order to charge the indorser of a demand note, even though it provide for interest, presentment must be made within a reasonable time, and *Merritt v. Todd* was criticised. *Thielman v. Guéblé* was followed in *Turner v. Iron Chief Mining Co.*, 74 Wis. 355. — W.

is expressed to be payable on demand, or at sight, or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted, or indorsed, when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand."

The earlier decisions in New York, distinguishing between demand notes that bear interest and those that do not, and denying that a demand note which bears interest, and is not known to be dishonored, has any apparent maturity, have not in late years been favorably received in that State and elsewhere, although there adhered to because long acquiesced in. See *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588; *Leonard v. Olson*, 99 Iowa,

162, 170, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230; *Hatch v. First Nat. Bank*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401. In California, § 3135 of the Civil Code provides that the "apparent maturity of a promissory note, payable at sight or on demand, is: (1) If it bears interest, one year after its date; or (2) if it does not bear interest, six months after its date."

(x) See *Wylie v. Cotter*, 170 Mass. 356, 358, 49 N. E. 746. A note is not made non-negotiable by a provision therein for increased interest after maturity. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958; *Hope v. Barker*, 112 Mo. 338; *Christian C. Bank v. Goode*, 44 Mo. App. 129. Acceptance of a bill after maturity is

Where a note on demand is endorsed within a reasonable time after its date, the indorsee has all the rights of an indorsee of a negotiable note on time where the indorsement was made before maturity; but what this reasonable time shall be must depend upon the facts of the case. It is not determined by any positive rule. (g) Nor is there a positive rule as to the presentment of bank-checks; (x) but * the rule as to overdue notes * 261 is applied with more strictness to them. (h)¹ But still, one who takes a check that is overdue is said not to take it subject to all infirmities of title, if he exercises a reasonable caution in taking it; of which a jury is to judge. (i) And the drawer of a check is not discharged by any delay in presenting it which has not been actually injurious to him.² In New York, it

(g) The question of reasonable time, within which a note due on demand must be indorsed after it is made, in order to shut out any equities between the maker and indorser, is purely a question of law. Per *Shaw*, C. J., *Sylvester v. Crapo*, 15 Pick. 93; *Camp v. Scott*, 14 Vt. 387. — Two days and even five months have been held to be within the limit. *Dennett v. Wyman*, 13 Vt. 485; *Sandford v. Mickles*, 4 Johns. 224. So one month. *Ranger v. Carey*, 1 Met. 369. On the other hand, under different circumstances, eight months, and two months, have been considered beyond it. *American Bank v. Jenness*, 2 Met. 288; *Nevins v. Townshend*, 6 Conn. 5; *Camp v. Scott*, 14 Vt. 387. See further, *Wethey v. Andrews*, 3

Hill (N. Y.), 582; *Thompson v. Hale*, 6 Pick. 259; *Mudd v. Harper*, 1 Md. 110; *Carleton v. Bailey*, 7 Foster (N. H.), 230; *Ames v. Merriam*, 98 Mass. 294; *Bickford v. First, &c. Bank*, 42 Ill. 238.

(h) *Boehm v. Sterling*, 7 T. R. 423; *Down v. Halling*, 4 B. & C. 330; *Rothschild v. Corney*, 9 B. & C. 388; *Brady v. Little Miami R. R. Co.*, 34 Barb. 249; *O'Brien v. Smith*, 1 Black. 99.

(i) *Rothschild v. Corney*, 1 Dan. & L. 325; *Foster v. Paulk*, 41 Me. 425; *Mohawk Bank v. Broderick*, 13 Wend. 133; *London Banking Co. v. Groome*, 8 Q. B. D. 288; *Rochester Bank v. Harris*, 108 Mass. 514; *Bull v. Bank of Kasson*, 123 U. S. 105; *Ames, B. & N.*, Vol I. 791, 792 n.

¹ In order to charge the drawer, when the time elapsing before presentment has been injurious to him (as by the failure of the bank), the payee of a check must present it within a reasonable time, and this has been defined as meaning that it must be presented or forwarded for collection either on the day it is received or the next day. *Rickford v. Ridge*, 2 Camp. 537; *Robson v. Bennett*, 2 Taunt. 388; *Moule v. Brown*, 4 Bing. N. C. 266; *Boddington v. Schlenker*, 4 B. & Ad. 752; *Hare v. Henty*, 10 C. B. N. s. 65; *Bailey v. Bodenham*, 16 C. B. N. s. 288; *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Clark v. Nat. Bank*, 2 MacArth. 249; *Simpson v. Pacific Co.*, 44 Cal. 139; *Woodruff v. Plant*, 41 Conn. 344; *Griffin v. Kemp*, 46 Ind. 176; *Cawein v. Browinski*, 6 Bush. 457; *Miller v. Mosely*, 26 La. An. 667; *Holmes v. Roe*, 62 Mich. 199; *Parker v. Reddick*, 65 Miss. 242; *Wear v. Lee*, 87 Mo. 358; *Taylor v. Sip*, 30 N. J. 284; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Smith v. Miller*, 43 N. Y. 171; *First Nat. Bank v. Alexander*, 84 N. C. 30; *National State Bank v. Weil*, 141 Pa. St. 457; *Blair v. Wilson*, 28 Gratt. 165, 171; *Jones v. Heiliger*, 36 Wis. 149. — W.

² *Alexander v. Burchfield*, 7 M. & G. 1067; *Laws v. Rand*, 3 C. B. N. s. 442; *Keene v. Beard*, 8 C. B. N. s. 372, 381; *Robinson v. Hawksford*, 9 Q. B. 52; *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Bull v. Bank of Kasson*, 123 U. S. 105; *Clark v. Nat. Bank*, 2 MacArth. 249; *Daniels v. Kyle*, 1 Ga. 304, 5 Ga. 2451; *Stevens v. Park*, 73 Ill. 387; *Henshaw v. Root*, 60 Ind. 220; *Security Co. v. Ball*, 107 Ind. 165, 168; *Gregg v. George*, 16 Kan. 546; *Mordis v. Kennedy*, 23 Kan. 408; *Smith v. Jones*, 2 Bush,

binding as if the bill were payable on demand. *Mutford v. Walcot* (1 Ld. Raym. 574), 4 English Ruling Cas. 216, 218 n. (x) See *Bradley v. Andrus*, 107 Fed. 196, 53 L. R. A. 432 and n.

[has been] held that a presentment of a check for payment on the day after receiving it, would be sufficient to charge the maker. (*jj*) It may be remarked that priority in the drawing of a check gives the holder no preference of payment over checks subsequently drawn. (*k*)¹ If a check be drawn on a bank where there are no funds, it need not be presented to maintain an action. (*l*) A check on a broker payable to bearer is a negotiable instrument, and may pass by indorsement so as to entitle the holder to sue the indorser as in the case of a bill of exchange. (*m*)

SECTION VII.

OF THE TRANSFER OF BILLS AND NOTES.

A bill once paid by the acceptor can no longer be negotiated; but until paid by him it is capable of indefinite negotia-

(*jj*) *Johnson v. Bank of N. America*, 5 Rob. 554; and see note 1, *infra*.

(*k*) *Dykes v. The Leather M. Bank*, 11 Paige, 612.

(*l*) *Foster v. Paulk*, 41 Me. 425. See *Wirth v. Austin*, L. R. 10 C. P. 689.

(*m*) *Keene v. Beard*, 98 Eng. C. L. 372. See also *Pars. Notes & Bills*, 58.

103; *Succession of Kercheval*, 14 La. An. 457; *Emery v. Hobson*, 63 Me. 32; *Parker v. Reddick*, 65 Miss. 242, 246; *Morrison v. McCartney*, 30 Mo. 183; *Cogswell v. Rockingham Savings Bank*, 59 N. H. 43; *Cowing v. Altman*, 79 N. Y. 167; *Stewart v. Smith*, 17 Ohio St. 82; *Schofield v. Moon*, 9 Heisk. 171; *Blair v. Hoge*, 28 Gratt. 165, 171; *Kinyon v. Stanton*, 44 Wis. 479; *Compton v. Gilman*, 19 W. Va. 312, 317. But indorsers of checks, like indorsers of other negotiable paper, are discharged by laches in presentment or notice, although not injured thereby. *Parker v. Reddick*, 65 Miss. 242; *Carroll v. Sweet*, 128 N. Y. 19; 2 *Daniel*, *Negot. Inst.* § 1587.

¹ In England, a check is held to be, like an ordinary bill of exchange, merely an order upon the drawee, and in no sense an assignment or partial assignment of a deposit in the bank upon which it is drawn. *Schroeder v. Central Bank*, 34 L. T. Rep. 735, 24 W. R. 710; *Hopkinson v. Forster*, L. R. 19 Eq. 74. See also *Rodick v. Gandell*, 12 Beav. 325; 1 *DeG. M. & G.* 763. And in this country the law is the same in many jurisdictions. (*x*) *First Bank v. Whitman*, 94 U. S. 343; *St. Louis, &c. Ry. Co. v. John-*

(*x*) A check drawn upon a bank is, in certain States, an equitable assignment of the maker's deposit therein, and becomes binding upon the bank on presentment, as against any claim of its own against the deposit, which it has not previously attempted to appropriate; and the death of the depositor does not revoke the power of the bank to pay when the payee of the check would not be affected thereby. *Niblark v. Park Nat. Bank*, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159; *Hemphill v. Yerkes*, 132 Penn. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607, 609 n.; *Raesser v. National Exchange Bank*, 88 Wis. 618, 56 L. R. A. 174; see *Roden v. State Nat. Bank (Ky.)*, *id.* 178. In England, *Massa-*

chusetts, and perhaps most of the States, a check upon a bank, or an unaccepted draft, is regarded as not properly an assignment either at law or in equity. *Hopkinson v. Forster*, L. R. 19 Eq. 74, 3 English Ruling Cas. 746, 755, 760 n.; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210; *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. 615, 12 C. C. A. 331. It is an equitable assignment only when payable out of a particular fund. *Brice v. Bannister*, 3 Q. B. D. 569, 10 English Ruling Cas. 411, 423 n. "A charge on a fund or debt operates as a partial equitable assignment." *Per Chitty*, L. J., in *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765, 769.

A transfer of a depositor's entire deposit

tion. (n)¹ * If paid in part it may be indorsed as to the * 262 residue. But while wholly due it cannot be indorsed in part; (o) and if it be indorsed in part, and is afterwards indorsed by the same indorser to the same indorsee for the remaining part, this is not a good indorsement. (p)

(n) *Connery v. Kendall*, 5 La. An. 515; *Pray v. Maine*, 7 Cush. 253; *Eaton v. McKown*, 34 Me. 510. Per Lord *Ellenborough*, *Callow v. Lawrence*, 3 M. & Sel. 97; *Beck v. Robley*, 1 H. Bl. 89 n. — But if a bill is paid by the drawer, it may afterwards be reissued by the drawer, and the acceptor will be still liable to pay it. *Hubbard v. Jackson*, 3 C. & P. 134, 4 Bing. 390, 1 Mo. & P. 11. — In *Callow v. Lawrence*, *supra*, Lord *Ellenborough* said: "A bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill

would have the effect of prejudicing any of the indorsers."

(o) *Hawkins v. Cardy*, 1 Ld. Raym. 360. And although an indorser has paid part of a bill to the indorsee, the latter may still recover the whole amount of the bill against the drawer. *Johnson v. Kennion*, 2 Wils. 262; *Martin v. Hayes*, 1 Busb. L. 423.

(p) *Hughes v. Kiddell*, 2 Bay, 324. This was an action against the indorser of a note. By one indorsement he had assigned part of the sum mentioned in the note, and the residue by another indorsement. The court held that the action could not be supported, on the ground that an indorsement for part of a note or bill is bad; and if so, then two vicious indorsements could never constitute a good one. See also *Hawkins v. Cardy*, 1 Ld. Raym. 360, *Carth.* 466; *Johnson v. Kennion*, 2 Wills. 262, per *Gould, J.*

ston, 133 U. S. 566, 574; *Ray v. Hiller*, 11 Col. 445; *National Bank v. Second Nat. Bank*, 69 Ind. 479; *Moses v. Franklin Bank*, 34 Md. 574; *Holbrook v. Payne*, 151 Mass. 383, 385; *Brennan v. Merchants' Bank*, 62 Mich. 343; *Coates v. Doran*, 83 Mo. 337; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324; *Saylor v. Bushong*, 100 Pa. 23; *Maginn v. Dollar Savings Bank*, 131 Pa. 362; *Pickle v. Muse*, 88 Tenn. 380.

But in some States a check is held to be an assignment *pro tanto* of the drawer's claim against the bank upon which the check is drawn. *Nat. Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Roberts v. Corbin*, 26 Iowa, 315; *Taylor's Adm. v. Taylor's Assignee*, 78 Ky. 470; *Gordon v. Muehler*, 34 La. An. 604; *Fonner v. Smith*, 31 Neb. 107; *Fogarties v. State Bank*, 12 Rich. Law, 518; *Pease v. Landauer*, 63 Wis. 20.

See *Laclede Bank v. Schuler*, 120 U. S. 511, 514; *Boettcher v. Colorado Bank*, 15 Col. 16; *Chaffee v. Bank*, 40 Ohio St. 1. — W.

¹ In *West Boston Bank v. Thompson*, 124 Mass. 506, 514, to the point that "when the indorser of a note which has been in circulation takes it up, all indorsements on the note subsequent to his are cancelled, and he cannot afterwards negotiate the note so as to make the subsequent indorsers liable to any person with notice of the facts," *Morton, J.*, said that "the mere fact that a note, before its maturity, comes in the usual course of business into the hands of the payee after having been once negotiated by him, does not destroy its negotiability, nor defeat the right of a *bona fide* holder, to recover against all who are parties to the note at the time it is negotiated to him." See also *West St. Louis Bank v. Shawnee County Bank*, 95 U. S. 557, and *Lemoine v. Bank of North America*, 3 Dillon, 44. — K.

by operation of law, and without a valuable consideration, confers no greater rights than he had, whether it be to a receiver, an assignee for creditors, an administrator, or a garnishing creditor. *Fourth St. Nat. Bank v. Yardley*, 165 U. S. 634, 17 S. Ct.

439, 41 L. Ed. 855 (limiting *Laclede Bank v. Schuler*, 120 U. S. 511, 515, 7 S. Ct. 644, 30 L. Ed. 704); *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426; *Dillman v. Carlin*, 105 Wis. 14, 17, 80 N. W. 932.

The holder of a bill or note payable to bearer, or of one payable to some payee or order and endorsed in blank, may transfer the same by mere delivery, (*q*) and is not liable upon it. (*r*) But where one obtains money on a bill or note by discount, and the bill or note is forged, if he did not indorse it he is still liable to refund the money to the party from whom he received it on the ground of an implied warranty that the instrument is genuine; and also on the general principle, that one who pays money without consideration may recover it back. (*s*)¹ (*v*)

If a note be made payable on its face or by indorsement to a party or his order, that party can transfer the note in full property only by his indorsement; and when he indorses it he makes * 263 himself liable to pay it if those who ought to have paid * it to him, had he continued to hold it, fail to pay it to the party to whom he orders it to be paid. His indorsement is in itself only an order on them to pay the bill or note; but the law annexes to this order a promise on his part to pay the bill or note if they do not. He may guard against this by indorsing it with the words "without recourse," which mean, by usage, that the holder is not to have, in any event, recourse to the indorser. (*t*) (*y*)

(*q*) *Davis v. Lane*, 8 N. H. 224; *Wilbour v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451.

(*r*) *Camidge v. Allenby*, 6 B. & C. 373. See also *Rogers v. Langford*, 1 Cr. & M. 637.

(*s*) *Jones v. Ryde*, 1 A. K. Marsh. 157, 5 Taunt. 489; *Bruce v. Bruce*, 1 A. K. Marsh. 165, 5 Taunt. 495; *Gompertz v. Bartlett*, 24 E. L. & E. 156; *Gurney v. Womersley*, 28 E. L. & E. 256, and editor's note; *Eagle Bank v. Smith*, 5 Conn.

71; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 87; *Thompson v. McCullough*, 31 Mo. 224. *Sed aliter*, if the bill or note is discounted by the banker of the acceptor or maker, *Smith v. Mercer*, 6 Taunt. 76. The ruling of *Abbott, C. J.*, in *Fuller v. Smith, Ry. & M.* 49, is not consistent with *Smith v. Mercer*, 6 Taunt. 76.

(*t*) *Rice v. Stearns*, 3 Mass. 225; *Up- ham v. Prince*, 12 Mass. 14; *Waite v. Foster*, 33 Me. 424.

¹ See *ante*, p. * 242, n. 1.

(*x*) The rights of the maker or of an indorser are not affected by the forgery of the name of a subsequent indorser, or by the addition of another's guaranty. *Meesman v. Werges*, 112 U. S. 139, 5 S. W. 65, 28 L. Ed. 641; *First Nat. Bank v. Weidenbeck*, 97 Fed. 896; *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 557, 590, 58 N. E. 162.

A mere certificate of indebtedness, indorsed in blank, may not, if stolen, be valid in the hands of a *bona fide* purchaser, but this does not apply to negotiable paper, at least when the owner's carelessness has not caused loss to an innocent person. *Scollans v. Rollins*, 179 Mass. 346, 352, 353, 60 N. E. 983.

(*y*) This form of indorsement does not

put a subsequent purchaser for value upon inquiry as to defences on the part of the maker, nor does it in any way affect the former's rights against the maker. *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 51 N. W. 305, 15 L. R. A. 386; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611. The party so indorsing is liable for breach of the implied warranty of the genuineness of the paper and its freedom from usury. *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; *Bevan v. Fitzsimmons*, 40 Ill. App. 108. Such implied warranty of genuineness also applies to one who sells and delivers negotiable paper without indorsing it. *Brown v. Ames*, 59 Minn.

While these words, or any words which convey clearly the same meaning, protect the indorser from any demand on him, they convey to the indorsee the paper itself, with all its negotiable qualities, in the same way as an indorsement with no words of restriction or exception could do. (*u*) The same purpose will be answered if he uses any other words, or others distinctly expressive of the same meaning. Without these the indorser is liable for the whole amount. (*v*)

It is this peculiarity which gives their great value and utility to bills and notes as instruments of commerce and business, and this liability is strictly defined and very carefully watched and protected. It is a conditional liability only. All [parties primarily liable] must have the bill or note presented to them, and payment demanded; and notice of the demand and non-payment must be given to [the drawer and indorsers in order to charge them]. And this requirement is very precise as to time, and somewhat so as to form, as we shall presently see.

It has been said that every party so indorsing a bill or note may be regarded as making a new bill or note; (*w*) this, though true in general, may not be precisely and exactly the rule of law; still important consequences sometimes flow from it.

* Thus an indorsement is said to imply that all previous * 264 parties could do validly what they did, and that the present indorser has power to make a valid indorsement. (*x*) And an acceptor is bound, although the name of the drawer is forged, and an indorser, although the maker's name is forged; for by acceptance and by each indorsement, a new contract is formed. (*y*) (*xx*) And the same rule would apply to a party who

(*u*) *Epler v. Funk*, 8 Barr, 468. Such an indorsement transfers the indorser's whole interest therein, but taken with other circumstances, it is said to *tend* to show that the note was not indorsed for value, and therefore to open to the maker the same defences against the indorsee which he could have made against the payee. *Richardson v. Lincoln*, 5 Met. 201.

(*v*) *Goupy v. Harden*, 7 Taunt. 159. In this case it was held, that an agent purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal on his indorsement, however small his commission.

(*w*) *Chitty & Hulme on Bills*, p. 241, and cases cited. See also *Pease v. Turner*, 3 How. (Miss.) 375. — In *Gwinnell v.*

Herbert, 5 A. & E. 436, it is said that the indorser of a promissory note does not stand in the situation of maker relatively to his indorsee, and the latter cannot declare against him as maker.

(*x*) *McNeil v. Knott*, 11 Ga. 142; *Beal v. Alexander*, 6 Tex. 531; *Delaware Bank v. Jarvis*, 20 N. Y. (6 Smith) 226.

(*y*) *Wilson v. Lutwidge*, 1 Stra. 648; *Jenys v. Fowler*, 2 Stra. 946; *Price v. Neal*, 3 Burr. 1354; *Smith v. Chester*, 1 T. R. 655, per *Buller, J.*; *Bass v. Clive*, 4 M. & Sel. 15, per *Dampier, J.*; *Smith v. Mercer*, 6 Taunt. 76; *Robinson v. Reynolds*, 2 Q. B. 196; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Goddard v. Merchants Bank*, 4 Comst. 147; *Hamilton v. Fearson*, 1 Cart. (Ind.) 540. So

476, 61 N. W. 448; *Strauss v. Hensley*, 7 App. D. C. 289, 36 L. R. A. 92.

(*xx*) The rule laid down in *Price v. Neal*, that a drawee who pays a forged

intervenes and accepts or pays *supra protest*. (z) But a distinction has been taken between a bill with the signature forged, and one of which the whole body is forged, holding that the implied admission or warranty of the acceptor does not apply in the latter case. (a) And if a prior indorsement be forged, it has been held that the second indorser cannot be charged as promisor or indorser. (aa) A drawee is bound to know the signature of his drawer, and if he pays the amount of the bill cannot recover it back;¹ but this obligation does not go beyond the signature, and if the amount of the bill is increased by a forgery, he has been permitted to recover from the payee the original amount, and whatever more he paid. (ab) If an acceptor gives to a holder for value a new bill in payment of a forged one, which he had

also the acceptor undertakes that the drawer has the capacity to draw and indorse. *Drayton v. Dale*, 2 B. & C. 299, 3 Dow. & R. 534, per *Bayley*, J.; *Smith v. Marsack*, 6 C. B. 486; *Mather v. Maidstone*, 18 C. B. 273.

(c) *Goddard v. Merchants Bank*, 4 Comst. 147.

(a) *Bank of Commerce v. Union Bank*,

3 Comst. 230. But see *Hall v. Fuller*, 5 B. & C. 750.

(aa) *Howe v. Merrill*, 5 Cush. 80.

(ab) *National Park Bank v. Ninth National Bank*, 55 Barb. 87; but this decision was reversed by the Court of Appeals, 46 N. Y. 77. See *Clews v. Banking Assoc.*, 89 N. Y. 418; 105 N. Y. 398; 114 N. Y. 70; and cases cited in 4 Harv. L. Rev. 306.

¹ *Hoffman v. Milwaukee Bank*, 12 Wall. 181; *Young v. Lehman*, 63 Ala. 519, 523; *First Nat. Bank v. Ricker*, 71 Ill. 439, 441; *First Nat. Bank v. Indiana Nat. Bank*, 30 N. E. Rep. 808 (Ind.); *National Bank v. Tappan*, 6 Kan. 456; *Hardy v. Chesapeake Bank*, 51 Md. 562, 585; *Manufacturers' Nat. Bank v. Swift*, 70 Mo. 515, 518; *National Bank v. Bangs*, 106 Mass. 441, 444; *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 280, 282; *Bernheimer v. Marshall*, 2 Minn. 78; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442, 446; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Ellis v. Ohio, &c. Co.*, 4 Ohio St. 628, 652; *Levy v. U. S. Bank*, 1 Binn. 36; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Rouvant v. San Antonio Bank*, 63 Tex. 610; *Bank of St. Albans v. Farmers', &c. Bank*, 10 Vt. 141; *Johnston v. Commercial Bank*, 27 W. Va. 343, 348, 359; *Ryan v. Bank of Montreal*, 12 Ont. R. 39. A contrary decision is *McKleroy v. Southern Bank*, 14 La. An. 458, and in Pennsylvania by statute the drawee may recover. *Corn Exchange Nat. Bank v. Nat. Bank of Republic*, 78 Pa. St. 233.

But if the holder was negligent in taking the bill, as where a banker buys a draft for a large amount from a stranger without inquiry, he must repay the drawee. *National Bank v. Bangs*, 106 Mass. 441; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; *Ellis v. Ohio, &c. Co.*, 4 Ohio St. 628; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Rouvant v. San Antonio Bank*, 63 Tex. 610. But see *Howard v. Mississippi Valley Bank*, 28 La. An. 727; *Commercial, &c. Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Allen v. Fourth Nat. Bank*, 59 N. Y. 12; *St. Albans Bank v. Farmers', &c. Bank*, 10 Vt. 141. Likewise, if the holder discovers the forgery before payment by the drawee, the latter may recover what he has paid. *First Nat. Bank v. Ricker*, 71 Ill. 439; *National Bank v. Bangs*, 106 Mass. 441, 444. — W.

draft or check to a *bona fide* purchaser cannot recover back the money paid, is now almost universally accepted. *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 395, 59 N. E. 62; *Bloomington v. Nat. Butchers & Drovers' Bank*,

68 N. Y. S. 35; *supra*, p. 281, n. (x); see *Green v. Purcell Nat. Bank* (Ind. Terr.), 37 S. W. 50; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739.

accepted, not knowing it to be forged when he gives the new bill, he is bound on the new bill. (b) So, if a bank pays a forged check, it bears the loss. (c) (x) And a party cannot be held liable upon paper on which his name is forged, merely because he has paid, without objection, other notes forged by the same person. (d) And if a bank receive payment of an amount due to it in its own bills, which turn out to be forged, it is bound. (e)¹ But, in general, payment of a debt in forged bills, both parties being innocent, is no payment, nor is a bank bound by discounting a forged note; (f) and it has been held that a depositor owes the bank no duty which requires him to examine his pass-book or vouchers, with * a view to the detection of for- * 265geries of his name. (g) But the loser by forged paper can

(b) *Mather v. Maidstone*, 37 E. L. & E. 335; s. c. 18 C. B. 273.

(c) *Levy v. Bank of United States*, 1 Binn. 27; *Bank of St. Albans v. F. & M. Bank*, 10 Vt. 141; *Orr v. Union Bank of Scotland*, 29 E. L. & E. 1.

(d) *Walters v. Harvey*, 17 Md. 150.

(e) *United States Bank v. Bank of Georgia*, 10 Wheat. 333.

(f) *Stedman v. Gooch*, 1 Esp. 5; *Markle v. Hatfield*, 2 Johns. 455; *Young v. Adams*, 6 Mass. 182; *Eagle Bank v. Smith*, 5 Conn. 71.

(g) *Weisser v. Denison*, 10 N. Y. 68; *Manufacturers Bank v. Barnes*, 65 Ill. 69.

¹ So an individual who pays a bill or note on which his name appears as a party, cannot recover the amount paid on discovering his name to be forged if the person receiving the payment was a holder for value without notice. *Mather v. Maidstone*, 18 C. B. 273; *Young v. Lehman*, 63 Ala. 519, 523; *Tyler v. Bailey*, 71 Ill. 34, 37; *Allen v. Sharpe*, 37 Ind. 67, 73; *Third Nat. Bank v. Allen*, 59 Mo. 310, 315; *Lewis v. White's Bank*, 27 Hun. 396; *Johnston v. Commercial Bank*, 27 W. Va. 343; *contra* is *Welch v. Goodwin*, 123 Mass. 71.

If the drawee pays a bill on the faith of forged bills of lading attached thereto, he cannot recover the payment from one who purchased the bill and received payment in good faith. *Thiedemann v. Goldschmidt*, 1 DeG. F. & J. 4; *Leather v. Simpson*, L. R. 11 Eq. 398; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *Young v. Lehman*, 63 Ala. 519; *First Nat. Bank v. Burkham*, 32 Mich. 323; *Craig v. Sibbett*, 15 Pa. 240; *Randolph v. Merchants' Nat. Bank*, 7 Baxt. 456.

Nor has the drawee who accepts a bill under similar circumstances any defence to an action on the acceptance. *Robinson v. Reynolds*, 2 Q. B. 196; *Baxter v. Chapman*, 29 L. T. Rep. 642; *Goetz v. Bank of Kansas City*, 119 U. S. 551. — W.

(x) Although forgery is an absolute defence, yet a depositor may be estopped to insist that the bank only is liable for payment made on a forged indorsement, as when he unduly neglects to examine the vouchers and account delivered to him by the bank, and to notify of error therein. See *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; *Phillips v. Mercantile Nat. Bank*, 67 Hun (N. Y.), 378; *Myers v. Southwestern Nat. Bank*, 193 Penn. St., 44 Atl. 280; *Harter v. Mechanics' Nat. Bank*, 63 N. J. L. 578, 44 Att. 715; *Land Title & Trust Co. v. Northwestern Nat. Bank*, 196 Penn. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717; *Tolman v. American Nat. Bank*, 22 R. I.

462, 48 Atl. 480, 84 Am. St. Rep. 850, 52 L. R. A. 877. But an indorser who receives no benefit from the forgery of his name, and whose agent the forger is not for any purpose, is not legally bound to forthwith disclaim the signature. *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923. And the holder of a check, payable to him but not indorsed, is not responsible to others for the care with which he keeps it, to prevent forgery. *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9. "Where no duty is owed, there can be no negligence." *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. Q. B. (n. s.), 713; *Welch v. Walsh*, 177 Mass. 555, 558, 59 N. E. 440.

recover it back only by showing proper diligence in detecting the forgery and in giving notice to those who might be affected by it. (*h*)

It has been held that a note made by a corporation in violation of a statute, is void in the hands of an innocent holder. (*i*) And this has been held also, where the signature of the promisor was obtained by fraud. (*j*) But where one whose name was forged took security for the note, it was held to be a ratification by him. (*k*)¹ And it is also held that mere illegality of consideration — if the note be not declared void by statute — will not affect the rights of one who holds it for value and in good faith. (*l*)

Whether payment of a debt in bills of an insolvent bank, both parties being ignorant of the fact, is payment, seems not to be quite settled. It must depend upon the question (which in each case may be affected by its peculiar circumstances), whether the payee takes the bills as absolute payment at his own risk, or takes them only as conditional payment, he to be bound only to use due diligence in collecting the bills, and if he fails, the payment to be null. Perhaps the weight of authority, as well as of reason, is in favor of this last view predominating where there is no sufficient evidence of a contrary intention. (*m*) How far a bill or note received by a creditor is considered in law as a payment of the debt, will be treated hereafter. (*n*)

The liability of an indorser may be considered, first as depending on the demand of payment, and then as to notice of non-payment, and the proceedings necessary thereon. But bills of exchange must also, in some instances, be presented for * 266 acceptance, * when they are made payable at a certain

(*h*) *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Pope v. Nance*, 1 Minor (Ala.), 299; *Schroeder v. Harvey*, 75 Ill. 638.

(*i*) *Root v. Godard*, 3 McLean, 102.

(*j*) *Dunn v. Smith*, 12 Sm. & M. 602.

(*k*) *Fitzpatrick v. S. Commissioners*, 7 Humph. 224.

(*l*) *Norris v. Langley*, 19 N. H. 423; *Johnson v. Meeker*, 1 Wis. 436.

(*m*) *Ellis v. Wild*, 6 Mass. 321; *Ontario Bank v. Lightbody*, 11 Wend. 9, 13 Wend. 101; *Wainwright v. Webster*, 11 Vt. 576; *Gilman v. Peck*, id. 516; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88; *Timmis v. Gibbins*, 14 E. L. & E. 64 n. *Contra*, *Lowrey v. Durrell*, 2 Port. (Ala.) 280; *Scruggs v. Gass*, 8 Yerg. 175; *Bayard v. Shunk*, 1 W. & S. 92. See p. * 257, note 1, *ante*.

(*n*) *Post*, Chap. on Defences.

¹ One who, knowing the signature to a promissory note to be forged, and intending to be bound by it, acknowledges it as his own, assumes the note as his own, and is bound by it just as if it had been originally signed by his authority. *Wellington v. Jackson*, 121 Mass. 157. But *Shisler v. Vandike*, 92 Penn. St. 447, declared that where a fraud is of such a character as the forged indorsement of a note, its ratification by the person whose name is forged is opposed to public policy, and cannot be permitted. — K.

time after sight, in order to fix the day of their maturity. If payable in so many days after date this is not necessary. But the holder may present any bill for acceptance at any time, even the last day before it is due; and if not accepted may sue the drawer and indorser. It is prudent and usual to present a bill for acceptance soon after it is received, as the holder thereby acquires the security of the acceptor. (o)

SECTION VIII.

OF PRESENTMENT FOR ACCEPTANCE.

Presentment for acceptance should be made by the holder or his authorized agent to the drawee or his authorized agent, (p) during the usual hours of business. (q) And the drawee has until the next day to determine whether he will accept, but may answer at once. (r)

A bill may be in some sort accepted before it is drawn, for a written promise to accept a certain bill hereafter to be made is * construed as an acceptance, if precisely that bill is * 267 drawn within a reasonable time after such promise. (s) (x)

(o) *Muilman v. D'Equino*, 2 H. Bl. 565, holding that a bill payable at sight, or a certain time after, must be presented to the drawee within a reasonable time. See *Fry v. Hill*, 7 Taunt. 397; *Mullick v. Radakissen*, 28 E. L. & E. 86; *Montelius v. Charles*, 76 Ill. 303. — No cause of action arises upon a bill payable at sight, until presented. *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, Ry. & M. 388.

(p) *Cheek v. Roper*, 5 Esp. 175, holding it not sufficient to call at the residence of the drawee and present the bill to a person unknown to the party calling.

(q) *Elford v. Teed*, 1 M. & Sel. 28; *Church v. Clark*, 21 Pick. 310; *Bank of United States v. Carneal*, 2 Pet. 543; *Harrison v. Crowder*, 6 Sm. & M. 464; *Parker v. Gordon*, 7 East, 385. — Presentment after banking hours, and an authorized person then answering, has been held sufficient. *Garnett v. Woodcock*, 1 Stark, 475. A presentment at 8 P. M. at the drawee's residence, has been held at a reasonable hour. *Barclay v. Bailey*, 2 Camp. 537. —

But eleven or twelve at night has been held otherwise. *Dana v. Sawyer*, 22 Me. 244. So of a demand at eight in the morning. *Lunt v. Adams*, 17 Me. 230. See *Flint v. Rogers*, 15 Me. 67; *Commercial Bank v. Hamer*, 7 How. (Miss.) 448; *Cohea v. Hunt*, 2 Sm. & M. 227. — Presentment should in all cases be at a reasonable time; and paper due from or at a bank should, as a general rule, be presented within banking hours. In other cases the period ranges through the whole day, down to the time of going to bed. *Cayuga Bank v. Hunt*, 2 Hill (N. Y.), 635; *Skelton v. Dustin*, 92 Ill. 49. See *Wiseman v. Chiapella*, 23 How. 368, for a discussion of the cases on presentment for acceptance.

(r) *Montgomery County Bank v. Albany City Bank*, 8 Barb. 399.

(s) *Pillans v. Van Mierop*, 3 Burr, 1670; *Coolidge v. Payson*, 2 Wheat. 66; *Wilson v. Clements*, 3 Mass. 1; *Goodrich v. Gordon*, 15 Johns. 6; *Parker v. Greele*, 2 Wend. 545; *Kendrick v. Campbell*, 1 Bailey, 522; *Carnegie v. Morrison*, 2 Met.

(x) In *Durkee v. Conklin*, 13 Col. App. 313, 57 Pac. 486, it was held that a ver-

bal acceptance of an order to pay money may bind, though funds of the drawer do

But a bill payable so many days after sight, cannot have its day of payment fixed, except by presentment; and it has therefore been said, that an acceptance by previous promise does not apply except to bills payable on demand, or at so many days after date. (t) It does not seem quite clear, however, why the acceptance by such promise might not be held valid to bind the acceptor, leaving the day of payment to be fixed by presentment. That is, if a bill payable at sixty days after sight were presented and acceptance refused, and the protest fixed the day of presentment and therefore the day when it should be paid, it is not clear why the acceptor might not be held on his promise to accept that very bill when it might be made and presented.

An acceptance must be absolute, and not differ in any respect from the terms of the bill. If any other be given, the holder may assent and so bind the acceptor, but must give notice, as in case of non-acceptance, to other parties, in order to bind them; (u) and the acceptor is held only so far as he promises by his acceptance. (v) (v) The usual way of accepting is by writing the word

381; *Storer v. Logan*, 9 Mass. 55; *McEvers v. Mason*, 10 Johns. 207; *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 121; *Williams v. Winans*, 2 Green (N. J.), 339; *Bayard v. Lathy*, 2 McLean, 462; *Vance v. Ward*, 2 Dana, 95; *Reed v. Marsh*, 5 B. Mon. 8; *Howland v. Carson*, 15 Penn. St. 453; *Beach v. State Bank*, 2 Cart. (Ind.) 488; *Cassell v. Dows*, 2 Blatch. 335; *Lewis v. Kramer*, 3 Md. 275; *Naglee v. Lyman*, 14 Cal. 450. See also *Exchange Bank v. Rice*, 98 Mass. 288; *Central Bank v. Richards*, 109 Mass. 413.

(t) Story on Bills of Exch. § 249;

Wildes v. Savage, 1 Story, 22; *Russell v. Wiggins*, 2 Story, 213; *Franklin Bank v. Lynch*, 52 Md. 270. *Contra* is *Ulster Bank v. McFarlan*, 3 Den. 553.

(u) *Walker v. Bank of State of New York*, 13 Barb. 636; *Lyon v. Sundius*, 1 Camp. 423; *Russell v. Phillips*, 14 Q. B. 891. And see *Niagara Bank v. Fairman*, &c. *Manufacturing Co.*, 31 Barb. 403; *Taylor v. Newman*, 77 Mo. 257; *Gibson v. Smith*, 75 Ga. 33.

(v) *Sallery v. Prindle*, 14 Barb. 186. See, however, *Clarke v. Gordon*, 3 Rich. L. 311.

not come to his hands till later. There is no failure of consideration for the acceptance of drafts given for the future delivery of goods because the goods are not delivered. *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194, 60 N. E. 429.

(x) The drawee of a bill of exchange has no right to alter it, as by striking out the word "order;" he can qualify his acceptance, but if he does not do so in plain and unmistakable terms, he must be taken to have accepted it generally. *Meyer v. Decroix*, [1891] A. C. 520, 25 Q. B. D. 343, 4 English Ruling Cas. 249, 444; *Fanshaw v. Peet* (26 L. J. Ex. 314), id. 243. An alteration, especially on the back of negotiable paper, which does not change its effect, does not avoid

such paper. *Theopold v. Deike*, 76 Minn. 121, 78 N. W. 977, 77 Am. St. Rep. 607. But a fraudulent and material alteration which amounts to forgery, avoids the paper, by the apparent weight of authority, even in the hands of a *bona fide* holder. *Citizens' Nat. Bank v. Williams*, 174 Penn. St. 66, 34 Atl. 304, 35 L. R. A. 464; *Exchange Nat. Bank v. Bank of Little Rock*, 58 Fed. 140, 39 L. R. A. 686; *Brown v. Johnson*, 127 Ala. 292, 28 So. 579, 85 Am. St. Rep. 134, 51 L. R. A. 403; *Simmons v. Atkinson Co.*, 69 Miss. 862, 12 So. 263; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Dexter v. Smith*, 12 Sawyer, 402; *Brock v. Brock*, 29 Ill. App. 334; *Gettysburg Nat. Bk. v. Chisolm*, 169 Penn. St. 564; *Mt. Morris Bank v. Lawson*, 27 N. Y. S. 272.

“accepted” on the face of the bill, and signing the acceptor’s name; but there is no precise formula or method which is necessary to constitute a good acceptance. It seems to be enough if it is substantially a distinct promise to pay the bill according to its terms, whether it be in writing upon the bill or upon a separate paper, or by parol. (w)¹ And a written promise to pay a bill operates as an acceptance of the bill when drawn; but it should be sufficiently precise to identify the bill as that authorized. (ww) In many * of our States there are statutes * 268 respecting acceptance of bills. (x)

An acceptance can be made only by a drawee, or by one for honor; but an acceptance by one of many drawees binds the acceptor. (y)

SECTION IX.

OF PRESENTMENT FOR PAYMENT.

A bill or note must be presented for payment at its maturity, or the indorsers are not held. They guarantee its payment, not by express words, but by operation of law. And for their protection the law annexes to their liability, as a condition, that reasonable efforts shall be made to procure the payment from those bound to

(w) *Edson v. Fuller*, 2 Foster (N. H.), 183; *Barnet v. Smith*, 10 id. 256; *Wynne v. Raikes*, 5 East, 514; *Fairlee v. Herring*, 3 Bing. 625. In *Ward v. Allen*, 2 Met. 53, a bill was read to the drawee, who said it was correct and should be paid; and this was treated as a sufficient acceptance. See *Parkhurst v. Dickerson*, 21 Pick. 307; *Pierce v. Kittredge*, 115 Mass. 374; *Luff v. Pope*, 5 Hill (N. Y.), 413; *Walker v. Lide*, 1 Rich. L. 249; *Walker v. Bank of State of New York*, 13 Barb. 636; *Lewis*

v. Kramer, 3 Md. 265; *Orear v. McDonald*, 9 Gill, 350.

(ww) *Plummer v. Lyman*, 49 Me. 229; *Burns v. Rowland*, 40 Barb. 368.

(x) In New York, Missouri, and California, the acceptance must be in writing, and may be by promise before the bill is drawn. And a drawee holding and refusing to return a bill to a holder for twenty-four hours, is to be held as accepting it.

(y) *Owen v. Van Uster*, 10 C. B. 318, 1 E. L. & E. 396.

¹ Retention or destruction of a bill by the drawee is not equivalent to an acceptance. *Jeune v. Ward*, 2 B. & Ald. 653; *Colorado Bank v. Boettcher*, 5 Col. 185, 15 Col. 16; *Holbrook v. Payne*, 151 Mass. 383; *Overman v. Hoboken Bank*, 30 N. J. T. 61, 31 id. 563. — W.

An acceptor is not estopped from setting up the fraudulent alteration after acceptance of a bill which the drawer made with blank spaces at the figures, even as against a *bona fide* holder. *Scholfield v. Londesborough*, [1895] 1 Q. B. 536.

In England, an alteration of a Bank of England note, even of its number, avoids it. *Suffell v. Bank of England*, 9 Q. B. D. 555, 3 English Ruling Cas. 640.

pay before them, and also that they shall have reasonable notice of a refusal to pay, that they may have an opportunity to indemnify themselves. The justice of this is obvious. A holder of a note, with a good indorser, might be very indifferent as to the payment by the promisor or an earlier indorser, if he knew that he could certainly collect the amount from the indorser on whom he relied; therefore the very liability of this indorser is made to rest upon the efforts of the holder to obtain the money from the prior parties. Again; each indorser transfers by indorsement a debt

* 269 due to * himself, and if by the guaranty which springs from his indorsement he has to pay this debt to another, he is entitled to all such prompt knowledge of the failure of the party whom he guarantees, and of his own consequent liability, as will enable him to secure a payment of this debt to himself, if that be possible. The rules, and the exceptions to the rules, in relation to demand of payment and notice of non-payment, will be found to rest upon these principles.

Generally the question of reasonable time, reasonable diligence, and reasonable notice is open to the circumstances of every case, and is determined by a reference to them. (z) (x) But in regard to bills and notes the law merchant has defined all of these with great exactness.

The general rule may be said to be, that the drawer and indorsers of a bill and the indorsers of a note are discharged from their liability, unless payment of the bill or note be demanded from the party previously bound to pay it, on the day on which it falls due. (a) (y) And if the holder neglects to make such demand, he not only loses the guaranty of subsequent parties, but all right to

(z) *Goodwin v. Davenport*, 47 Me. 112.

(a) *Field v. Nickerson*, 13 Mass. 131; *Martin v. Winslow*, 2 Mason, 241; *Sice v. Cunningham*, 1 Cowen, 397; *Montgomery County Bank v. Albany City Bank*, 8 Barb. 396; *Holbrook v. Allen*, 4 Fla. 87; *Robinson v. Blen*, 20 Me. 109; *Magruder v. Union Bank*, 3 Pet. 87; *Juniati Bank v. Hale*, 16 S. & R. 157. If the bill or note

is payable at a time certain, it must be presented on the last day of grace; and a demand either before or after that day is insufficient to charge the indorser. *Id.*; *Howe v. Bradley*, 19 Me. 31; *Leavitt v. Simes*, 3 N. H. 14; *Farmers' Bank v. Duvall*, 7 G. & J. 78; *Piatt v. Eads*, 1 Blackf. 81; *Etting v. Schuylkill Bank*, 2 Barr, 355.

(x) What is such reasonable time is a question of law, when the facts are clear; and it depends upon the facts in each case. *German-American Bank v. Atwater*, 165 N. Y. 36, 58 N. E. 763; *Singer v. Dickneite*, 51 Mo. App. 245. When a party indorses past-due paper, the implied contract with the holder is that demand be made within a reasonable time, and that

protest follow dishonor at once. *German-American Bank v. Atwater*, *supra*.

(y) Presentment for payment is not dispensed with by presentment and non-acceptance of a bill before maturity without protest. *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696, 5 S. Ct. 314, 28 L. Ed. 866.

recover for the consideration or debt for which the bill or note was given. (b)¹

* Let us look at the exceptions to this rule requiring * 270 such presentment of a bill or note. Bankruptcy or insolvency, however certain or however manifested, is not one. (c) Though the bank or shop be shut, presentment there or to the parties personally must still be made. (d) Nor will the death of the party prevent the necessity of demanding payment of his personal representatives, if he have any, (e) and if not, at his house; nor will the death of the party who should give notice; for if no executor or administrator is appointed before the note falls due, the executor or administrator may make sufficient demand and give notice within a reasonable time after the appointment. (f)

Delay or omission to demand payment does not, however, discharge the drawer of a bill, if the drawee had in his hands no effects of the drawer, at any time between the drawing of the bill and its maturity, and had no right on other ground to expect the payment of the bill, (g) for the drawer had then no right to draw

(b) *Bridges v. Berry*, 3 Taunt. 130; *Camidge v. Allenby*, 6 B. & C. 373. In *Hare v. Henty*, 10 C. B. N. s. 65, 100 Eng. C. L. 65, it is held that a banker receiving a check upon another banker, not resident in the same town, is not bound to transmit it for presentment, by the post of the day on which he receives it, but he has until post time of the next day for so doing. See also 2 Pars. Notes & Bills, 72.

(c) *Russell v. Langstaffe*, Dougl. 515; *Ec parte Johnston*, 3 Deac. & C. 433; *Bowes v. Howe*, 5 Taunt. 30; *Gower v. Moore*, 25 Me. 16; *Ireland v. Kip*, Anthon, 142; *Shaw v. Reed*, 12 Pick. 132; *Groten v. Dalheim*, 6 Greenl. 476; *Holland v. Turner*, 10 Conn. 308; *Orear v. McDonald*, 9 Gill, 350; *Smith v. Miller*, 52 N. Y. 545; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495. And although the indorsers, at the time of indorsement, had reason to believe, and did believe, that the maker would not pay, this does not dispense with due notice to them of such maker's default. *Denny v. Palmer*, 5 Ired. L. 610; *Oliver v. Munday*, 2 Penning. 982; *Allwood v. Haseldon*, 2 Bailey, 457.

(d) *Howe v. Howe*, 5 Taunt. 30, reversing the decision of the King's Bench in the same case, 16 East, 112. And see

Camidge v. Allenby, 6 B. & C. 373. If the maker is absent on a voyage at sea, having a domicile within the State, payment must be demanded there. *Whittier v. Groffam*, 3 Greenl. 82; *Dennie v. Walker*, 7 N. H. 199. See *Ogden v. Cowley*, 2 Johns. 274; *Galpin v. Hard*, 3 McCord, 394; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294.

(e) *Gower v. Moore*, 25 Me. 16; *Landry v. Stansbury*, 10 La. 484.

(f) *White v. Stoddard*, 11 Gray, 258.

(g) *De Berdt v. Atkinson*, 2 H. Bl. 336; *Terry v. Parker*, 6 A. & E. 502; *Kinsley v. Robinson*, 21 Pick. 327; *Foard v. Womack*, 2 Ala. 368; *Wollenweber v. Ketterlinus*, 17 Penn. St. 389; *Allen v. Smith's Adm'r*, 4 Harring. (Del.) 234; *Oliver v. Bank of Tenn.*, 11 Humph. 74; *Orear v. McDonald*, 9 Gill. 350. See also *Fitch v. Redding*, 4 Sandf. 130; *Allen v. King*, 4 McLean, 123; *Durrum v. Hendrick*, 4 Tex. 492; *Bowring v. Andrews*, 3 McLean, 576; *Gillett v. Averill*, 5 Denio, 85; *Mobley v. Clark*, 28 Barb. 390; *Culver v. Marks*, 122 Ind. 554. But where a note is signed by one person as a principal, and others as sureties, it is not a sufficient excuse to show that the sureties had no funds in the place of payment; for it was

¹ It was decided in *German Nat. Bank v. Foreman*, 138 Pa. St. 474, that the plaintiff bank had discharged the indorser of a note which it held by allowing the maker to withdraw a deposit after the maturity of the note. — W.

the bill, and therefore no right to demand or notice, because he could not profit by it to get payment to himself of the debt from the drawee, there being no such debt. So also if the trans-

* 271 action between the drawer and the drawee was * illegal. (*h*)

But such presentment should still be made in all cases to hold the subsequent parties. (*i*) And it is held that an accommodation drawer is entitled to demand and notice of dishonor, although he had no funds in the hands of the drawee. (*ii*) The discharge from liability arising from such delay or omission may be waived, by an express promise to pay made *after* such discharge, or by a payment in part, from which the law infers an acknowledgment of liability; but not by a mere promise to pay made *before* such delay or omission. (*j*) (*x*) If the party who should pay the note has absconded, or has no domicile or regular place of business, and cannot be found by reasonable endeavors, payment need not be demanded of him, because it would be of no

the duty of the *maker*, and not of the sureties, to provide for the payment. *Fort v. Cortes*, 14 La. 180.

(*h*) *Copp v. McDougall*, 9 Mass. 1.

(*i*) *Wilkes v. Jacks*, Peake Cas. 202; *Leach v. Hewitt*, 4 Taunt. 730; *Ramduclollday v. Darioux*, 4 Wash. C. C. 61; *Carter v. Flower*, 16 M. & W. 743.

(*ii*) *Merchants' Bank v. Easley*, 44 Mo. 286.

(*j*) That payment of part is a waiver of non-demand on the maker, see *Vaughan v. Fuller*, Stra. 1246; *Taylor v. Jones*, 2 Camp. 106; *Lundie v. Robertson*, 7 East, 231; *Haddock v. Bury*, id. 236 n.; *Hodge v. Fillis*, 3 Camp. 464; *Hopley v. Dufresne*, 15 East, 275; *Ryram v. Hunter*, 36 Me. 217; *Low v. Howard*, 11 Cush. 268; *Dorsey v. Watson*, 14 Mo. 59; *Harvey v. Troupe*, 23 Miss. 538. — That a new promise to pay, after notice of the neglect to demand of the maker, is a waiver, see *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Seeley v. Bisbee*, 2 Vt. 105; *Ladd v. Kenney*, 2 N. H. 340; *Sogers v. Hackett*, 1 Foster (N. H.), 100; *Breed v. Hillhouse*, 7 Conn. 523; *Jones v. O'Brien*, 26 E. L. & E. 283; *Peto v. Reynolds*, id. 404. See also p. *434, note, *post*. It must be shown affirmatively that the indorser, when he made the promise, knew that no demand had been made on the maker. *Otis v. Hussey*, 3 N. H. 346;

New Orleans Railroad Co. v. Mills, 2 La. An. 824; *Robinson v. Day*, 7 La. An. 201. But it is said in *Bruce v. Lytle*, 13 Barb. 163, that where there is an express promise, demand and notice will be presumed unless the contrary be shown. — So if an indorser take *full* security from the maker to secure him against his liability to pay the note, this excuses a demand on the maker, and notice thereof to the indorser. *Durham v. Price*, 5 Yerg. 300; *Duvall v. Farmers' Bank*, 2 G. & J. 31; *Mead v. Small*, 2 Greenl. 207; *Marshall v. Mitchell*, 34 Me. 227; *Marshall v. Mitchell*, 35 Me. 223; *Prentiss v. Danielson*, 5 Conn. 175; *Perry v. Green*, 4 Harrison, 61; *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Coddington v. Davis*, 3 Denio, 16; *Bond v. Farnham*, 5 Mass. 170; *Stephenson v. Primrose*, 8 Port. (Ala.) 155. — *Aliter*, of only *part* security. *Spencer v. Harvey*, 17 Wend. 489; *Bruce v. Lytle*, 13 Barb. 163; *Burroughs v. Hannegan*, 1 McLean, 309; *Kyle v. Green*, 24 Ohio, 495; *Woodman v. Eastman*, 10 N. H. 359; *Andrews v. Boyd*, 3 Met. 434; *Otsego Co. Bank v. Warren*, 18 Barb. 290. The whole doctrine is subject to many qualifications; and in *Kramer v. Sanford*, 4 W. & S. 328, it was observed that this doctrine of waiver in consideration of security had no footing in Westminster Hall. See *infra*, p. *317.

(*x*) After an indorser is discharged for want of notice of dishonor, his liability is revived only by acts done with full knowledge of all material facts, and his igno-

rance of the fact that demand was not made upon the maker is vital upon this question. *Parks v. Smith*, 155 Mass. 26, 28 N. E. 1044.

utility to a subsequent party; (*k*) still, notice of these facts * should be given. And it has been held that where * 272 demand of payment was delayed by political disturbances, or by any invincible obstacle, it was enough if the demand was made as soon as possible after the obstruction ceased. (*l*)

Where the bill or note is *made payable* at a particular place specified in the body of it, it seems to be the rule in England that it must be presented for that purpose at that place [to make even the acceptor or maker liable], for the place is part of the contract; (*m*) but "payable at," etc., out of the body of the note, either at the bottom, or in the margin, is but a memorandum, which binds nobody. (*n*) And in this country, neither a bill or note drawn payable at a place certain, nor a bill drawn payable generally, but accepted payable at a specified place, need be presented at that place, (*o*) (*x*) in order to * sustain an action * 273

(*k*) Putnam v. Sullivan, 4 Mass. 45; Gilbert v. Dennis, 3 Met. 495, 499; per Shaw, C. J.; Duncan v. McCullough, 4 S. & R. 480; Lehman v. Jones, 1 W. & S. 126; Wheeler v. Field, 6 Met. 290; Gist v. Lybrand, 3 Ohio, 307; Central Bank v. Allen, 16 Me. 41; Bruce v. Lytle, 13 Barb. 163; Nailor v. Bowie, 3 Md. 251; Ratcliff v. Planters' Bank, 5 Sneed, 425.—So when the maker of the note was a seafaring man, having no residence or place of business in the State, and was at sea when payment was due, no demand was held requisite. Moore v. Coffield, 1 Dev. 247. So where the maker of a promissory note removes from the State subsequently to making, and continues to reside abroad until its maturity. Foster v. Julien, 24 N. Y. 28. — But where the holder was told, at the time of the indorsement, that the maker was a transient person, and his residence unknown, an *effort* should be made, notwithstanding, to find him. Otis v. Hussey, 3 N. H. 346.

(*l*) Patience v. Townley, 2 Smith, King's Bench, 223. See Rouquette v. Overmann, L. R. 10 Q. B. 525; Bond v. Moore, 93 U. S. 593; Dunbar v. Tyler, 44 Miss. 1; Norris v. Despard, 38 Md. 487. And so the prevalence of a contagious malignant fever in the place of residence of the parties, which occasioned a stoppage of all business, has been held a sufficient excuse for a delay of two months in giving notice of a non-payment. Tunno v. Lague, 2 Johns. Cas. 1. If the holder de-

posits the note in the post-office in season to reach the place of payment at the proper time, to be there presented by his agent, but through the mistake of the postmaster it is misdirected and delayed, these facts have been held to excuse the delay. Windham Bank v. Norton, 22 Conn. 213.

(*m*) Rowe v. Young, 2 Br. & B. 165; Sanderson v. Bowes, 14 East, 500; Spindler v. Grellett, 1 Exch. 384; Emblin v. Dartnell, 12 M. & W. 830. These decisions, however, led to the enactment of 1 & 2 Geo. IV. c. 78, which provides that an acceptance at a particular place is a general acceptance, unless expressed to be payable there only, and not otherwise or elsewhere. On the construction of this statute, see Selby v. Eden, 3 Bing. 611; Fayle v. Bird, 6 B. & C. 531.

(*n*) Masters v. Barretto, 8 M. G. & S. 433; Exon v. Russell, 4 M. & Sel. 505; Bowling v. Harrison, 6 How. 259.

(*o*) United States Bank v. Smith, 11 Wheat. 171; Foden v. Sharp, 4 Johns. 183; Wolcott v. Van Santvoord, 17 Johns. 248; Caldwell v. Cassidy, 8 Cowen, 271; Haxtum v. Bishop, 3 Wend. 15; Wallace v. McConnell, 13 Pet. 136; Carley v. Vance, 17 Mass. 389; Watkins v. Crouch, 5 Leigh, 522; Ruggles v. Patten, 8 Mass. 480; Allen v. Smith's Adm'r, 4 Harring. (Del.) 234; Dougherty v. Western Bank of Georgia, 13 Ga. 288; Ripka v. Pope, 5 La. An. 61; Blair v. Bank of Tenn. 14 Humph. 84; Weed v. Van Houten, 1 Halst. 189; McNairy v. Bell, 1 Yerg.

(*x*) See Parker v. Kellogg, 158 Mass. 90, 32 N. E. 1038; Farnsworth v. Mullen,

164 Mass. 112, 41 N. E. 131; McNair v. Moore, 55 S. C. 435, 33 S. E. 491, 74 Am.

against the maker or acceptor; but he may show by way of defence, that he was ready there with funds, and thus escape all damages and interest; (*p*) and if he can show positive loss from the want of such presentment (as the subsequent failure of a bank where he had placed funds to meet the bill), he will be discharged from his liability on the bill to the amount of such loss. Such seems to be the prevailing, though not the only view, taken of this subject by the American authorities; for some of much weight hold, that where the acceptance is thus qualified, the holder may refuse it, and protest as for non-acceptance, but if he receives and assents to it he is bound by it, and can demand payment nowhere else. The drawers and indorsers are certainly discharged by a neglect to demand payment at such specified place. (*q*) If the place be designated only in a memorandum not in the body of the bill or note, presentment may be made at such place, but may also be made where it might have been without such memorandum. (*r*) If the note be payable at *any* of several different places, presentment at any one of them will be suffi-

502; *Mulherrin v. Hannum*, 2 id. 81; *Bacon v. Dyer*, 3 Fairf. 19; *Remick v. O'Kyle*, id. 340; *Dockray v. Dunn*, 37 Me. 442; *Nichols v. Pool*, 2 Jones (N. C.), 23; *Irvine v. Withers*, 1 Stew. (Ala.) 234; *Eldred v. Hawes*, 4 Conn. 465; *Waite, J.*, in *Jackson v. Parker*, 13 id. 358; *Payson v. Whitcomb*, 15 Pick. 212; *Sumner v. Ford*, 3 Ark. 389; *Green v. Goings*, 7 Barb. 652; *Brigham v. Smith*, 16 N. H. 274; *Hills v. Place*, 48 N. Y. 520; *Yeaton v. Berney*, 62 Ill. 61; *Mahan v. Waters*, 60 Mo. 167. *Contra*, per *Story, J.*, *Picquet v. Curtis*, 1 Sumner, 478. See also *New Hope D. B. Co. v. Perry*, 11 Ill. 467; *Ganes v. Manning*, 2 Green (Iowa), 251; *Andrews v. Hoxie*, 5 Tex. 171; *Carter v. Smith*, 9 Cush. 321; *McKenzie v. Durant*, 9 Rich. L. 61; *Bank of State v. Bank of C. F.*, 13 Ired. L. 75. — If the bill or note be payable at a particular place, *on demand*, then, according to *Savage, C. J.*, in *Caldwell v.*

Cassidy, 8 Cowen, 271, demand is necessary. This is denied in *Dougherty v. Western Bank of Georgia*, 13 Ga. 287; but it is there decided that bank-notes are exceptions to the general rule, on the ground of public policy, and demand upon them must be made. This may, however, be doubted.

(*p*) *Wolcott v. Van Santvoord*, 17 Johns. 248; *Wallace v. McConnell*, 13 Pet. 136; *Savage, C. J.*, in *Haxtum v. Bishop*, 3 Wend. 21; *Wilde, J.*, in *Carley v. Vance*, 17 Mass. 392; *Caldwell v. Cassidy*, 8 Cowen, 271.

(*q*) See 3 Kent Com. 97, 99; *Picquet v. Curtis*, 1 Sumner, 478; *Gale v. Kemper's Heirs*, 10 La. 305; *Warren v. Allnut*, 12 La. 454; *Bacon v. Dyer*, 12 Me. 19. *Contra*, in Iowa, *Fuller v. Dingman*, 41 Iowa, 506.

(*r*) *Williams v. Waring*, 10 B. & C. 2. See *Exon v. Russell*, 4 M. & Sel. 505; *Morris v. Husson*, 4. Sandf. 93.

St. Rep. 760. A loan and trust company is not a national or State bank, when not expressly made so by statute, and presentment at its office does not charge the indorser of a note made payable "at any bank in B." *Nash v. Brown*, 165 Mass. 384, 43 N. E. 180.

Presentment of a demand note is not necessary, at least when it is made payable at a particular place. *Citizens' Sav.*

Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; *Central Bank v. Kimball*, 76 N. Y. S. 227. As to checks, delay in their presentment discharges the maker only when such delay causes him loss or injury. *Supra*, p. 238, n. (*y*); *Comer v. Dufour*, 95 Ga. 376, 22 S. E. 543; *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 27 S. E. 979.

cient. (s) It has been held that where a note was made payable at a certain house, and the occupant * of the house * 274 was himself the holder of the note at its maturity, it was demand enough if he examined his accounts, and refusal enough if he had no balance in his hands belonging to the party bound to pay. (t)

SECTION X.

OF WHOM, WHEN, AND WHERE THE DEMAND OR PRESENTMENT FOR PAYMENT SHOULD BE MADE.

Demand of payment should be made by the holder, or his authorized agent, of the party bound to pay, or his authorized agent; (u) and at his usual place of residence, or usual place of business; if the former, within such hours as may be reasonably so employed, and if the latter, in business hours; but a demand at a bank where a note is payable, made after business hours, but while the bank is still open and the officers are there, has been held sufficient. (v) If the holder finds the dwelling-house or place of business of the payor closed, so that he cannot enter the same, and after due inquiry cannot find the payor, the prevalent doctrine in this country is, that he may treat the bill or note as dishonored. (w) If the payor has changed his residence to some other place within the same State, the holder must endeavor to find it and make demand there; but if he have removed out of the State, subsequent to making the note, the demand may be made at his former residence. (x) The presumption * is * 275 that the maker lives where he dates the note, and demand must be made there, unless when the note falls due the payor

(s) *Langley v. Palmer*, 30 Me. 497.

(t) *Sanderson v. Judge*, 2 H. Bl. 509.

(u) *Lord Kenyon*, in *Cooke v. Callaway*, 1 Esp. 115. — And a person in possession of a bill, payable to his own order, is a holder for this purpose. *Smith v. McClure*, 5 East, 476, 2 J. P. Smith, 43; — *v. Ormston*, 10 Mod. 286. — A demand by a notary is sufficient. *Hartford Bank v. Stedman*, 3 Conn. 489; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Smith*, 18 Johns. 230. — Parol authority to an agent to demand payment is sufficient. *Shed v. Brett*, 1 Pick. 401.

(v) *Shepherd v. Chamberlain*, 8 Gray, 225; *Salt Springs Bank v. Burton*, 58 N. Y. 430. See *Hallowell v. Curry*, 41 Penn. St. 322.

(w) *Hine v. Allely*, 4 B. & Ad. 624; *Shed v. Brett*, 1 Pick. 413; *Williams v. Bank of United States*, 2 Pet. 96; *Ogden v. Cowley*, 2 Johns. 274; *Fields v. Mallett*, 3 Hawks, 465; *Buxton v. Jones*, 1 Man. & G. 83. — But in such case some inquiry or effort ought to be made to find the maker. *Ellis v. Commercial Bank*, 7 How. (Miss.) 294; *Sullivan v. Mitchell*, 1 Car. L. Rep. 482; *Collins v. Butler*, Stra. 1087.

(x) *Anderson v. Drake*, 14 Johns. 114; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Gillespie v. Hannahan*, 4 McCord, 503; *Reid v. Morrison*, 2 W. & S. 401; *Wheeler v. Field*, 6 Met. 290; *Nailor v. Bowie*, 3 Md. 251. See *Gilmore v. Spies*, 1 Barb. 158.

resides elsewhere within the State, and the holder knows it, and then the holder must make the demand there. (y)

Presentment for payment, or demand, is sufficient, if made on one member of a partnership. If there be joint makers who are not partners; we hold it should be made on all. (yy) (x) But it is not always so held. (yz) It has been held that the holder of negotiable paper may assume that a party resides where he resided when he put his name on the paper, unless he has notice or knowledge of a change of residence. (ya)

The whole law in respect of demand and notice is very much influenced by the usage of particular places, where such usage is so well established and so well known that persons may be supposed to contract with reference to it. Of this the English rule in relation to checks on bankers affords an instance, (z) and also the usage of the banks of our different cities as to notes discounted by them, or left with them for collection. In this country the

(y) *Fisher v. Evans*, 5 Binn. 541; *Nailor v. Bowie*, 3 Md. 251; *Lowery v. Scott*, 24 Wend. 358; *Smith v. Philbrick*, 10 Gray, 252. See also on this subject, *Taylor v. Snyder*, 3 Denio, 145. A note specifying no place of payment, was dated, made, and indorsed in the State of New York, but the maker and indorser resided in Mexico, and continued to reside there when the note fell due, their place of residence being known to the payee and holder, both when the note was given and when it matured; and it was held that a demand of payment on the maker and a notice to the indorser were necessary to charge the indorser. *Gilmore v. Spies*, 1 Barb. 158; affirmed on appeal, 1 Comst. 321. But it is said in *Ricketts v. Pendleton*, 14 Md. 320, that where the maker does not reside, and has no place of business in the State where the note is payable, no demand upon him is necessary to charge the indorser.

(yy) *Blake v. McMillen*, 22 Iowa, 358; *Union Bank v. Willis*, 8 Met. 504. So held as to joint indorsers, in *Sayre v. Frick*, 7 Watts & S. 383, and *Shepard v. Hawley*, 1 Conn. 367; *Red Oak Bank v. Orvis*, 40 Iowa, 332; *Gates v. Beecher*, 60 N. Y. 518, 523.

(yz) A demand on one of three joint promisors held sufficient in *Harris v. Clark*, 10 Ohio, 5; *Allen v. Harrah*, 30 Iowa, 363, to the same effect, with regard to an Ohio note, following *Harris v. Clark*, *supra*.

(ya) *Ward v. Perrin*, 54 Barb. 89. But see *Peters v. Hobbs*, 25 Ark. 67.

(z) *Robson v. Bennett*, 2 Taunt. 388. By the practice of the London bankers, if one banker who holds a check drawn on another banker presents it after four o'clock, it is not then paid, but a mark is put on it to show that the drawer has assets, and that it will be paid; and checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing-house; *held*, that a check presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking-house of the drawee. Such a marking, under this practice, amounts to an acceptance, payable next day at the clearing-house. It is not necessary to present for payment a check payable on demand till the day following the day on which it is given. A person receiving a check on a banker is equally authorized in lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade. Although in consequence thereof the notice of its dishonor is postponed a day, one day being allowed for notice from the payee to the drawer, after the day on which notice is given by the bankers to the payee. See *Bancroft v. Hall*, Holt, 476; *Henry v. Lee*, 2 Chitt. 124. See *Heywood v. Pickering*, L. R. 9 Q. B. 428.

(x) See *infra*, p. * 282, n. (z); *Bell v. First Nat. Bank*, 115 U. S. 372.

practice is not uniform; but, in general, a demand is made some days before the maturity of a note, by a notice post-dated on the day of maturity, omitting the days of grace. But it is usual also, if the note be not paid on the last day of grace, to make a formal demand on that day, after business hours. (x) Bills and notes sometimes express days of grace, but generally not. Usually and in some States by statutory provisions, all bills and notes on time, when grace is not expressly excluded, are entitled to grace. (a)¹ (y) And it has been * held that a bank post-note * 276 dated, which had across one end the words "due on" a certain day which excluded all the days of grace, which words the bank cashiers of Boston, where the note was issued, testified were placed there to indicate that the note was due and payable on that day without grace, was still entitled to grace. (b) But notes payable on demand are not entitled to grace, (c) nor are checks on banks, though payable on time. (d) (z)

(a) *Corp v. McComb*, 1 Johns. Cas. 328; *Jackson v. Richards*, 2 Caines, 343. In the absence of proof to the contrary, the legal presumption is, that in every State in the Union three days of grace are allowed by law on bills of exchange and promissory notes. *Wood v. Corl*, 4 Met. 203. See also *Bussard v. Levering*, 6 Wheat. 102; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. United States Bank*, 11 id. 431; *Cook v. Darling*, 2 R. I. 385; *Reed v. Wilson*, 12 Vroom, 29. The days of grace on negotiable notes constitute a part of the original contract. *Savings Bank v. Bates*, 8 Conn. 505, but the notes may be declared on according to their terms without adding the days

of grace. *Padwick v. Turner*, 11 Q. B. 124. — Whenever the maker of a note is entitled to grace, the indorser has the same privilege. *Pickard v. Valentine*, 13 Me. 412; *Central Bank v. Allen*, 16 Me. 41.

(b) *Perkins v. Franklin Bank*, 21 Pick. 483, confirmed in *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13.

(c) *In re Brown*, 2 Story, 503; *Salter v. Burt*, 20 Wend. 205; *Somerville v. Williams*, 1 Stew. (Ala.) 484; *Cammer v. Harrison*, 2 McCord, 246.

(d) *Bowen v. Newell*, 5 Sandf. 326; *Way v. Towle*, 155 Mass. 374. *Contra*, *Culter v. Reynolds*, 64 Ill. 321.

¹ On mere instalments of interest no days of grace are allowed. *Macloon v. Smith*, 49 Wis. 200; *Bank of North America v. Kirby*, 108 Mass. 497, 501. — K.

(x) In England, under the Bills of Exchange Act, 1882, § 14, sub-s. 1, making a bill due and payable "on the last day of grace," when payment is refused by the acceptor at any time on the last day of grace, the holder, though entitled to give notice of dishonor to the drawer and indorsees, cannot sue upon the bill until that day has expired. *Kennedy v. Thomas*, [1894] 2 Q. B. 759. In Illinois days of grace were allowed until they were very sensibly abolished by Laws 1895, p. 261, whereby any negotiable paper is made payable when it says it is. See *Gilbert v. Sprague*, 88 Ill. App. 508. In Massachusetts grace is also abolished except that three days are allowed upon a draft or bill of exchange made payable

within the Commonwealth at sight, unless there is an express stipulation to the contrary. Mass. Rev. Laws, p. 640, § 101.

A note indorsed and delivered on the second day of grace is taken before maturity, and its purchaser is a purchaser for value. *Haug v. Riley*, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 244.

(y) A coupon interest note, if negotiable, is entitled to grace. *Lantry v. French*, 33 Neb. 524, 50 N. W. 679; *Hartsuff v. Hall*, 58 Neb. 417, 78 N. W. 716; *Wood v. Cons. El. Light Co.*, 36 Fed. 538, 149 U. S. 770, 13 S. Ct. 1045, 37 L. Ed. 957.

(z) A check is not irregular because it is post-dated; such a check is, by the

It sometimes happens that when a bill is drawn in one country, and made payable in another, the laws in relation to presentment and demand differ in those countries; and then the question arises, which law shall prevail. It would seem that the law of the place in which it is payable prevails; (e) but it has been decided that the law of the country in which the bill is indorsed shall govern exclusively as to the liabilities and duties of the indorsers, on the ground that every indorsement is substantially a new contract. (f) Hence, a bill drawn in one place and * 277 payable in * another, and there accepted, must be governed, as to the acceptor, by the laws of the place in which it is accepted. (g) And as no indorsement becomes effectual until actual transfer, the place of the actual transfer is the place of the contract of indorsement. (h)

(e) *Rothschild v. Currie*, 1 Q. B. 43. See also *Gibbs v. Fremont*, 9 Exch. 25; *Phillips v. Im Thurn*, 1 L. R. C. P. 463, 4 English Ruling Cas. 622; *Rouquette v. Overmann*, L. R. 10 Q. B. 525; *Todd v. Neal*, 49 Ala. 266; *Pierce v. Indseth*, 106 U. S. 546.

(f) *Aymer v. Sheldon*, 12 Wend. 439. See also *Hatcher v. McMorine*, 4 Dev. L. 122.

(g) *Lizardi v. Cohen*, 3 Gill, 430.

(h) *Cook v. Litchfield*, 5 Sandf. 330; *Young v. Harris*, 14 B. Mon. 556.

weight of authority, without grace. *Hitchcock v. Edwards*, 60 L. T. 636; *Forster v. Mackreth*, L. R. 2 Ex. 163, 4 English Ruling Cas. 210, 215 n.; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; *Way v. Towle*, 155 Mass. 374, 31 Am. St. Rep. 552; *Frazier v. Trow's Printing Co.*, 24 Hun (N. Y.), 281; *Taylor v. Sip*, 30 N. J. L. 284. Certain authorities hold that a check which is not payable immediately is a bill of exchange. *Harrison v. Nicolle*, Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746; *Ivory v. State Bank*, 36 Mo. 475; and see *Way v. Towle*, *supra*; *Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10.

A banker's draft addressed by one branch of a bank to another branch of the same bank is not a check within §§ 60, 82, of the English Bills of Exchange Act, 1882; nor is it within § 17 of the Revenue Act, 1883. *Gordon v. London, City and Midland Bank*, [1902] 1 K. B. 242. See *Fielding v. Corry*, [1898] 1 Q. B. 268. As to the liability of banks for their correspondents' acts, see *Second Nat. Bank v. Merchants' Nat. Bank (Ky.)*, 55 L. R. A. 273.

If the drawee holds funds of the drawer, but not sufficient to pay his check in full, the check is not an assignment; he may, but need not, apply such funds to its payment *pro tanto*. *Fourth St. Bank v.*

Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. Ed. 855; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210; *Beauregard v. Knowlton*, 156 Mass. 395, 31 N. E. 389.

The drawer of a check who, on his own behalf, or for his own benefit, has it certified and then delivers it to the payee, is not discharged; but he is discharged if the payee or holder, in his own behalf, and for his own benefit, gets it certified, instead of getting it paid. *Born v. First Nat. Bank*, 123 Ind. 78, 24 N. E. 173, 18 Am. St. Rep. 312, 7 L. R. A. 442; *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 32 Am. St. Rep. 472, 16 L. R. A. 510; *Randolph Nat. Bank v. Hornblower*, 160 Mass. 401, 35 N. E. 850. See *People v. St. Nicholas Bank*, 77 Hun (N. Y.), 159; 6 Harv. L. Rev. 138, 31 Cent. L. J. 373, 3 Kent Com. (14th ed.), 88, n. (c); 41 Am. L. Reg. n. s. 127; *Bigelow on Bills & Notes* (2d ed.), 69. A check certified before delivery is subject to all the rules applicable to uncertified checks, with respect to its subsequent negotiation. *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281. A bank is liable upon its certification to a holder for value, but, as between the original parties only, it may afterwards correct a mistake therein. *Hill v. Nation Trust Co.*, 108 Penn. St. 1, 56 Am. Rep. 189; *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71.

SECTION XI.

OF NOTICE OF NON-PAYMENT.

When a bill is not accepted, or a bill or note is not paid at maturity, by the party bound then to pay it, all subsequent parties must have immediate notice of this fact.¹ The contract of an indorser is a written contract; his liability is conditional and depends upon due demand and notice, and cannot be made absolute by parol evidence of statements made before or at the time of the indorsement. (*hh*)² Thus a verbal agreement of the parties to waive notice may not render it unnecessary; (*i*) but it is sometimes waived in writing, and this usually on the note; as by the words, "I waive demand and notice;" and such waiver is sufficient. (*j*) (*x*) A waiver of demand alone should operate as a waiver of notice; for if demand of payment is not made because unnecessary, a notice can hardly be necessary or useful; but a waiver of notice alone is not a waiver of demand, for though the party waiving may not wish for notice of the non-payment, he may still claim that * payment should be * 278

(*hh*) *Goldman v. Davis*, 23 Cal. 256.

(*i*) It is so intimated in some English cases. *Free v. Hawkins*, Holt, 550, 8 Taunt. 92. But see *Drinkwater v. Tebbetts*, 17 Me. 16; *Boyd v. Cleaveland*, 4 Pick. 525; *Taunton Bank v. Richardson*, 5 Pick. 437; *Fuller v. McDonald*, 8 Greenl. 213; *Marshall v. Mitchell*, 35 Me. 221; *Farmers' Bank v. Waples*, 4 Harring. (Del.) 429; *Hoadley v. Bliss*, 9 Ga. 303; *Lary v. Young*, 8 Eng. (Ark.) 402; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495.

Although a bill or note has been indorsed long after it is overdue, there must still be a demand and notice of default in order to charge the indorser, because a bill or note, although overdue, does not cease to be negotiable. *Dwight v. Emerson*, 2 N. H. 159; *Berry v. Robinson*, 9 Johns. 121; *Greely v. Hunt*, 21 Me. 455; *Kirkpatrick v. McCulloch*, 3 Humph. 171; *Adams v. Torbert*, 6 Ala. 865.

(*j*) *Woodman v. Thurston*, 8 Cush. 159.

¹ Omission to give notice of default in the payment of previous instalments of a note so payable does not discharge the indorser as to later instalments. *Fitchburg Ins. Co. v. Davis*, 121 Mass. 121. See *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46. — K.

² One who indorses a note after maturity is entitled to notice of dishonor. *Rosson v. Carroll*, 90 Tenn. 90; *Ames Cas. B. & N.* vol. ii. 212, 214 n. — W.

(*x*) The waiver, new promise, or admission of liability must be in unequivocal terms; waiver of protest may be made orally; and knowledge that due notice of dishonor has not been given is sufficient, though the party does not know the legal effect of such omission. *Parks v. Smith*, 155 Mass. 26, 28 N. E. 1044; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479; *Werr v. Kohles*, 71 N. Y. S. 713; *Valley Nat. Bank v. Urich*,

191 Penn. St. 556, 43 Atl. 354; *Sloan v. Gibbes*, 56 S. C. 480, 35 S. E. 408; 76 Am. St. Rep. 559; *Citizens' Bank v. Millet*, 103 Ky. 1, 44 S. W. 366, 82 Am. St. Rep. 546. The holder's laches as to demand and notice may be waived by the indorser's promise to pay the note after maturity, or by his part payment. *Amor v. Stoeckele*, 76 Minn. 180, 78 N. W. 1046; *Linthicum v. Caswell*, 46 N. Y. S. 610, 19 App. Div. 541.

demand. (*k*) A waiver of protest has been construed variously: that it is a waiver of demand but not of notice, (*l*) that after waiver of protest, demand must still be made, (*ll*) and that such waiver is a waiver of demand and notice. (*lm*).

There may be a constructive waiver of demand and notice; as, by an act of the indorser or drawer which puts the holder off his guard, or which prevents the holder from treating the note as he otherwise would. There are many cases showing how this waiver may be effected. (*ln*) An indorser consenting to an extension of time between maker and payee, thereby waives demand and notice at the original maturity of the note. (*lo*)

No waiver affects any party but him who makes it. It was formerly held that a neglect to give notice would not support a defence to a bill, unless injury could be proved; but it is now well settled that the law presumes injury. (*m*)

The omission to give such notice may, however, be excused by circumstances which rendered it impossible, or nearly so. The maker's letter, before maturity, stating inability to pay, and requesting delay, does not excuse want of demand or of notice. (*n*) But a request of the indorser for delay, or an agreement with him for delay, would excuse or waive demand and notice. (*o*) The absconding or absence beyond reach of the party to be notified, (*p*)¹

(*k*) *Drinkwater v. Tebbetts*, 17 Me. 16; *Lane v. Steward*, 20 Me. 98; *Berkshire Bank v. Jones*, 6 Mass. 524; *Buchanan v. Marshall*, 22 Vt. 561. See also *Union Bank v. Hyde*, 6 Wheat. 572; *Coddington v. Davis*, 3 Denio, 16; *Bird v. Le Blanc*, 6 La. An. 470; *Voorhies v. Atlee*, 29 Iowa, 49.

(*l*) *Wall v. Bry*, 1 La. An. 312.

(*ll*) *Buckley v. Bentley*, 42 Barb. 646.

(*lm*) *Fisher v. Price*, 37 Ala. 407; *Jackson v. Anderson*, 37 Mo. 91; *Porter v. Kernball*, 53 Barb. 467.

(*ln*) *Gove v. Wining*, 7 Met. 212; *Taylor v. French*, 4 E. D. Smith, 458; *Mintun v. Fisher*, 7 Cal. 573; *Kyle v. Green*, 14 Ohio, 490; *Amoskeag v. Moore*, 37 N. H. 539; *Curtiss v. Martin*, 20 Ill. 557; *Cheshire v. Taylor*, 29 Iowa, 492. But see *Haskell v. Boardman*, 8 Allen, 38.

(*lo*) *Walker v. Graham*, 21 La. An. 209.

(*m*) *Dennis v. Morrice*, 3 Esp. 158; *Norton v. Pickering*, 8 B. & C. 610; *Hill v. Heap*, Dow. & R. 59; *10 Berdt v. Atkinson*, 2 H. Bl. 336. — But in *Terry v.*

Parker, 6 A. & E. 502, it was held, that if a drawer of a bill of exchange have no effects in the hands of the drawee at the time of the drawing of the bill, and of its maturity, and have no ground to expect that it will be paid, it is not necessary to present the bill at maturity; and if it be presented two days afterwards, and payment be refused, the drawer is liable, and the case of *De Berdt v. Atkinson* is denied to be correct. And see *ante*, page * 271, note (*j*).

(*n*) *Pierce v. Whitney*, 29 Me. 188.

(*o*) *Ridgeway v. Day*, 13 Penn. St. 208; *Clayton v. Phipps*, 14 Mo. 399.

(*p*) *Walwyn v. St. Quintin*, 2 Esp. 516, 1 B. & P. 652; *Bowes v. Howe*, 5 Taunt. 30. And see *Crosse v. Smith*, 1 M. & Sel. 145; *Bruce v. Lytle*, 13 Barb. 163. — So war between one country and the country where the note is payable excuses immediate notice; but notice should be given within reasonable time after peace. *Hopkirk v. Page*, 2 Brock. 20; *Griswold v. Waddington*, 16 Johns. 438; *Scholefield v. Eichelberger*, 7 Pet. 586.

¹ Notice to the person named in a will as executor of the non-payment of a promissory note indorsed by his testator, which became payable after the will was offered for probate and letters testamentary applied for, and before the executor named declined

or ignorance of his residence, (*q*) or the death or sufficient illness of the party bound to give notice, or any sufficient accident or obstruction, will excuse the want of notice. But nothing of this kind is a sufficient excuse, provided the notice could have been given by great diligence and earnest endeavor, for so much is required by the law. (*r*) * Nor will the holder's inability * 279 to learn the proper place for giving notice, though an excuse for him, be available to another indorser who possesses the necessary information. (*s*)

A conveyance of all the property of the maker to the indorser, and an acceptance by him, would be regarded as waiving his right to notice. (*t*) It might, however, be questioned whether it would have this effect, if made after the maturity of the note, and without mention of it. (*u*)

It may not be certain, whether the giving of full security to the indorser by the maker, would necessarily operate as a waiver. We should say it would not, because the maker might intend only to secure the indorser, if he be legally held. (*v*)

It is a well-settled rule, that where there has been no demand or notice, the party entitled to it waives this defence, by a promise to pay, made with a full knowledge of the circumstances and of

(*q*) *Hunt v. Maybee*, 3 Seld. 266; *Porter v. Judson*, 1 Gray, 175.

(*r*) A party is bound to use *reasonable*, but not *excessive*, diligence. *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Bender*, 21 Wend. 643; *Clark v. Bigelow*, 16 Me. 246; *Roberts v. Mason*, 1 Ala. (N. S.) 373; *Preston v. Daysson*, 7 La. 7; *Runyon v. Montfort*, 1 Bush. L. 371; *Manchester Bank v. Fellows*, 8 Foster (N. H.) 302. — If due diligence be used it will be sufficient, although notice should be sent to the wrong place. *Burmester v. Barron*, 9 E. L. & E. 402; *Nichol v. Bate*, 7 Yerg. 305; *Barr v. Marsh*, 9 id. 253; *Phipps v. Chase*, 6 Met. 491; *Barker v. Clarke*, 20 Me. 156. And where a party is ignorant of the address of the person liable upon a bill or note, it is sufficient if he use reasonable diligence to ascertain it, and after having ascertained it, sends a notice forthwith. *Dixon v. Johnson*, 29 E. L. & E. 504.

(*s*) *Beale v. Parrish*, 20 N.Y. 407. But see *Cosgrave v. Boyle*, 6 Can. Sup. Ct. 165.

(*t*) This seems, upon the whole, to be

to accept the trust, is sufficient to charge the estate; but such notice, if the note matured after the executor had renounced the trust, and a special administrator had been appointed, is not sufficient, although no public notice of the latter's appointment had been ordered or given. *Goodnow v. Warren*, 122 Mass. 79. — K.

settled by authority. See *Corney v. Da Costa*, 1 Esp. 302; *Barton v. Baker*, 1 S. & R. 334; *Kramer v. Sandford*, 4 Watts & S. 328; *Bond v. Farnham*, 5 Mass. 170; *Bank of South Carolina v. Myers*, Bailey, 412; *Barrett v. Charleston Bank*, 2 McMullan, 191; *Stephenson v. Primrose*, 8 Port. Ala. 155; *Perry v. Green*, 4 Harr. 61; *Vreeland v. Hyde*, 2 Hale, 429; *Seacord v. Miller*, 3 Kern. 55; *Benedict v. Caffee*, 5 Duer, 226.

(*u*) *Walters v. Munroe*, 17 Md. 154.

(*v*) The cases on this subject are numerous and obscure. 3 Kent, Com. 113, and Story, Prom. Notes, § 357, and on Bills, § 374, would seem to hold the taking of security a waiver of the notice. But it is held otherwise in *Creamer v. Perry*, 17 Pick. 332; *Woodman v. Eastman*, 10 N. H. 359; *Holland v. Turner*, 10 Conn. 308; *Taylor v. French*, 4 E. D. Smith, 458; *Kramer v. Sandford*, 4 Watts & S. 328; *Seacord v. Miller*, 3 Kern. 55; *Moore v. Coffield*, 1 Dev. 247, *Denny v. Palmer*, 610; *Dufour v. Morse*, 9 La. 333. See 1 Pars. Notes & Bills, 560-575.

his defence. (*vv*). And such a promise, made with full knowledge of the absence of demand or notice, operated as a waiver, although the promisor did not know that demand of the note was necessary to hold him. (*vw*)

No mere probability that the note or bill will not be paid excuses demand, and it is even held that the certainty of non-payment does not. (*w*) And if an indorser adds to his name the word "surety," this is said only to give him the right of a surety in addition to that of an indorser. (*x*)

If there be joint indorsers (not partners) notice should be given to each; and it is held that neglect to give notice to either one discharges all. (*yy*)

In general, the notice must be given within a reasonable time; and what this time is, is a question of law for the court, (*z*)

and each case will be judged by its circumstances.

* 280 * It is so important that the rights and duties of all persons interested in negotiable paper should be as exactly defined and as certainly known as possible, that there is now a positive rule of law on the subject; and this, as gathered from the usage in commercial places, and the weight of authorities is, that notice of non-payment *may* be given to parties liable to pay, on the same day on which payment has been refused; (*a*) (*x*) either personally or by mail, as may be proper under the circumstances; and that notice *should* be given as soon as on the day following that on which payment has been refused; (*b*)¹ or by the mail of

(*vv*) *Salisbury v. Renick*, 44 Mo. 554.

(*vw*) *Matthews v. Allen*, 16 Gray, 594.

See p. *434, note, *post*.

(*w*) *Gray v. Bell*, 2 Rich. L. 67.

(*x*) *Bradford v. Corey*, 5 Barb. 461;

Campbell v. Knapp, 15 Penn. St. 27.

(*yy*) *People's Bank v. Keech*, 26 Md. 521.

(*z*) *Hussey v. Freeman*, 10 Mass. 84; *Nash v. Harrington*, 2 Aik. 9; *Haddock v. Murray*, 1 N. H. 140; *Sussex Bank v. Baldwin*, 2 Harrison, 488; *Bank of Utica v. Bender*, 21 Wend. 643; *Remer v. Downer*, 23 id. 620; *Bennett v. Young*, 18 Penn. St. 261; *Smith v. Fisher*, 24 Penn.

St. 222. — It seems to be in some respects partly a question of law and partly of fact. See *Taylor v. Bryden*, 8 Johns. 173; *Ferris v. Saxton*, 1 Southard, 1; *Scott v. Alexander*, 1 Wash. (Va.) 335; *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 610.

(*a*) *Burbridge v. Manners*, 3 Camp. 193; *Bussard v. Levering*, 6 Wheat. 102; *Corp. v. McComb*, 1 Johns. Cas. 328; *Farmers' Bank v. Duvall*, 7 G. & J. 79; *Smith v. Little*, 10 N. H. 526; *McClane v. Fitch*, 4 B. Mon. 599; *Coleman v. Carpenter*, 9 Barr, 178.

(*b*) If the parties reside in the same

¹ If mail communication is stopped by war, posting a notice is insufficient. *Farmers' Bank v. Gunnell*, 26 Gratt. 131; *Lapeyre v. Robertson*, 20 La. An. 399. — W.

(*x*) *Burbridge v. Manners* also holds, with other cases, that payment or satisfaction before the day is merely a personal defence; probably, also, payment of a note on the day when it falls due discharges the note even against a purchaser

for value taking it later on the same day. *Watson v. Wynan*, 161 Mass. 96, 99, 36 N. E. 692; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Mulcahy v. Fenwick*, 161 Mass. 164, 36 N. E. 689.

the same day, or by the next mail afterwards, provided no convenient or usual means intervene. Where there is but one mail departing upon the day succeeding the default, notice must be sent thereby unless it depart before ordinary business hours on that day. (c) But if there be more than one mail it is considered that it is sufficient if the notice be deposited in time to go by any mail of that day. (d) In London, [or other city where letters are delivered by a carrier,] it may be sent by penny-post to parties residing there.¹

The notice should be properly addressed. Where an indorser added to his indorsement his street and number, it was held that the notice should be so addressed. (dd)

If the parties live in the same town or city, [and letters are not delivered by carriers,] the notice should be personal, or left at the residence or place of business of the party, and if sent through the mail, it is sufficient only if in fact received in due season. (e) By "parties" in this rule, is meant the party to be notified, and the party who is to give the notice, and this last is the bank or notary holding the * paper as agent, and not the * 281 owner. (f) In general, a personal notice is good, if given anywhere, (g) unless the reception of notice is an official act, requiring an official place. (h)

If the parties do not live in the same town, then it may be sent to the post-office nearest to the residence of the party to be

town, notice given at any time on the next day after the default is sufficient. *Grand Bank v. Blanchard*, 23 Pick. 305; *Remington v. Harrington*, 8 Ohio, 507; *Whittlesey v. Dean*, 2 Aik. 263.

(c) *Lennox v. Roberts*, 2 Wheat. 373; *Seventh Ward Bank v. Hanrick*, 2 Story, 416; *Davis v. Hanly*, 7 Eng. (Ark.) 647; *Lawson v. Farmers' Bank*, 1 Ohio St. 207; *Hartford Bank v. Stedman*, 3 Conn. 489; *Howard v. Ives*, 1 Hill (N. Y.), 263; *Whitwell v. Johnson*, 17 Mass. 449; *Mitchell v. Degrand*, 1 Mason, 176; *United States v. Barker*, 4 Wash. C. C. 465; *Chick v. Pillsbury*, 24 Me. 458; *Downs v. Planters' Bank*, 1 Sm. & M. 261; *Mitchell v. Cross*, 2 R. I. 437; *Burgess v. Vreeland*, 4 N. J. 71; *Stephenson v. Dickson*, 24 Penn. St. 148. See *Gladwell v. Turner*, L. R. 5 Ex. 59.

(d) *Whitwell v. Johnson*, 17 Mass. 449; *Housatonic Bank v. Laffin*, 5 Cush.

550; *Story on Prom. Notes*, § 324; *Carter v. Burley*, 9 N. H. 558.

(dd) *Bartlett v. Robinson*, 9 Bosw. 305, 39 N. Y. 187.

(e) *Bowling v. Harrison*, 6 How. 248; *Hyslop v. Jones*, 3 McLean, 96; *Foster v. Sineath*, 2 Rich. L. 338; *Van Vechten v. Pruyn*, 3 Kern. 549. But by statute it is sufficient, in New York, if the notice be put in the mail. See, as interesting cases on the requisites of notice, *Walker v. Stetson*, 14 Ohio (U. S.), 89, and *Palmer v. Whitney*, 21 Ind. 58.

(f) *Bowling v. Harrison*, 6 How. 248; *Burbank v. Beach*, 15 Barb. 326; *Green v. Fouley*, 20 Ala. 322; *Manchester Bank v. Fellows*, 8 Foster (N. B.), 302.

(g) *Hyslop v. Jones*, 3 McLean, 96. See *Bartlett v. Hawley*, 120 Mass. 92.

(h) *Seneca Bank v. Neass*, 5 Denio, 329.

¹ *Stocken v. Collin*, 7 M. & W. 515; *Walters v. Brown*, 15 Md. 285; *Peirce v. Pendar*, 5 Met. 352, 356; *Gist v. Lybrand*, 3 Ohio, 307; *Shoemaker v. Mechanics'* *Bank*, 59 Pa. 79. — W.

notified, (i)¹ or it may be sent to the post-office where the party usually receives his letters, although not his actual place of residence; (j) or to the post-office at the place of the party's residence, though he usually receives his letters at a nearer office in another town; (k) or to the place of his actual residence at the time, although the party has his domicile elsewhere. (kk) If the sender knows that the other party usually receives his letters at another office, he may send notice there. (l) And if the indorser has changed his residence, and the change is unknown to the party sending notice, he may send the notice to his former residence. (m) (x) So he may send it to any place designated

* 282 by the indorser on the note. (n) * Where notice may be properly given through the post-office, it is sufficient if the notice be deposited in the office in season, although it is never received by the indorser. (o)²

(i) *Scott v. Lifford*, 9 East, 347; *Dunlap v. Thompson*, 5 Yerg. 67; *Spann v. Baltzell*, 1 Fla. 302. — But in *Peirce v. Pendar*, 5 Met. 352, it was held, that when both parties resided in the same town, notice could not be given through the post-office. In *Green v. Farley*, 20 Ala. 322, where both indorser and holder resided in Montgomery, but the acceptor resided in Mobile, and the note was there protested, it was held that notice to the indorser sent by the notary through the post-office was sufficient. And see *Bell v. Hagerstown Bank*, 7 Gill, 216; *Morton v. Westcott*, 8 Cush. 425.

(j) *Morris v. Husson*, 4 Sandf. 94; *Bank of Louisiana v. Tournillon*, 9 La. An. 132.

(k) *Seneca Bank v. Neass*, 5 Denio, 329; *Morton v. Westcott*, 8 Cush. 425;

Manchester Bank v. White, 10 Foster (N. H.), 456.

(kk) *Young v. Durgin*, 15 Gray, 264.

(l) *Walker v. Bank of Augusta*, 3 Ga. 486; *Sherman v. Clark*, 3 McLean, 91; *Mont. Co. B. v. Marsh*, 3 Seld. 481. *Thompson, J.*, in *Bank of Columbia v. Lawrence*, 1 Pet. 578.

(m) *Union Bank of T. v. Gowen*, 10 Sm. & M. 333; *Hunt v. Fish*, 4 Barb. 324; *Hunt v. Nugent*, 4 Barb. 541.

(n) *Burmester v. Barron*, 9 E. L. & E. 402; s. c. 17 Q. B. 828; *Morris v. Husson*, 4 Sandf. 93. But the mere dating of the note does not dispense with proper inquiry as to residence. *Carroll v. Upton*, 3 Comst. 272; *Pierce v. Struthers*, 27 Penn. St. 249; *Runyon v. Montfort*, 1 Busb. L. 371.

(o) *Bell v. Hagerstown Bank*, 7 Gill,

¹ If there are several post-offices in the same town, the notice may be sent to either, *Saco Bank v. Sanborn*, 63 Me. 340, unless the party usually receives his mail at one alone, when it should be sent there, *Roberts v. Taft*, 120 Mass. 169. Notice sent on the day of default to E., where the indorser had formerly resided, but whence he had removed to C. without the holder's knowledge, and thence forwarded to C. on the next day, where the indorser received it, is seasonable. *North Bennington Bank v. Wood*, 51 Vt. 471. — A notice left at the desk of a custom-house officer is *prima facie* sufficient. *Commonwealth Bank v. Mudgett*, 44 N. Y. 514; or if addressed to the director of a corporation who endorsed its bill as surety, at its place of business, it is sufficient. *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639. — If an indorser's residence is unknown, information may be sought from the other parties to the note. *Gilchrist v. Donwell*, 53 Mo. 591. See *Gawtry v. Doane*, 51 N. Y. 84, 92. — K.

² The deposit of a notice in a post-office box from which a postman collects letters

(x) The general rule is, that notice is to be so given, and at such place, that it will be most likely to reach the indorser promptly; notice by mail to him at the city where he is then known to reside is sufficient, though he still keeps an agent

in the place of his former residence which continues to be his domicile. *Bank of America v. Shaw*, 142 Mass. 290, 7 N. E. 779; *Lamkin v. Edgerly*, 151 Mass. 348, 24 N. E. 49; *Bigelow on Bills & Notes* (2d ed.), 158.

Where an indorser receives notice, and is bound to give notice to other parties as the condition of making them liable to him, he comes under similar rules, and each successive indorser has until the next day to give such notice. (*p*) But no party bound to give notice can profit by the days to which other parties are entitled. Thus, if a note has six indorsers, and the holder notifies the last, and the last notifies the fifth, and so on until all are notified, the first indorser will not receive notice until six days have elapsed, and will still be held to all parties. But if the holder gives no notice until the fourth day, and then notifies the first and second indorsers, no indorser will be held.

If a bill is sent to an agent for collection, he is treated as a holder of the note for the purpose of giving notice, and his principal has the same time for notifying his indorsers after receiving notice from the agent, as if himself an indorser receiving notice from an indorsee. (*q*) (*x*) It has however recently been held in England that the allowance of a day in each step in notice applies only as between the parties to a bill, and not as between a distant holder and his agent. (*qq*)

Whether joint indorsers, who are not partners, are entitled to separate notice, may not be certain; but we think that they have this right, on reason as well as authority. (*r*) (*y*)

216; *Sasscer v. Farmers' Bank*, 4 Md. 409. See also *Stocken v. Collin*, 7 M. & W. 515.

(*p*) *Darbyshire v. Parker*, 6 East, 3; *Smith v. Mullett*, 2 Camp. 208; *Jameson v. Swinton*, 2 Camp. 374; *Brown v. Ferguson*, 4 Leigh, 37. This rule is so well settled that, although the party receiving notice may easily have forwarded it the same day, yet he is not under obligation to send it until the next post after the day of its reception. *Geill v. Jeremy*, Mo. & M. 61. See *Hilton v. Shepherd*, 6 East, 14 n.; *West River Bank v. Taylor*, 34 N. Y. 128.

(*q*) *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Church v. Barlow*, 9 Pick. 547; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Rosson v. Carroll*, 90 Tenn. 90.

(*qq*) *In re Leeds Banking Co.*, L. R. 1 Eq. 1.

(*r*) It would seem that notice to one is enough, from *Porthouse v. Parker*, 1 Camp. 82, and *Harris v. Clark*, 10 Ohio, 5. That notice must be given to each, is held in *Shepard v. Hawley*, 1 Conn. 367; *Willis v. Green*, 5 Hill (N. Y.), 232; *Union Bank v. Willis*, 8 Met. 504; *State Bank v. Slaughter*, 7 Blackf. 133.

regularly has the same legal effect as deposit in the post-office. *Skilbeck v. Garbett*, 7 Q. B. 846; *Johnson v. Brown*, 154 Mass. 105; *Pearce v. Langfit*, 101 Pa. St. 507. — W.

(*x*) Payment to such agent after the principal's death appears to be a discharge. *Deweese v. Muff*, 57 Neb. 17, 77 N. W. 361, 73 Am. St. Rep. 488, 42 L. R. A. 789. A purchaser from such agent succeeds only to the rights and equities of such agent. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791; 75 Am. St. Rep. 762. See *Second Nat. Bank v. Merchants' Nat. Bank (Ky.)*, 65 S. W. 4, 55 L. R. A. 273. It is held to be negligence to send negotiable

paper by mail to the payor at a distant place for collection, though such payor is the only bank at that place, and it is the custom so to send; but such payor, when an indorser, continues liable though it neglects to make demand or give notice. *American Exchange Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451; *Auten v. Manistee Nat. Bank*, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329.

(*y*) Presentment to joint makers, and

If Sunday or any other day intervene, which, by law, or by established usage, is not a day of business, then it is not counted, and the obligation as to notice is the same as if it fell on the * 283 succeeding day. (s) If a note or bill payable without * grace falls due on such a day, it is not payable until the next day. But if the last day of grace falls upon such a day, then it is payable on the day before; for the days of grace are regarded as matters of favor, and are abridged instead of being lengthened by the intervention of such a day. (t) An action brought on the last day of grace has been held to have been brought too soon; (u) but this is not settled. (v) ¹

(s) *Eagle Bank v. Chapin*, 3 Pick. 180; *Agnew v. Bank of Gettysburg*, 2 Har. & G. 479; *Hawkes v. Salter*, 4 Bing. 715; *Wright v. Shawcross*, 2 B. & Ald. 501 n.; *Bray v. Hadwen*, 5 M. & Sel. 68. So of public holidays. *Cuyler v. Stevens*, 4 Wend. 566; *Lindo v. Unsworth*, 2 Camp. 602.

(t) Where days of grace are allowed, and the last of them falls on Sunday, the fourth of July, or other public holiday, the bill or note is payable the day before. *Ranson v. Mack*, 2 Hill (N. Y.), 588; *Cuyler v. Stevens*, 4 Wend. 566; *Sheldon v. Benham*, 4 Hill (N. Y.) 129; *Homes v. Smith*, 20 Me. 264; *Tassell v. Lewis*, 1 Ld. Raym. 743; *Haynes v. Birks*, 3 B. & P. 599; *Bussard v. Levering*, 6 Wheat. 102; *Adams v. Otterback*, 15 How. 539; *Lewis v. Burr*, 2 Caines Cas. 195; *Barlow*

v. Planters' Bank, 7 How. (Miss.) 129; *Offut v. Stout*, 4 J. J. Marsh. 332. But if no grace is allowed, and the day on which the bill or note by its terms falls due is a holiday, it is not payable until the day after. *Salter v. Burt*, 20 Wend. 205; *Avery v. Stewart*, 2 Conn. 69; *Delamater v. Miller*, 1 Cowen, 75; *Barratt v. Allen*, 10 Ohio, 426. — If, however, the nominal day of payment in an instrument, which is entitled to grace, happens to fall on Sunday or on a holiday, the days of grace are the same as in other cases, and payment is not due until the third day after. *Woolley v. Clements*, 11 Ala. 220.

(u) *Wiggle v. Thomason*, 11 Sm. & M. 452; *Walter v. Kirk*, 14 Ill. 55.

(v) See *McKenzie v. Durant*, 9 Rich. L. 61; *Ammidown v. Woodman*, 21 Me. 580.

¹ “A promissory note entitled to grace is payable on demand at any reasonable time and place on the last day of grace, and, if the maker neglects or refuses payment upon such demand, the note is dishonored and may be put in suit immediately; but if no such demand is made and he has done nothing amounting to a waiver of it, he has the whole of the day in which to make payment, and is not liable to an action until the expiration of the time within which such demand might have been made upon him.” *Estes v. Tower*, 102 Mass. 65, 66. To the same effect are *Leftley v. Mills*, 4 T. R. 170, 174; *Heise v. Bumpass*, 40 Ark. 548; *Veazie Bank v. Winn*, 40 Me. 62; *Vandesande v. Chapman*, 48 Me. 262; *Nat. Exchange Bank v. Nat. Bank of North America*, 132 Mass. 147; *Fletcher v. Thompson*, 55 N. H. 308; *McKenzie v. Durant*, 9 Rich. 61; *Coleman v. Ewing*, 4 Humph. 241.

In some jurisdictions, it is held, however, that though payment be demanded and refused on the last day of grace, no action will lie till the next day. *Davis v. Eppinger*, 18 Cal. 381; *Osborn v. Moncure*, 3 Wend. 170; *Coleman v. Carpenter*, 9 Pa. St. 178. In the following cases there are *dicta* to the same effect, but in fact no demand

notice to joint indorsers, or to joint and several makers or indorsers, is now largely controlled by statute; in general, all indorsers, if not partners, appear to be now entitled to personal notice. See *Jarnagin v. Stratton*, 95 Tenn. 619, 32 S. W. 619, 30 L. R. A. 495; *Phipps v. Harding*, 70 Fed. 468, 17 C. C. A. 203, 34 U. S. App. 148, s. c. *nom.* *Hudson Furniture Co.*

v. Harding, 30 L. R. A. 513; *Closz v. Miracle*, 103 Iowa, 198, 72 N. W. 502; *Benedict v. Schmieg*, 13 Wash. 476, 43 Pac. 374, 52 Am. St. Rep. 61, 36 L. R. A. 703 and note; *Hays v. Citizens Savings Bank*, 101 Ky. 201, 40 S. W. 573; *Mass. St. 1898*, c. 533, § 78; *Mass. Rev. Laws (1902)*, p. 639, § 95.

The purpose of notice is, that the party receiving it may obtain security from the party liable to him, for the sum for which he is liable to other parties. (xx) No precise form is necessary; but it must be consonant with the facts, and state distinctly the dishonor of the bill, and either expressly or by an equivalent implication, that the party to whom the notice is sent is looked to for the payment. (w) And it is held by the * best authority, * 284 that this implication arises from the actual notice of dishonor. (x) Nor will a slight mistake in the name or description of the note or party vitiate the notice, unless the party receiving it is misled thereby; (y) nor need the notice state who owns or who protests the note. (z) Any party may give notice, and it will

(w) *Hartley v. Case*, 4 B. & C. 339; *Solarte v. Palmer*, 7 Bing. 530; *Boulton v. Welsh*, 3 Bing. N. C. 688, remarked upon in *Houlditch v. Cauty*, 4 id. 411; *Grugeon v. Smith*, 6 A. & E. 499; *Strange v. Price*, 10 id. 125; *Cooke v. French*, id. 131; *Furze v. Sharwood*, 2 Q. B. 388; *King v. Bickley*, id. 419; *Robson v. Curlew*, id. 421; *Hedger v. Steavenson*, 2 M. & W. 799; *Lewis v. Gompertz*, 6 id. 399; *Bailey v. Porter*, 14 id. 44; *Messenger v. Southey*, 1 Man. & G. 76; *Armstrong v. Christiani*, 5 C. B. 687; *Everard v. Watson*, 18 E. L. & E. 194; *Barstow v. Hiriart*, 6 La. An. 98; *Denegre v. Hiriart*, id. 100; *Cook v. Litchfield*, 5 Sandf. 330; *Beals v. Peck*, 12 Barb. 245; *Spann v. Baltzell*, 1 Fla. 302; *Reedy v. Seixas*, 2 Johns. Cas. 337; *United States Bank v. Carneal*, 2 Pet. 543; *Mills v. Bank of United States*, 11 Wheat. 431; *Shed v. Brett*, 1 Pick. 401; *Gilbert v. Dennis*, 3 Met. 495; *Pinkham v. Macy*, 9 id. 174; *Dole v. Gold*, 5 Barb. 490; *De Wolf v. Murray*, 2 Sandf. 166; *Youngs v. Lee*, 2 Kern. 551; *Smith v. Little*, 10 N. H. 526; *Cowles v. Harts*, 3 Conn. 516; *Wheaton v. Wilmarth*, 13 Met. 423; *Cayuga County*

Bank v. Warden, 1 Comst. 413; *Platt v. Drake*, 1 Dougl. (Mich.) 296; *Spies v. Newberry*, 2 id. 425; *Bank of Cape Fear v. Sewell*, 2 Hawks, 560. See also 1 Am. Lead. Cas. 231-237; *Boehme v. Carr*, 3 Md. 202; *Farmers' Bank v. Bowie*, 4 id. 290; *Woodin v. Foster*, 16 Barb. 146; *Wynn v. Alden*, 4 Denio, 163; *Townsend v. Lorain Bank*, 2 Ohio (N. S.), 345; *Paul v. Joel*, 4 H. & N. 355. And if a party to a note gives positive notice of dishonor, which afterwards turns out to be true, it is immaterial whether he had knowledge of the fact at the time when he gave the notice or not. *Jennings v. Roberts*, 29 E. L. & E. 118.

(x) *Chard v. Fox*, 14 Q. B. 200; *Graham v. Sangston*, 1 Md. 60; *Mills v. Bank of United States*, 11 Wheat. 431; *Metcalfe v. Richardson*, 20 E. L. & E. 301.

(y) *Mellersh v. Rippen*, 11 E. L. & E. 499; *Smith v. Whiting*, 12 Mass. 6; *Tobey v. Lenning*, 14 Penn. St. 483; *Cayuga County Bank v. Warden*, 2 Seld. 19; *Snow v. Perkins*, 2 Mich. 239; *Housatonic Bank v. Laffin*, 5 Cush. 546; *Denistoun v. Stewart*, 17 How. 606.

(z) *Bradley v. Davis*, 26 Me. 45.

had been made on the makers, so that it was rightly held that actions begun on the last day of grace were premature. *Wells v. Giles*, 2 Gale, 209; *Hinton v. Duff*, 11 C. B. N. S. 724; *Randolph v. Cook*, 2 Port. 286; *Wilcombe v. Dodge*, 3 Cal. 260; *Benson v. Adams*, 69 Ind. 353; *Wiggle v. Thomason*, 19 Miss. 452; *Hopping v. Quin*, 12 Wend. 517; *Taylor v. Jacoby*, 2 Pa. St. 495; *Hamilton, & Co. v. Sinker*, 74 Tex. 51.

As to when the statute of limitations begins to run, see *Blackman v. Nearing*, 43 Conn. 56; *Watkins v. Willis*, 58 Tex. 521. — W.

(xx) The indorser of a bill, being a surety for its payment to the holder, is entitled, after he has paid it, to the benefit of securities deposited by the acceptor with the holder to cover it, whether or not he knew, when he indorsed it, of such

deposit; his right is not dependent upon contract, but results from the equity of indemnification attendant on the suretyship. *Duncan, Fox, & Co. v. North & South Wales Bank* 6 A. C. 1, 4 English Ruling Cas. 591.

enure to the benefit of every other party, (a) provided the party giving the notice be himself the holder or an indorser already fixed by notice, (b) and gives the notice to the party sought to be charged within one day after the dishonor, or after receiving notice himself. (c) The holder may leave without notice whom he will, and hold by due notice those whom he will; and the indorser having due notice, must himself notify prior parties to whom he would look. (d) But if a holder prevents an indorser from having recourse to a prior party, by discharging that prior party, he cannot look to the indorser whom he notifies. And notice given to one party does not hold another; thus if a second indorser having notice, and thereby being bound, neglects to give notice to the first indorser, the latter would not be liable. (e) Nor does authority to an agent to indorse a note imply authority to receive notice of dishonor. (f) And if one partner makes a note which another indorses, regular notice of the dishonor must be given to the indorser. (g) If the paper be in fact dishonored, a notice may be good, although the party giving it had no certain knowledge of the fact. (h)

The party giving the notice must have with him the note or bill, unless there are special circumstances accounting for and excusing its absence. (hh)

* 285 * After the holder of a dishonored bill or note has given due notice to indorsers, he may indulge the acceptor or maker with forbearance or delay, without losing his claim on the indorsers, provided he retains the power of enforcing payment at any moment. (i) But if he makes a bargain for delay, promising it on a consideration which makes the promise binding, or under

(a) *Chapman v. Keene*, 3 A. & E. 193; overruling *Tindal v. Brown*, 1 T. R. 167, 2 id. 186 n., and *Ex parte Barclay*, 7 Ves. 597; *Beal's Adm'r v. Alexander*, 6 Tex. 531. But the notice must be given by a party to the bill. If given by a stranger it will not suffice. *Jameson v. Swinton*, 2 Camp. 373; *Chanoine v. Fowler*, 3 Wend. 173; *Wilson v. Swabey*, 1 Stark. 34. So in case of non-acceptance, notice to the drawer by the drawee will not avail, for the latter is not a party. *Stanton v. Blossom*, 14 Mass. 116.

(b) *Lysaft v. Bryant*, 9 C. B. 46.

(c) *Brown v. Ferguson*, 4 Leigh, 37; *Simpson v. Turney*, 5 Humph. 419. See also *Turner v. Leech*, 4 B. & Ald. 451; *Rowe v. Tipper*, 20 E. L. & E. 220 n.

(d) *Valk v. Bank of State*, 1 McMull. Eq. 414; *Carter v. Bradley*, 19 Me. 62; *Lawson v. Farmers' Bank*, 1 Ohio St. 206.

(e) *Morgan v. Woodworth*, 3 Johns. Cas. 90.

(f) *Valk v. Gaillard*, 4 Strob. L. 99.

(g) *Foland v. Boyd*, 23 Penn. St. 476.

(h) *Jennings v. Roberts*, 4 E. & B. 615.

(hh) *Arnold v. Dresser*, 8 Allen, 435.

(i) *Pole v. Ford*, 2 Chitt. 125; *Philpot v. Bryant*, 4 Bing. 717; *Badnall v. Samuel*, 3 Price, 521; *Walwyn v. St. Quintin*, 1 B. & P. 652; *McLemore v. Powell*, 12 Wheat. 554; *Bank v. Myers*, 1 Bailey, 412; *Planters' Bank v. Sellman*, 2 G. & J. 230; *Gahn v. Niemcewicz*, 11 Wend. 312; *Frazier v. Dick*, 5 Rob. (La.) 249; *Walker v. Bank of Mont. Co.*, 12 S. & R. 382; *Freeman's Bank v. Rollins*, 13 Me. 202; *Bateson v. Gosling*, L. R. 7 C. P. 9; *Tobey v. Ellis*, 114 Mass. 120; *Hagey v. Hill*, 75 Penn. St. 108.

his seal, this destroys his claim against the indorser. (j) The reason is, that he ought not to claim payment of the indorsers, unless, on payment, he could transfer to them the bill or note, with a full right to enforce payment at once from the acceptor or maker. But he could give them no such right if he had, for good consideration, given to the acceptor or maker his promise that they should not be sued.

It has been a subject of some discussion whether the above rule applies in cases of assignments in insolvency.¹ Bankrupt and insolvent laws usually provide that the discharge of the bankrupt or insolvent shall not discharge his indorsers or sureties; and it is sometimes attempted to effect the same result in voluntary assignments in insolvency. The indentures contain a provision that the creditors who become parties to them shall discharge the insolvent; but they also contain a further provision that the indorsers or sureties shall not be discharged. And the question has been whether the indorsers or sureties are discharged notwithstanding this provision. But we think the reason of the rule which discharges them, does not hold in this case. For where the debtor himself stipulates that his discharge shall not prevent his creditors from having recourse to his indorsers or sureties, it

(j) *Clark v. Henty*, 3 Y. & Col. 187; *Greely v. Dow*, 2 Met. 176; *Wharton v. Williamson*, 13 Penn. St. 273. See also *Moss v. Hall*, 5 Exch. 46. Unlike, however, the case of a surety, a party liable on a bill as indorser will not be dis-

charged, though the party for whom he is bound take security of the acceptor and then release it without his consent. (x) *Hurd v. Little*, 12 Mass. 503; *Pitts v. Congdon*, 2 Comst. 352.

¹ An indorser or surety is not discharged by the creditor's voting to accept a composition in bankruptcy from the maker, *Ex parte Jacobs*, L. R. 10 Ch. 211; *Megrath v. Gray*, L. R. 9 C. P. 216; *Guild v. Butler*, 122 Mass. 498; and notice must be sent to an indorser, although a bankrupt, and his assignee has been appointed, *Ex parte Baker*, 4 Ch. D. 795. — K.

(x) Additional security discharges a surety only when it is the consideration of a contract to give time, which contract must be made with the principal debtor, and not with a co-surety. The acceptor of a bill may be discharged as a surety by giving time to the principal debtor. *Overend, Gurney, & Co. v. Oriental Financial Corp.*, L. R. 7 H. L. 348, L. R. 7 Ch. 142, 4 English Ruling Cas. 576; *Clarke v. Birney*, 41 Ch. D. 422; *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164. The effect of the release of collaterals is always measured by the injury done to the surety; and a substitution of one security for another, when made in

good faith, and for the benefit of all concerned, is governed by the same rule. *State Bank v. Smith*, 155 N. Y. 185, 201, 49 N. E. 680.

As a rule a provision for the "renewal" of a bill or note means that it shall be between the same parties, and be the same in essential terms; but it is not always used in this technical sense. *Barber v. Mackrell*, 68 L. T. 29, 41 W. R. 341. If the original note was illegal, its renewal is open to the same defences, unless the illegality is cured or waived. *Brown v. James*, 37 N. Y. S. 529. As to the effect of a renewal on the rights of the parties and on liens or mortgages, see the note to *Newhall v. Clay* (Cal.) in 55 L. R. A. 673.

must be understood that he binds himself not to oppose such discharge to a suit against himself by the indorsers or sureties * 286 if they are held liable to his creditors * by reason of a provision which he himself expressly makes. The reason, therefore, fails, which generally makes his discharge their discharge. And, it may be added, that it is for their benefit that this provision should be carried into effect. For if his discharge necessarily operated their discharge, creditors would naturally prefer a claim against them to the dividend of an insolvent, and would therefore take nothing from him, but all from them. Whereas, if this clause permits them to get what they can from the insolvent, and look to the indorsers or sureties only for the balance, they would always do so, and the sureties would have the benefit of whatever was paid by way of dividend. (*k*)

SECTION XII.

OF PROTEST.

If a foreign bill be not accepted, or not paid at maturity, it must be protested at once; and this should be done by a notary public, to whose official acts under his seal, full faith is given in all countries. (*l*) (*x*) Inland bills are generally, and promissory notes very often protested in like manner, but this is not required by the law merchant. (*m*) It is held, on the weight of authority, that our States are so far foreign to each other, that a bill drawn in one of them, upon a drawee resident in another, * 287 requires protest. (*n*) The notary's certificate * of protest

(*k*) *Parke, B., Kearsley v. Cole*, 16 M. & W. 135; *Ex parte Gifford*, 6 Ves. 805; *Boulton v. Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck, Cases in Bankruptcy, 517; *Nicholson v. Revill*, 4 A. & E. 675; *Lewis v. Jones*, 4 B. & C. 506, n.; *Nichols v. Norris*, 3 B. & Ad. 41; *Clagett v. Salmon*, 5 G. & J. 314; *Owen v. Homan*, 3 E. L. & E. 112; *Price v. Barker*, 30 E. L. & E. 157; *Sohier v. Loring*, 6 Cush. 537. See *ante*, p. * 29.

(*l*) *Gale v. Walsh*, 5 T. R. 239; *Bryden v. Taylor*, 2 Har. & J. 396; *Townley*

v. Sumrall, 2 Pet. 170. And the duty of the notary cannot be performed by an agent or clerk. *Onondaga County Bank v. Bates*, 3 Hill (N. Y.), 52; *Cole v. Jessup*, 9 Barb. 393.

(*m*) *Windle v. Andrews*, 2 B. & Ald. 696; *Bonar v. Mitchell*, 5 Exch. 415; *Young v. Bryan*, 6 Wheat. 146; *Burke v. McCay*, 2 How. 66; *Johnson v. Brown*, 154 Mass. 105. See *Corbin v. Planters Nat. Bank*, 87 Va. 661.

(*n*) Whether a bill drawn in one State upon persons resident in another is a for-

(*x*) Protest is necessary by the acceptor for non-payment of a foreign bill, but not for better security if the acceptor becomes insolvent before maturity; the expenses of the former, but not of the latter, may

be recovered by the drawer against the acceptor. *In re English Bank of the River Plate*, [1893] 2 Ch. 438. See *Bigelow on Bills and Notes* (2d ed.), 129.

would not be evidence of dishonor, where the protest was not required by law, (o) even if the notes were payable in a foreign country. (p) If the bill be protested for non-acceptance by the drawee, any third person may intervene, and accept or pay the bill, for the honor of the drawer or any indorser; and such acceptance *supra protest* has the same effect as if the bill had been drawn on him. He is liable in the same way, and he has his remedy against the person for whom he accepts, and all prior parties with notice; and if he pays the bill for an indorser he stands in the position of an indorsee for value. (q) And this is true although the acceptance is at the request and for the honor of the drawee after his refusal. (r) The holder is not bound to receive an acceptance *supra protest*, (s) but must receive payment if tendered to him *supra protest*. But after a general acceptance by the drawee there can be no acceptance *supra protest*, and a third party can only add his credit to the bill by a collateral guarantee. (t) If the bill designates a third party to whom recourse is to be had on non-acceptance, it is said that this direction must be obeyed. (u) (xx)

The notarial protest is generally admissible, but not conclusive

eign bill so as to require a protest in case of non-acceptance or non-payment, is a question concerning which there has been a difference of judicial opinion. In New York and Connecticut such bills are held not foreign. *Miller v. Hackley*, 5 Johns. 375; *Bay v. Church*, 15 Conn. 15. But the case in New York has been since overruled in the same jurisdiction; and in the other States where the question has arisen, and in the U. S. Supreme Court, a contrary opinion has been held. *Duncan v. Course*, 1 So. Car. Const. 100; *Cape Fear Bank v. Stinemetz*, 1 Hill (S. C.), 44; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Brown v. Ferguson*, 4 Leigh, 37; *Halliday v. McDougall*, 20 Wend. 81; *Carter v. Burley*, 9 N. H. 558; *Buckner v. Finley*, 2 Pet. 586; *Schneider v. Cochrane*, 9 La. An. 235; *Armstrong v. American Bank*, 133 U. S. 433; *Joseph v. Salomon*, 19 Fla. 623, 632; *Johnson v. Brown*, 154 Mass. 105. This is in accordance with the doctrine of *Mahoney v. Ashlin*, 2 B. & Ad. 478, where a bill drawn in Ireland upon a

person resident in England was held to be a foreign bill.

(o) *Union Bank v. Hyde*, 6 Wheat. 574; *Taylor v. Bank of Illinois*, 7 Monr. 580; *Bank of U. S. v. Leathers*, 10 B. Mon. 64; *Carter v. Burley*, 9 N. H. 558.

(p) *Kirtland v. Wanzer*, 2 Duer, 278.

(q) *Holt*, C. J., in *Mutford v. Walcott*, 1 Ld. Raym. 574; *Mertens v. Winnington*, 1 Esp. 112; *Goodhall v. Polhill*, 1 C. B. 233; *Geralopulo v. Wieler*, 10 C. B. 690, 4 English Ruling Cas. 654, 664, 3 E. L. & E. 515; *Wood v. Pugh*, 7 Ohio, Part 2, 156; *Baring v. Clark*, 19 Pick. 220. The payer *supra protest* for the honor of the indorser cannot hold such indorser liable if he have already been discharged by reason of want of notice of the non-acceptance. When a party has once been exonerated, his liability cannot be revived without his assent. *Higgins v. Morrison*, 4 Dana, 100.

(r) *König v. Bayard*, 1 Pet. 250.

(s) *Mitford v. Walcott*, 12 Mod. 410.

(t) *Jackson v. Hudson*, 2 Camp. 447.

(u) Story on Bills of Exch. §§ 65, 219.

(xx) A commission paid by the drawer to an acceptor for honor, in respect of his acceptance and payment of the bill, can-

not be claimed from the original acceptor by the drawer. *In re English Bank of the River Plate*, [1893] 2 Ch. 438.

evidence of the facts therein stated, which properly belong to the act of protest. (v) (*xa*)

* 288 * Banks which receive bills and notes for collection, generally, perhaps always, employ agents to collect, and notaries to demand and protest. And it has been held that such a bank is liable only for due discretion in choosing its agent, and not for the agent's negligence. (w) (*ya*) And if any act is to be done at a distance from the bank, the assent of the holder of the note to the employment of a sub-agent will be presumed. (x) But where a bank assumes to act directly by its own servants or agents, the general principles of agency would apply, and make the bank responsible for the acts of its agents.

As to the form and particular statements of the protest, the true rule is, that notice of protest should inform the party, with reasonable certainty, what note or bill it is on what he is to be charged. (*xx*)

SECTION XIII.

ON DAMAGES FOR NON-PAYMENT OF BILLS.

If a bill of exchange be not paid at maturity, the holder may at once redraw on the drawer or indorser, not only for the face of

(v) So by statute in New Hampshire, Kentucky, Pennsylvania, Ohio, Alabama, and California. See also *Gordon v. Price*, 10 Ired. L. 385; *Graham v. Sangston*, 1 Md. 59; *Sumner v. Bowen*, 2 Wis. 524; *Austin v. Wilson*, 24 Vt. 630.

(w) *Agricultural Bank v. Commercial Bank*, 7 Sm. & W. 592. See *Britton v. Niccols*, 104 U. S. 757; *May v. Jones*, 88 Ga. 308; *Guelich v. Nat. State Bank*, 56 Iowa, 434; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; *Bank v. Butler*, 41 Ohio St. 519; *Morgan v. Tener*, 83 Pa.

305, 307. But see *contra Ayrault v. Pacific Bank*, 47 N. Y. 570; *Corn Exchange Bank v. Farmers' Nat. Bank*, 118 N. Y. 443, 447; *American Express Co. v. Haire*, 21 Ind. 4.

(x) *Dorchester Bank v. N. E. Bank*, 1 Cush. 177; *Baldwin v. Bank of Louisiana*, 1 La. An. 13; *Citizens Bank v. Howell*, 8 Md. 530; *Planters Bank v. Wilmington Bank*, 75 N. C. 534.

(xx) *Bank v. Woods*, 28 N. Y. 545; *Home Ins. Co. v. Green*, 19 N. Y. 118.

(xa) See *Nelson v. First Nat. Bank*, 69 Fed. 798, 16 C. C. A. 425; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 563; *Swampscott Machine Co. v. Rice*, 159 Mass. 404, 34 N. E. 520; *Legg v. Vinal*, 165 Mass. 554, 43 N. E. 518; *Townsend v. Auld*, 63 N. Y. St. Rep. 418, 10 Misc. Rep. 343; 3 Kent Com. (14th ed.), 94, n. (x); *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893; *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66.

A misdescription, in a notice of protest, of the date of the instrument vitiates the

notice only when it misleads. *Northrup v. Cheney*, 50 N. Y. S. 389.

(ya) A bank is liable for a malicious and false protest by its notary. *May v. Jones*, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154. Directions to "protest" a note mean the taking of all necessary steps to bind the indorsers; some authorities hold that the notary's official acts of protest are not, merely of themselves, those of agency. See *Williams v. Parks (Neb.)*, 89 N. W. 395, 56 L. R. A. 759.

the bill, but for so much more as shall indemnify him; and therefore for so much as shall cover the necessary costs of protest, notice, commissions, and whatever further loss he sustains by the current rate of exchange on the place where the drawer or indorser resided. (y) (x) This is the rule of the law-merchant; but in this country, instead of re-exchange, or damages to be ascertained by a reference to the above items of loss, established rates of damage are fixed by statute or by usage. (z) These rates are larger in proportion to the distance of the place where the drawee resides from the place where the bill is drawn. * For * 289 the amount, or percentage of damage, at different distances, we can only refer to the laws of the several States. They differ considerably; and it may be regretted that more uniformity does not prevail among the several States in relation to this matter. It seems to be settled by the weight of authority, that, in determining the amount of re-exchange, the actual or mercantile par or valuation of money should be regarded, and not the mere legal or nominal rate which, as between this country and England, differs very widely from the true value. (a)

(y) *Mellish v. Simeon*, 2 H. Bl. 378; *De Tastet v. Baring*, 11 East, 265; *Graves v. Dash*, 12 Johns. 17 (overruling *Hendricks v. Franklin*, 4 Johns. 119); *Denston v. Henderson*, 13 id. 322. The holder may also, upon protest for *non-acceptance*, without waiting for protest upon non-payment, maintain an action against the drawer or indorser, and recover all the customary damages. *Welden v. Buck*, 4 Johns. 144; *Whitehead v. Walker*, 9 M. & W. 506. But the *acceptor* is not liable

for re-exchange. *Woolsey v. Crawford*, 2 Camp. 445; *Napier v. Schneider*, 12 East, 420; *Sibely v. Tut*, 1 McMull. Eq. 320; *Suse v. Pompe*, 98 Eng. C. L. 538. See on this topic, *Pars. Notes & Bills*, 652, 661.

(z) *Hendricks v. Franklin*, 4 Johns. 119, per *Spencer, J.*; *Parsons, C. J.*, in *Grimshaw v. Bender*, 6 Mass. 157.

(a) *Scott v. Bevan*, 2 B. & Ad. 78; *Smith v. Shaw*, 2 Wash. C. C. 167; *Grant v. Healey*, 3 Sumner, 523.

(x) *De Rham v. Grove*, 18 Abb. Pr. (N. Y.) 43. An action against a bank for wrongfully refusing to honor a trader's check closely resembles an action for slander or libel; an averment that the plaintiff is a trader supplies the lack of allegations that he suffered special damage, or that the bank acted maliciously. *Schaffner v. Ehrman*, 139 Ill. 109, 23 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. E. 84, 23 L. R. A. 190; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255.

When a bank is notified that money

deposited with it belongs to a person other than the depositor, it is usually held that it may refuse to honor the depositor's checks, and may be required to pay the fund to the true owner; clearly however, it must act, in the first instance, not upon a mere notice, but upon facts, and must be able to justify its action. See *Hanna v. Drovers' Nat. Bank*, 194 Ill. 252, 62 N. E. 556. As to the right and duty of a bank to pay or withhold payment from an agent or fiduciary, see *Armour v. Greene County State Bank*, 112 Fed. 631; *Rochester & Charlotte Tp. Road Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790 and note.

SECTION XIV.

BILLS OF LADING.

These documents are also by the law-merchant now treated as negotiable instruments to a certain extent. (*aa*) The master, by signing such bill, promises to deliver the goods to A "or his assigns." If A indorses the bill to any person, or in blank, delivering it to any person, that constitutes such person his assignee, and vests in him a property in the goods, and he may claim the goods of the captain or owners in the place of the person putting them on board, and with the same rights. (*b*) But a bill of lading is rather *quasi* negotiable than actually so,¹ the effect of the indorsement being only to transfer the property in the goods and not the right upon the contract itself, and the indorsee cannot maintain an action on the bill itself in his own name, nor

an action on the case for the non-delivery of the goods. (*c*)²

* 290 And a mere memorandum of shipment would not * have the force nor the negotiability of a bill of lading, (*d*) nor will the property in goods, for which a bill of lading has been given, pass by a mere delivery of the bill without indorsement, (*e*) or by indorsement without delivery. (*f*) (*x*)

(*aa*) These are also made so in England by 18 & 19 Vict. ch. 111.

(*b*) *Lickbarrow v. Mason*, 2 T. R. 63; *Newsom v. Thornton*, 6 East, 41; *Berkley v. Watling*, 7 A. & E. 39, 2 Nev. & P. 178; *Saltus v. Everett*, 20 Wend. 268; *Chandler v. Belden*, 18 Johns. 157; *Ryberg v. Snell*, 2 Wash. C. C. 294. In *Renteria v. Ruding*, 1 Mo. & M. 511, Lord *Tenterden* said that a bill of lading, in which the word "assigns" did not appear, was nevertheless "an indorsable instrument," and assignable by such indorsement.

(*c*) *Thompson v. Dominy*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 297; *Dows v. Cobb*, 12 Barb. 310; *Lineker v. Aylesford*, 1 Cal. 75. See also *Rowley v. Bigelow*, 12 Pick. 314; *Stanton v. Eager*, 16 Pick. 474; *Tindal v. Taylor*, 4 E. & B. 219.

(*d*) See *Jenkyns v. Usborne*, 13 Law J. (N. S.) C. P. 196; *Brandt v. Bowlby*, 2 B. & Ad. 932.

(*e*) *Stone v. Swift*, 4 Pick. 389. But see *Walter v. Ross*, 2 Wash. C. C. 283.

(*f*) *Buffington v. Curtis*, 15 Mass. 528; *Allen v. Williams*, 12 Pick. 297.

¹ Unlike the case of a negotiable instrument, one who has not title to a bill of lading, as a thief or finder, cannot transfer any right to a *bona fide* purchaser for value without notice, even though the bill of lading was indorsed in blank. *Gurney v. Behrend*, 3 E. & B. 622, 633; *Pease v. Gloahec*, L. R. 1 P. C. 219, 223; *Shaw v. Railroad Co.*, 101 U. S. 557; *Friedlander v. Texas & Pacific Ry. Co.*, 130 U. S. 416, 423; *Tison v. Howard*, 57 Ga. 410; *Stollenwerck v. Thacher*, 115 Mass. 224; *Dows v. Perrin*, 16 N. Y. 325; *Barnard v. Campbell*, 55 N. Y. 462. — W.

² A warehouse receipt is negotiable only to the same extent and for the same purposes as a bill of lading or carrier's receipt; its indorsement or delivery does not transfer the contract itself, but only the property represented by it, and becomes mere evidence of title. *Hale v. Milwaukee Dock Co.*, 29 Wis. 482. — K.

(*x*) *Robert C. White Live-Stock Commission Co. v. Chicago, &c. R. Co.*, 87 Mo. App. 330; *National Commercial Bank v. Lackawanna Transp. Co.*, 69 N. Y. S. 396,

Certificates are sometimes used as if they were negotiable; but in an interesting case in Massachusetts, it was decided that they were not, and that the word "trustee" added to the name of the person in whose name they stood notified the person to whom they were delivered as security, and he could not make a valid transfer of them. (*ff*)

SECTION XV.

OF PROPERTY PASSING WITH POSSESSION.

By the common law, one who has no title to a chattel can give no title, except by a sale in market overt, which is not known in this country. An exception exists in the case of negotiable notes made payable to bearer, or payable to order and indorsed in blank, so as to be transferable by delivery. (*g*) We consider that this exception extends to all negotiable instruments which are transferable by mere delivery by any party holding them; and that by delivery thereof, a good title passes "to any person honestly acquiring them;" (*h*) because the property passes with

(*ff*) *Shaw v. Spencer*, 100 Mass. 382. See also *Gaston v. Am. Exchange Bank*, 2 Stewart, 98, and *infra*, vol. ii. pp. 289-294.

(*g*) *Miller v. Race*, 1 Burr. 452.

(*h*) So said by *Abbott, C. J.*, in *Gorgier v. Mievill*, 3 B. & C. 45. In *Clark v. Shee*, Cowper, 197, Lord *Mansfield* puts notes and money on precisely the same footing. See also *James v. Chalmers*, 2

59 App. Div. 270; *Lazard v. Merchants & Miners' Transp. Co.*, 78 Md. 1, 26 Atl. 897. The charter-party is primarily to be looked to as showing the parties' agreement; and that kind of contract is liberally construed. *Brown v. Certain Tons of Coal*, 34 Fed. 913; *The Alvah*, 59 Fed. 630; *The Caledonia*, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644; *Compania Bilbaina v. Spanish-American Light & Power Co.*, 146 U. S. 483, 13 S. Ct. 142, 36 L. Ed. 1054; *Texas & P. Ry. Co. v. Reiss*, 183 U. S. 621, 22 S. Ct. 253, 46 L. Ed. ; *Lumberman's Mining Co. v. Gilchrist*, 55 Fed. 677; *American Steel Barge Co. v. Cargo of Coal*, 107 Fed. 964; *Matthias v. Beech*, 111 Fed. 940. A bill of lading, as a mere receipt as to quantity and quality, may be explained; but it is also a contract for transportation, and, as such, it is conclusive of the parties' intentions. *Witzler v. Collins*, 70 Me. 290; *The Queensmore*, 51 Fed. 250; *The Willie D. Sandhval*, 92 Fed. 286; *Planters' Fertilizer Manuf. Co. v. Elder*, 101 Fed. 1001; *Chicago, &c. Ry. Co. v. Simon*, 160 Ill. 648, 652, 43 N. E. 596;

McLean & Hope v. Fleming, L. R. 2 H. L. Sc. 128, 4 English Ruling Cas. 665, 678 n.; *Bullard v. American Express Co.*, 107 Mich. 695, 65 N. W. 551, 61 Am. St. Rep. 358, 362 n.; *Vega S. S. Co. v. Cons. Elevator Co.*, 75 Minn. 308, 77 N. W. 973.

A carrier is not liable upon a bill of lading until the goods are delivered to him, even though the bill has passed into the hands of a *bona fide* pledgee for value. *Missouri Pac. Ry. Co. v. McFadden*, 154 U. S. 155, 14 S. Ct. 990, 38 L. Ed. 944; *The Carlos F. Roses*, 177 U. S. 655, 665, 20 S. Ct. 803; 44 L. Ed. 929; *Nat'l Bank of Commerce v. Chicago, &c. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A., 263; *Smith v. Booth*, 110 Fed. 680; see 32 Am. L. Reg. (n.s.) 757 n. Under the New York St. of 1886, § 633, a carrier is not civilly liable for delivering merchandise to the consignee without surrender of the bill of lading, though it is not plainly marked "Not negotiable," and is subsequently transferred to a *bona fide* purchaser. *Mairs v. Baltimore & O. R. Co.*, 76 N. Y. S. 838.

the possession. Only, as has been said, when suspicion is cast, upon his ownership, as by showing that the paper got into circulation by force or fraud, need he account for it, even by showing that he had paid a good consideration for it. (i) It becomes, then, important to determine what are negotiable instruments.

* 291 If, for example, the bond of a railroad * company, payable to bearer, is a negotiable instrument, then a purchaser in good faith holds it not only free from the equitable defences which the company might have made against the first holder, but also against the claims of an owner who may have lost it, or from whom it was stolen. We regard both the English and American authorities as making all instruments negotiable which are payable to bearer, and also those which are by custom transferable by delivery, within which definition the common bonds of railroad companies would fall. Of the coupons attached, which have no seal, this would seem to be the rule. But usage must have great influence in determining this question. Our note will show the state of the authorities on this subject. (j) ¹

Seld. 209; Seeley v. Engell, 17 Barb. 530; Lemon v. Temple, 7 Ind. 556; Shelton v. Sherfey, 3 Greene (Iowa), 108; Wilson v. Lazier, 11 Gratt. 477. But he must be a lawful holder, and is not if he took it usuriously from an agent. He cannot retain it against an insolvent principal. Keutgen v. Parks, 2 Sandf. 60.

(i) Berry v. Alderman, 24 E. L. & E. 318; s. c. 14 C. B. 95; Fitch v. Jones, 32 E. L. & E. 134; s. c. 5 E. & B. 238; McKesson v. Stanberry, 3 Ohio (N. s.) 156; Catlin v. Hansen, 1 Duer, 309; McCaskill v. Ballard, 8 Rich. L. 470; Perrin v. Noyes, 39 Me. 384; Bissell v. Morgan, 11 Cush. 198. See p. *241, ante.

(j) See Gorgier v. Mievile, 3 B. & C. 45, and compare it with Glyn v. Baker, 13, East, 509. See also Wookey v. Pole 4 B. & Ald. 1; Grant v. Vaughan, 3 Burr. 1516, where a draft by a merchant on his banker was held negotiable. This case distinctly confirms the case of Miller v. Race. In Jackson v. Y. & C. R. Co., 48 Me. 147, it was held that unless there was some statutory provision to that effect an action could not be maintained upon interest coupons, not containing negotiable words by an assignee. Goodenow, J., delivered a dissenting opinion, citing and supporting the text above. Since that time the same question has been passed upon by the Supreme Courts

of the United States and of Pennsylvania, both of which fully sustain the negotiability of such instruments. Knox Co. Com. v. Aspinwall, 21 How. 539; Beaver Co. v. Armstrong, 44 Penn. St. 63. See also Redfield on Railways, 595, § 239, and 2 Am. Law Reg. (N. s.) 748. See Lickbarrow v. Mason, 5 T. R. 683, respecting bills of lading, before cited. Zwinger v. Samuda, 7 Taunt. 265; Lucas v. Dorrén, 7 Taunt. 278; Lang v. Smith, 7 Bing. 284; in which case it was held that certain *bordereaux* and *coupons*, entitling the bearer to certain portions of the public debt of Naples, were not negotiable, the jury finding that they did not usually pass from hand to hand like money, Taylor v. Kymer, 3 B. & Ad. 321, and Taylor v. Trueman, 1 Mo. & M. 453, were decided on the construction of Stat. 6 Geo. IV. c. 94. But an instrument for the payment of money *under seal* is not negotiable, although it appear to be so upon its face; at least where any writing is necessary in order to transfer it. Clark v. Farmers' Man. Co., 15 Wend. 256; Parke, Baron, in Hibblewhite v. McMorine, 6 M. & W. 200. In Fisher v. The Morris Canal and Banking Co., decided in the Supreme Court of New Jersey in 1855, it was held that railroad bonds are negotiable, and this case was fully concurred in by the Court of Appeals.

¹ The scrip of a foreign government, issued by it on negotiating a loan, and for which a bond is to be given after all instalments have been duly paid, is, by the cus-

If the owner of a note or bill not negotiable, or if negotiable * specially indorsed to him, lose it, he may, on * 292 sufficient proof of its tenor and of his loss, sustain an action at law, because no finder can give good title to any holder by a *bond fide* sale of such paper to him. (k) But if the paper be negotiable and indorsed in blank, or if it be payable to bearer, then the promisor or indorser may be held liable to an innocent holder for consideration. It follows, therefore, that the promisor or indorser should not be liable to the loser without sufficient indemnity to him against the possible demand of such innocent purchaser. (l) But courts of law find it difficult to require such

Delafield v. Illinois, 2 Hill (N. Y.), 159, is generally regarded as having settled the same point in New York, in reference to State bonds. But the Court of Appeals in the Schuyler case, held that certificates of stock in a corporation are not negotiable; or at least, that he who takes an assignment of a certificate, without any transfer in the corporation's books, acquires only the title of assignor. *Mechanics Bank v. New York and New Haven Railroad Co.*, 3 Kern. 599. So in *Ide v. Conn. & Pass. Riv. R. R. Co.*, 32 Vt. 297, it was held that a railway bond payable to bearer is a negotiable instrument and may be declared upon and described in an action of assumpsit as a "bond." The result would seem to be that all corporation bonds and government stocks which pass by delivery or indorsement with delivery are negotiable, but that certificates of stocks in a corporation are

not. See *Hodges v. Shuler*, 22 N. Y. (8 Smith) 114.

(k) *Wain v. Bailey*, 10 A. & E. 616; *McGregory v. McGregor*, 107 Mass. 543; *Tucker v. Tucker*, 119 Mass. 79. See *King v. Zimmerman*, L. R. 6 C. P. 466.

(l) *Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; *Clay v. Crowe*, 18 E. L. & E. 514; *Davis v. Dodd*, 4 Taunt. 602; *Poole v. Smith*, 1 Holt, 144; *Rowley v. Ball*, 3 Cowen, 303; *Kirby v. Sisson*, 2 Wend. 550; *Devlin v. Clark*, 31 Mo. 22. But evidence is admissible to show that the note has been *actually destroyed*, or that it *cannot* come to the hands of a *bond fide* holder. *Rolt v. Watson*, 4 Bing. 273; *Rowley v. Ball*, *supra*. The case where a bank-bill is cut in halves and one of them is lost, and payment sought for the other, would seem to stand upon the same grounds as that of a lost negotiable instrument.

tom of all the stock-markets of Europe, a negotiable instrument, and passes by mere delivery to a *bond fide* holder for value. English law follows this custom. *Goodwin v. Roberts*, 1 App. Cas. 476. — *Boyd v. Kennedy*, 9 Vroom, 146, decided that corporation coupon bonds lawfully issued, containing words of negotiability, are negotiable like commercial paper. To the same effect are *Vermilye v. Adams Ex. Co.*, 21 Wall. 138; *Marion Commissioners v. Clark*, 94 U. S. 278; *Cromwell v. Lac County*, 96 U. S. 51; *Force v. Elizabeth*, 1 Stewart, 403; *Exchange Bank v. Hartford, & C. R. Co.*, 8 R. I. 375; *Dinsmore v. Duncan*, 57 N. Y. 573; *Chesapeake Co. v. Blair*, 45 Md. 102, 110; *Griffith v. Burden*, 35 Iowa, 138, 142; *San Antonio v. Lane*, 32 Tex. 405. See *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374. — An interest coupon detached from a mortgage bond of a railroad is negotiable by delivery and may be enforced against the corporation by a *bond fide* holder who has no interest in and cannot produce the bond. *Haven v. Grand Junction R. Co.*, 109 Mass. 88. To the same effect are *Evertson v. Newport Bank*, 66 N. Y. 14; *Cicero v. Clifford*, 53 Ind. 191; *Kennard v. Cass. Co.*, 3 Dillon, 147. "Interest coupons detached from bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and therefore subject to the same rules as bank-notes or other negotiable instruments. They are, in effect, promissory notes by the law merchant, and possess all the attributes of negotiable paper." *Royce, J.*, in *North Bennington Bank v. Tabor*, 52 Vt. 87, 93. — Days of grace are not allowed on coupons. *Chaffee v. Middlesex R. R.*, 146 Mass. 224, 234; *Arents v. Commonwealth*, 18 Grat. 750, 773. But see *contra Evertson v. Newport Bank*, 66 N. Y. 14. — K.

indemnity, or to judge of its sufficiency; and therefore, generally at least, they turn the loser over to courts of equity, in which the defendant may be properly secured by adequate indemnity; and there the action will be maintained. (*m*) Hence if a note or bill, transferable by delivery, be lost to the owner at the time of its maturity, this loss is, in general, a defence against a suit at law. (*n*) (*x*) But in some of our States, statutes permit recovery (*o*) if the plaintiff gives indemnity, and in others, the courts so direct. (*p*) But, if it is physically destroyed, it may be recovered at law, — where, if only lost, courts would have denied relief. (*q*)

Mayor *v.* Johnson, 3 Camp. 324. But see *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. 172; *Patton v. State Bank*, 2 Nott & McC. 464; *Hinsdale v. Bank of Orange*, 6 Wend. 378.

(*m*) *Pierson v. Hutchinson*, 2 Camp. 211; Lord *Eldon*, in *Ex parte Greenway*, 6 Ves. 812.

(*n*) *Aranguren v. Scholfield*, 38 E. L. & E. 424; *Morgan v. Reintzel*, 7 Cranch, 273.

(*o*) New York, Alabama, Mississippi.

(*x*) See *Crowe v. Cray*, 9 Exch. 604, 4 English Ruling Cas. 648, 653; *Butler v. Joyce*, 9 Mackey (D. C.), 191, 16 L. R. A.

(*p*) *Meeker v. Jackson*, 3 Yeates, 442; *Anderson v. Robson*, 2 Bay, 495; *Fales v. Russell*, 16 Pick. 315; *Bullet v. Bank of Penn.*, 2 Wash. C. C. 172; *Swift v. Stevens*, 8 Conn. 431; *Thayer v. King*, 15 Ohio, 242.

(*q*) *Aborn v. Bosworth*, 1 R. I. 401; *Swift v. Stevens*, 8 Conn. 431; *Rogers v. Miller*, 4 Scam. 334; *McNair v. Gilbert*, 3 Wend. 344; *Pintard v. Tackington*, 10 Johns. 104; *Wright v. Wright*, 54 N. Y. 437, 441.

205 and note; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 N. E. 704, 32 Am. St. Rep. 693, 699 n., 18 L. R. A. 331.

* CHAPTER XVII.

* 293

INFANTS.

IN general, all persons may enter into contracts; and when a contract is made, the law presumes the competency of the parties. If, therefore, a party rests his action or his defence upon the incompetency or incapacity of himself or of the other party, this must be proved. (*a*) This incompetency may be absolute and entire, or limited and partial; in some cases a contract is void as to both parties, and in others only as to one; in some cases void, and in others voidable. We shall consider these questions as we proceed.

As the essence of a contract is an assent or agreement of the minds of both parties, where such assent is impossible, from the want, immaturity, or incapacity of mind, there can be no perfect contract. On this ground rests, originally, the disability of infants. We will first consider this class of disabled persons.

SECTION I.

INCAPACITY OF INFANTS TO CONTRACT.

All persons are denominated infants, by the common law, until the age of twenty-one. But in some parts of this country * females reach majority, at least for some purposes, at * 294 eighteen, as in Vermont, (*b*) in Maryland, (*c*) in Ohio, (*d*) in Maine, (*e*) in Missouri, (*f*) in Texas, (*g*) and, perhaps, in some others of our States. A person is of full age at the beginning of the last day of his twenty-first year, or the day before his twenty-

(*a*) *Jeune v. Ward*, 2 Stark. 326; *Leader v. Barry*, 1 Esp. 353; *Henderson v. Clark*, 27 Miss. 436. If to a plea of infancy the plaintiff reply a new promise, *after the defendant became of age*, he may show a new promise at any time (before the suit was commenced), and the defendant must prove that he was still a minor at the time of such ratification. *Bay v. Gunn*, 1 Denio, 108; *Borthwick v. Caruthers*, 1 T. R. 648; *Hartley v. Wharton*,

11 A. & E. 934. — If the infant leave the point in doubt, the defence is not sustained. *Harrison v. Clifton*, 17 Law Jour. Ex. 283.

(*b*) *Sparhawk v. Buell*, 9 Vt. 42, 79.

(*c*) *Davis v. Jacquin*, 5 Har. & J. 100.

(*d*) Ohio Statutes, ch. 59.

(*e*) Maine, Acts of 1852, ch. 291.

(*f*) Laws of Missouri, 1849, p. 67.

(*g*) *Hartley's Dig. of Texas Laws*, art. 2420.

first birthday. This rule is founded upon an ancient authority, and upon the principle that the law recognizes no parts of a day, and therefore when the last day of the last year begins, it is considered as ending. (*h*) A similar rule as to infancy prevailed in the Roman civil law. (*i*) An infant, using the word in its common meaning, that of a child who has not left its mother's arms, cannot make a contract in fact; but most children who are a few years old are capable of making a contract. And when the law says that they are not capable until the age of twenty-one, it is for their sake, and by way of protection to them. If we keep this principle distinctly in mind, it will guide us through the intricacies of the law in relation to this subject.

Thus as a general rule, the contract of an infant is said to be not void, but voidable. That is, he may, either during his minority, or within a reasonable time after he becomes of age, (*j*) avoid the contract if he will; or when he reaches the age of twenty-one, if he sees it to be for his benefit, and chooses so to do, he may confirm and enforce the contract. It has been said that whatever contract the court can see and declare to be to his prejudice,

that will be pronounced void; and whatever contracts * 295 are not clearly to his prejudice, but may be useful, * these will be held voidable. And in reliance on this principle as a safe and sufficient rule, an infant's warrant of attorney authorizing a conveyance of his land, (*k*) a confession of a judgment, against him (*l*)¹ and his *cognovit* for the same purpose,

(*h*) There seems but one case, on this question, in England, reported, under the name of *Herbert v. Turball*, in 1 Keb. 589, and in Sid. 162, and without names in 1 Salk. 44, and referred to as good law in 2 Salk. 625, in *Ld. Raym.* 480, and in *Com. Dig. Infant*, A; and the rule is repeated in all the text-books. The reason is analogous to that which made the old law writers speak of a year and a day, when they mean a whole year. The same rule is asserted in *Hamlin v. Stevenson*, 4 Dana, 597, and in *State v. Clarke*, 3 Harr. (Del.) 557.

(*i*) *Savigny*, Dr. Rom. 182, 383, 384.

(*j*) *Zouch v. Parsons*, 3 Burr. 1794, settled that an infant cannot avoid his conveyances of land until he becomes of age. *McCarthy v. Nicrosi*, 72 Ala. 332; *Hastings v. Dollarhide*, 24 Cal. 195; *Welch v. Bunce*, 83 Ind. 382; *Irvine v. Irvine*, 5 Minn. 61; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. In *Roof v. Stafford*,

7 Cowen, 179, it was held that the same rule applied to a sale of chattels; but in the same case, on error, 9 Cowen, 626, the distinction was maintained that while he could not avoid a conveyance of lands until he was of age, he might a sale of chattels. So also in *Bool v. Mix*, 17 Wend. 119; *Shipman v. Horton*, 17 Conn. 481; *Carr v. Clough*, 26 N. H. 280; *Shirk v. Shultz*, 113 Ind. 571; *McCarthy v. Nicrosi*, 72 Ala. 332. [In *Matthewson v. Johnson*, 1 Hoff. Ch. 560 and *Harrod v. Myers*, 21 Ark. 592, it was held that though an infant's conveyance of real estate could not be avoided till maturity, he might enter and take the profits during minority.]

(*k*) *Lawrence v. McArter*, 10 Ohio, 37; *Pyle v. Cravens*, 4 Litt. 17.

(*l*) *Saunderson v. Marr*, 1 H. Bl. 75; *Bennett v. Davis*, 6 Cowen, 393; *Waples v. Hastings*, 3 Harring. (Del.) 403; *Knox v. Flack*, 22 Penn. St. 337.

¹ So, too, a judgment confessed by an infant's partner. *Soper v. Fry*, 37 Mich. 236. — K.

although the action was wholly for necessities, (*m*) or his appointment of an agent of any kind, (*n*) his bond *with a penalty*, or for the payment of interest, (*o*) a release by a female infant to her guardian, (*p*) an infant's contract of suretyship, (*q*) his release of his legacy or distributive share in an estate, (*r*) and a mortgage by an infant wife of her reversionary interest, for the purpose of securing the debts of a partnership in which her husband was a partner, (*s*) have each been declared to be absolutely void. (*t*) (*x*)

The better opinion, however, as may be gathered from the later cases, cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void, that is, so far void that he cannot ratify them after he arrives at the age of legal majority. Such, at least, is the strong tendency of modern decisions. (*u*)

(*m*) *Oliver v. Woodroffe*, 4 M. & W. 650.

(*n*) *Doe d. Thomas v. Roberts*, 16 M. & W. 778.

(*o*) *Baylis v. Dinely*, 3 M. & Sel. 477; *Hunter v. Agnew*, 1 Fox & S. 15; *Colcock v. Ferguson*, 3 Desaus. 482.

(*p*) *Fridge v. The State*, 3 G. & J. 104.

(*q*) *Wheaton v. East*, 5 Yerg. 41, 61; *Allen v. Minor*, 2 Call, 70; *Hastings v. Dollarhide*, 24 Cal. 195, 209; *West v. Penny*, 16 Ala. 187. But see *contra* *Hinely v. Margaritz*, 3 Penn. St. 428; *Fetrow v. Wiseman*, 40 Ind. 148. And see *Owen v. Long*, 112 Mass. 403; *Reed v. Lane*, 61 Vt. 481.

(*r*) *Langford v. Frey*, 8 Humph. 443.

(*s*) *Cronise v. Clark*, 4 Md. Ch. 403. See also *McCarty v. Murray*, 3 Gray, 578.

(*t*) In Connecticut some contracts of an infant are made void by statute. *Rogers v. Hurd*, 4 Day, 57; *Maples v. Wightman*, 4 Conn. 376.

(*u*) The rule that an infant's contracts are void or voidable according as they may be pronounced prejudicial or useful, has been laid down, and recognized by many courts and judges. See *Keane v. Boycott*,

2 H. Bl. 515; *Baylis v. Dinely*, 3 M. & Sel. 477, 481; *Latt v. Booth*, 3 Car. & K. 292; *Vent v. Osgood*, 19 Pick. 572; *Lawson v. Lovejoy*, 8 Greenl. 405; *Rogers v. Hurd*, 4 Day, 57; *McGan v. Marshall*, 7 Humph. 121; *Fridge v. The State*, 3 G. & J. 104; *Ridgely v. Crandall*, 4 Md. 435; *Wheaton v. East*, 5 Yerg. 41; *McMinn v. Richmonds*, 6 id. 9; *Kline v. Beebe*, 6 Conn. 494; *United States v. Bainbridge*, 1 Mason, 71, 82, and many other cases. But it may be questioned whether it is a sufficiently clear, certain, and *practical* rule. The more recent authorities incline to hold *all* (or all with a single exception) an infant's contracts *voidable* merely, and that it is the privilege and right of the *infant* only (not that of the court) to declare his contracts void. And the rule itself as alluded to in the text, and sustained by the older authorities, has been declared unsatisfactory, liable to many exceptions, and difficult of safe application. See *Fonda v. Van Horne*, 15 Wend. 631, 635; *Breckenbridge's Heirs v. Ormsby*, 1 J. J. Marsh 236, 241; *Scott v. Buchanan*, 2 Humph. 468; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Powell*, 8 Tex. 80;

(*x*) An infant's warranties in his application for life insurance do not bind him so as to make their falsity a defence in a suit upon the policy. *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 23 R. I., 50 Atl. 834. A recent writer in 15 Harvard L. Rev. 739, criticises this decision on the ground that warranties are not promises, but conditions precedent. An infant may disaffirm his contract of life insurance. *Johnson v. Northwestern Mut. L. Ins. Co.*, 56 Minn. 365, 57 N. W. 934; *Union Central L. Ins. Co. v. Hilliard*, 63

Ohio St. 478, 59 N. E. 230, 81 Am. St. Rep. 644. See *Craig v. Van Bebber* (100 Mo. 584), 18 Am. St. Rep. 569, 596, 615 n. An agreement by an infant employed by a railroad company to become a member of an insurance society, to the funds of which the company contributes, is valid as part of the contract of service. *Clements v. London & N. W. Ry. Co.*, [1894] 2 Q. B. 482; see *Walter v. Everard*, [1891] 2 Q. B. 369; *In re Globe Mut. Ben. Ass'n*, 135 N. Y. 280, 32 N. E. 122.

* 296 * But the contract of an infant for necessities is neither void nor voidable. It is permitted for his own sake that he may make a valid contract for these things, as otherwise, whatever his need, he might not be able to obtain food, shelter, or raiment. And the principles which govern this rule show plainly that it is intended only for his benefit, and is regarded and treated as an exception to a general rule.

The word necessities, in relation to an infant, is not used in a strict sense; but the social position of the infant, his means, and those of his parents, are taken into consideration. Necessaries for him mean such things as he ought properly to have, and not merely that which is indispensable to his life or his bodily comfort. It is difficult to lay down any positive rule which shall determine what are and what are not necessities. Indeed there is no such rule. It may be said, however, that whether articles of a certain *kind*, or certain *subjects* of expenditure, are or are not such necessities as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question also as to *quantity*, are, generally, matters of fact for the jury to determine. (v) The cases cited in the notes will show the views taken of this question by various courts in England and in this country.

It seems to be certain that food, clothing, lodging, and needful medicine are such necessities; and the infant may contract for them on credit, although he has ready funds in his possession. (w) So, proper instruction. (x) (xx) Necessaries for an infant's

Fetrow v. Wiseman, 40 Ind. 148; Weaver v. Jones, 24 Ala. 420; Keil v. Healey, 83 Ill. 104; Lemmon v. Beeman, 45 Ohio St. 505, 509. And see a just criticism by Mr. Justice Bell upon the vague and indefinite use of the words "void" and "voidable," in State v. Richmond, 6 Foster (N. H.), 232; Parke, B., in Williams v. Moore, 11 M. & W. 256; 1 Am. Lead. Cas. 103, 104. And see Nashville R. R. Co. v. Elliot, 1 Cow. 611; and *post*, note (b), * 329.

(v) Bent v. Manning, 10 Vt. 225, 230; Beeler v. Young, 1 Bibb. 519, 521; Grace v. Hale, 2 Humph. 27, 29; Stanton v. Wilson, 3 Day, 37; Phelps v. Worcester, 11 N. H. 51; Harrison v. Fane, 1 Man. & G. 550; Peters v. Fleming, 6 M. & W. 42; Burghart v. Angerstein, 6 C. & P.

690; Tupper v. Cadwell, 12 Met. 559; Davis v. Caldwell, 12 Cush. 512. If the *quantity* of goods supplied be excessive, and if the jury give the plaintiff his whole bill, their verdict may be set aside. Johnson v. Lines, 6 W. & S. 80. So if they find a verdict for the plaintiff, contrary to the opinion of the court, a new trial will be granted. Harrison v. Fane, 1 Man. & G. 550.

(w) Burghart v. Hall, 4 M. & W. 727.

(x) For some, the term "proper instruction" might include a knowledge of the languages, while for others a mere knowledge of reading and writing may be sufficient. Alderson, B., in Peters v. Fleming, 6 M. & W. 48. But a regular collegiate education for one in the ordinary station and circumstances in life has been held in this

(xx) The father, if not unsuitable in character, has the primary right to con-

trol the intellectual and religious education of his minor child, as well as to its custody,

* wife may be validly contracted for by him; but not, it is * 297 said, if they are necessities provided in view of marriage, though his wife afterwards use them. (y) And it seems that, as an incident to a marriage, which an infant may contract, he is liable during coverture for the antenuptial debts of his wife, which she was legally liable to pay, at her marriage. (z) He is also liable to the same extent as an adult would be for necessities supplied to his lawful children. (a) In some cases, such things as horses, regimentals, watches, or even jewelry, are regarded as necessities. (b) An infant cannot borrow money, so as to

country not within the term "necessaries," but a good "common-school" education would be, for every one; such an education is essential to the intelligent discharge of civil, political and religious duties. *Royce, J.*, in *Middlebury College v. Chandler*, 16 Vt. 683, 686. Instruction in reading and writing was held necessary, in *Manby v. Scott*, 1 Sid. 112; and the reason given was, that it was for the benefit of the realm that learning should be advanced. See *Raymond v. Loyl*, 10 Barb. 489. [A professional education was held not a necessary in *Turner v. Gaither*, 83 N. C. 357. But instruction in a trade was held necessary in *Walter v. Everard*, (1871) 2 Q. B. 369.]

(y) *Turner v. Trisby*, 1 Stra. 168. See *Rainsford v. Fenwick*, Carter, 215; *Abell v. Warren*, 4 Vt. 149, 152, *Beeler v. Young*, 1 Bibb. 519, 520. And see *Sams v. Stockton*, 14 B. Mon. 232. And an infant widow is personally bound by her contract for the funeral expenses of her deceased husband, who died leaving no assets. *Chapple v. Cooper*, 13 M. & W. 252.

(z) *Paris v. Stroud*, Barnes's notes, 95; *Roach v. Quick*, 9 Wend. 238; *Butler v. Breker*, 7 Met. 164.

(a) *Dicta* in *Abell v. Warren*, 4 Vt. 152; *Beeler v. Young*, 1 Bibb. 520.

(b) To be necessities the articles must be *bonâ fide* purchased for use, and not for

mere ornament; they need not be such as a person could not do without, but should be in quality and quantity suitable for his real wants, and his condition and circumstances in life. The term includes his food, but not dinners, confectionery, fruit, &c., supplied to his friend. *Brooker v. Scott*, 1 M. & W. 67; *Wharton v. McKenzie*, 5 Q. B. 606; *Barnes v. Barnes*, 50 Conn. 572. Also lodging and house-rent, *Kirton v. Elliott*, 2 Bulst. 69; *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 B. & P. 340. But not food for his horses. *Mason v. Wright*, 13 Met. 306. Nor the rent of a building for carrying on a trade or manual occupation. *Lowe v. Griffith*, 1 Scott, 458. Suitable clothing also comes within the class of necessities, but not suits of satin and velvet with gold lace. *Makarell v. Bachelor*, Cro. E. 583. Nor racing jackets. *Burghart v. Angerstein*, 6 C. & P. 690. Nor cockades for an infant captain's soldiers. *Hands v. Slaney*, 8 T. R. 578; although regimentals for a volunteer, and livery for such captain's servant have been held to be necessities, *Id.*; *Coates v. Wilson*, 5 Esq. 152. The following are examples of articles not generally "necessaries": Horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles. *Beeler v. Young*, 1 Bibb. 519; *Glover v. Ott*, 1 McCord, 572; *Rainwater v. Durham*, 2 Nott & McC. 524;

but he may abandon this right. *In re Newton*, [1896] 1 Ch. 740. *In re Agar-Ellis*, 24 Ch. D. 317, 13 English Ruling Cas. 30, 51, 53 n.; *Fletcher v. Hickman*, 50 W. Va. 244, 40 S. E. 371, 55 L. R. A. 896; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, 183 n.; *Berkshire v. Caley*, 157 Ind. 1, 60 N. E. 696; *Peacock v. Linton (R. I.)*, 47 Atl. 887, 53 L. R. A. 192; 2 Kent Com. (14th Ed.), 193, n. 1. Under a statute authorizing a parent to sue for injury to his minor child, the judgment obtained by him bars a subsequent action by the minor after coming of age, or by his

guardian. *Lathrop v. Schutte*, 61 Minn. 196, 63 N. W. 493, *Hess v. Adamant Manuf. Co.*, 66 Minn. 79, 68 N. W. 774. A father, who is guardian of his minor child, is not ordinarily permitted to expend more than the income of the latter's estate in his maintenance or education without a previous order of court therefor; but he will be allowed for medical or surgical expenses incurred without such order, and trenching upon the corpus of the estate, in saving the ward's life. *Williams v. Bonner (Miss.)*, 31 So. 207.

* 298 * render himself liable to an action for money lent, although borrowed and expended for necessities; because the law does not, for his own sake, trust him with the expenditure. (c) Nor is he liable on a contract for repairs made upon his house, although the house must have fallen into decay without them. (d) Nor can he bind himself for the insurance of his property, (e) nor for the board of horses which he uses in his business. (f) And it is said that an action cannot be maintained against an infant for the falsehood of his warranty, or for a breach of it. (g)

It is said that a lawsuit may or may not be a necessary for an infant, according to circumstances. (gg)¹

Grace v. Hale, 2 Humph. 27; Clowes v. Brooke, 2 Stra. 1101; Harrison v. Fane, 1 Man. & G. 550. A stanhope. Charters v. Bayntun, 7 C. & P. 52. Coach hire. Hedgley v. Holt, 4 C. & P. 104. A chronometer for a lieutenant in the navy, not then in commission. Berolles v. Ramsay, Holt, 77. Balls and serenades. Carter, 216. Counsel fees and expenses of a lawsuit. Phelps v. Worcester, 11 N. H. 51. But see Epperson v. Nugent, 57 Miss. 45; Barker v. Hibbard, 54 N. H. 539; Askey v. Williams, 74 Tex. 294. Each case is governed by its own circumstances; horses are not generally necessary. See above; Skrine v. Gordon, 9 Ir. Rep. C. L. 479; House v. Alexander, 105 Ind. 109; Wood v. Losey, 50 Mich. 475. See Mohney v. Evans, 51 Pa. St. 80. But when an infant had been advised to ride on horseback for his health, a different rule was applied. Hart v. Prater, 1 Jur. 623.

(c) Smith v. Gibson, Peake, Ad. Cas. 52; Darby v. Boucher, 1 Salk. 279; Probart v. Knouth, 2 Esp. 472, n.; Beeler v. Young, 1 Bibb, 519, 521; Earle v. Peale, 1 Salk. 387, 10 Mod. 67; Bateman v. Kingston, 6 L. R. Ir. 328; Chapman v. Hughes, 61 Miss. 339; Walker v. Simpson, 7 W. & S. 83, 88; Bent v. Manning, 10 Vt. 225, 230. It is otherwise in equity. Marlow v. Pitfield, 1 P. Wms. 558. But money advanced to an officer, to procure the liber-

ation of an infant from an arrest on a debt for necessities, may be recovered, it not being, strictly speaking, money lent. Clarke v. Leslie, 5 Esp. 28. [So a recognizance entered into to secure freedom from imprisonment on a criminal charge binds a minor. State v. Weatherwax, 12 Kan. 463. And see Fagin v. Goggin, 12 R. I. 398.] So an infant is liable for money paid at his request to satisfy a debt which he had contracted for necessities. Randall v. Sweet, 1 Denio, 460; Kilgore v. Rich, 83 Me. 305. So if the infant gives his note for the necessities, and another signs as surety, and subsequently pays the note, he may recover the amount of the infant. Conn v. Coburn, 7 N. H. 368; Haine v. Tarrant, 2 Hill (S. C.), 400.

(d) Tupper v. Cadwell, 11 Met. 559; Wallis v. Bardwell, 126 Mass. 366.

(e) Mut. F. Ins. Co. v. Noyes, 32 N. H. 345.

(f) Merriam v. Cunningham, 11 Cush. 40. See also, on the point of his binding himself by contract, Swift v. Barnett, 10 Cush. 436, and Hussey v. Roundtree, Busb. L. 110.

(g) Morrill v. Aden, 19 Vt. 505; Prescott v. Norris, 32 N. H. 101.

(gg) Thrall v. Wright, 38 Vt. 494. And see note (b), ante.

¹ Clothing and bridal outfit supplied an infant for her marriage, though finer than would ordinarily be requisite, may be a necessary. Sams v. Stockton, 14 B. Mon. 232; Garr v. Haskett, 86 Ind. 373; Jordan v. Coffield, 70 N. C. 110, 113. Likewise, dentistry, Strong v. Foote, 42 Conn. 203. But a pair of jewelled solitaires worth £25, and an antique silver goblet worth £15 15s., intended for a present, are not necessities. Ryder v. Wombwell, L. R. 3 Ex. 90; L. R. 4 Ex. 32. Nor travelling expenses incurred for pleasure, McKanna v. Merry, 61 Ill. 177. Nor a buggy, Howard v. Simpkins, 70 Ga. 322. Nor a wagon, Paul v. Smith, 41 Mo. App. 275. Nor a bicycle, Pyne v. Wood, 145 Mass. 558. Nor materials for a house, Wornock v. Loar, 11 S. W. Rep. 438 (Ky.) Nor are supplies furnished an infant in planting on his own account. Nor provisions if he is boarding with his father, Decell v. Lewenthal, 57 Miss. 331.

"The law does not encourage persons to engage in business during non-age, but,

SECTION II.

OF THE OBLIGATIONS OF PARENTS IN RESPECT TO INFANT CHILDREN.

The obligation of the father to maintain the child is and always has been recognized, in some way and in some degree, * in all civilized countries. The infant cannot support * 299 himself, others must therefore supply him with the means of subsistence, and the only question is, whether the public (that is, the State) shall do this, or his parent. And justice, equally with the best affections of our nature, answers that it is the duty of the parent. But it is a very difficult question how far this duty is made a legal obligation by the common law.

In England, after much questioning, and perhaps a tendency to hold the father liable for necessities supplied to the child on the ground of moral obligation and duty, (*h*) it seems to be on the whole settled, that this moral obligation is not a legal one; and indeed it is held that no * such legal obligation * 300 exists in the case of contracts made by the child for necessities. (*i*) The father's liability is nevertheless * admitted in * 301 many English cases, but is now put on the ground of *agency* ;

(*h*) In *Simpson v. Robertson*, 1 Esp. 17 (1793), which is the earliest case on this point, Lord *Kenyon* said he had ruled before, that if a tradesman colludes with a young man, and furnishes him with clothes to an extravagant degree, *though the father might have been liable had they been to a reasonable extent*, the tradesman who gives credit to such an extravagant degree shall not, at law, be allowed to recover. *Crantz v. Gill*, 2 Esp. 471 (1796), decided that if the father gives the son a reasonable allowance for his expenses, he is not liable even for necessities furnished to the son. This case seems to imply that such liability exists in the absence of rebutting circumstances. — In *Urmston v. Newcomen*, 4 A. & E. 899, 6 Nev. & M. 454 (1836), it was considered doubtful whether a parent was, at *common law*, liable to pay a third person who furnishes necessities for his deserted child. — In *Law v. Wilkin*, 6 A.

& E. 718 (1837), Lord *Denman*, C. J., said : "A father is properly liable for any necessary provision made for his infant son." *Littledale, Patteson, and Coleridge*, JJ., made no objection to this *dictum*, although the decision of the case did not require it. See *Cooper v. Phillips*, 4 C. & P. 581; *Bazeley v. Forder*, L. R. 3 Q. B. 559.

(*i*) In *Baker v. Keen*, 2 Stark. 501 (1819), *Abbott*, C. J., said : "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied." See *Fluck v. Tollemache*, 1 C. & P. 5; *Blackburn v. Mackey*, 1 C. & P. 1 (1823); *Rolfe v. Abbott*, 6 C. & P. 286 (1833); *Clements v. Williams*, 8 C. & P. 58 (1837); *Seaborne v. Maddy*, 9 C. & P. 497 (1840); *Mortimore v. Wright*, 6 M. & W. 482 (1840); *Shelton v. Springett*, 20 E. L. & E. 281.

on the contrary, its policy is to keep infants from engaging in business, until they have attained full age, and upon this ground it is uniformly held that articles purchased for business purposes, whether that of agriculture or commerce, cannot be deemed necessities. This is the law, as the courts declare, even though the infant depends upon his business for support." *House v. Alexander*, 105 Ind. 109, 110. In Georgia by statute an infant is liable for articles purchased to aid him in his business. *McKamy v. Cooper*, 81 Ga. 679. — W.

* 302 and the authority of the infant to bind the father by * contracts for necessities is inferred, both in England and in this country, from very slight evidence. (j) If we take the

* 303 case * of necessities supplied to an infant actually incapacitated by want of age, or by disease of mind or body, from making any contract, or acting in any way as the agent of any person, the father cannot be made liable except on the ground of his parental obligation; and there are cases, or rather *dicta* in some cases which might indicate, perhaps, that the question would be decided in England in favor of this liability on his part, if it were necessary. It will be noticed, that where it is most distinctly denied that this moral obligation of the parent constitutes a legal obligation, the denial is confined to a liability for the contracts of the child. The reason is said to be, the danger of permitting a father to be bound in this way, and it is variously illustrated in the cases; but this reason fails where the infant can make no contracts, and must be supplied or suffer.

In this country, the rule of law varies in the different States. In most of them in which the question has come before the courts, the legal liability of the parent for necessities furnished to the infant, is asserted, unless they are supplied by the father; and it is put on the ground that the moral obligation is also a legal one, and some of our courts have declared this quite strongly. (k)

(j) This was doubted in *Mortimore v. Wright*, whether *Law v. Wilkin*, and *Blackburn v. Mackey* were law. And in *Shelton v. Springett*, where the father had given his son £5 and sent him to London to look out for a ship, telling him to put up at a particular hotel, but the son put up at another, upon which evidence the jury had found a verdict against the father for the son's board, the verdict was set aside and a nonsuit ordered on the ground that there was no evidence to warrant a jury in holding the father liable. In *Forsyth v. Milne* (1808), cited in *McPherson on Infants*, p. 511, the defendant's wife, in his absence and without his knowledge, contracted with a third person for the board of their minor daughter. The defendant paid the bill, but expressed some disapprobation of it. The mother removed the daughter to another situation; it was held that the first payment so far acknowledged the discretionary power of the wife to contract, as to make the father liable to the plaintiff upon the second contract. — See *Bryan v. Jackson*, 4 Conn. 288 (1822); *McKenzie v. Stevens*, 19 Ala. 691. — In *Nichole v. Allen*, 3 C. & P. 36 (1827), a parent who knows that a third person is

maintaining his minor child, although illegitimate, and expresses no dissent, is held liable, unless he shows that the child is there against his consent; but this case was denied in *Mortimore v. Wright*. — See *Rumney v. Keyes*, 7 N. H. 571 (1835); *Rawlins v. Vandyke*, 3 Esp. 250 (1800); *Deane v. Annis*, 14 Me. 26 (1836); *Swain v. Tyler*, 26 Vt. 1. *Thayer v. White*, 12 Met. 343 (1847), has an important bearing upon implied liability; the jury were here held warranted in inferring, from the father's silence, his consent to the transaction notified to him. *Held*, also, that such consent was proof either of an original authority to the son, or of a subsequent affirmance by the father, which bound him to pay for the goods.

(k) See *Stanton v. Willson*, 3 Day, 37 (1808). But see *Finch v. Finch*, 22 Conn. 411, *post*, note (o). In *Edwards v. Davis*, 16 Johns. 284, it was decided that there was no common-law obligation requiring a child to support a parent; but *Spencer, J.*, in delivering the opinion of the court, said: "The duty of a parent to maintain his offspring, until they attain the age of maturity, is a perfect common-law duty." In the matter of *Ryder*, 11 Paige, 187,

In other States the present English rule has been *declared * 304 to be law, and agency and authority are held to be the only ground of such liability. (l) (x)

* The law can hardly be considered as positively settled * 305 either in England or in this country. But, resting not so much on direct and specific authorities, as on the general character of American jurisprudence on this subject, we would state, as strongly prevailing rules here, that where goods are supplied to an infant which are not necessities, the father's authority must be proved to make him liable; where they are necessities, the father's authority is presumed, unless he supplies them himself, or was ready to supply them; where the infant lives with the father,

Walworth, C., says: "A parent who has the means is undoubtedly bound to support his or her minor child." For recent New York decisions, see close of next note. See also *Benson v. Remington*, 2 Mass. 113; *Whipple v. Dow*, id. 415; *Dawes v. Howard*, 4 id. 97; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Pidgin v. Cram*, 8 N. H. 350, 2 Kent, Com. 198; *Call v. Ward*, 4 W. & S. 118; *Dennis v. Clark*, 2 Cush. 353; *State v. Cook*, 12 Ired. L. 67; *Beasley v. Watson*, 41 Ala. 234; *Jordan v. Wright*, 45 Ark. 237; *McMillen v. Lee*, 78 Ill. 443; *Porter v. Powell*, 79 Iowa, 151; *Gilley v. Gilley*, 79 Me. 292; *Gleason v. Boston*, 144 Mass. 25; *Tyler v. Arnold*, 47 Mich. 564; *McShan v. McShan*, 56 Miss. 412; *Parker v. Tillinghast*, 19 Abb. N. C. 190; *Pretzinger v. Pretzinger*, 45 Ohio St. 452; *Fitler v. Fitler*, 33 Pa. 50; *Gill v. Read*, 5 R. I. 343; *Fowlkes v. Baker*, 29 Tex. 135; *Carpenter v. Tatro*, 36 Wis. 297.

(l) In *Hunt v. Thompson*, 3 Scam. 180 (1841), *Wilson, C. J.*, said: "That a parent is under an obligation to provide for the maintenance of his infant children is a principle of natural law; and it is upon this natural obligation alone that the duty of a parent to provide his infant children with the necessities of life rests; for there is no rule of municipal law enforcing this duty. The claim of the wife upon the husband, for necessities suitable to his rank and fortune, is recognized by the principles of the common law, and by statute. A like claim to some extent may be enforced in favor of indigent and infirm parents,

and other relatives, against children, &c., in many cases; but, as a general rule, the obligation of a parent to provide for his offspring is left to the natural and inextinguishable affection which Providence has implanted in the breast of every parent. But "either an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessities furnished his infant child by a third person." — *Owen v. White*, 5 Port. (Ala.) 435 (1837), seems to deny the legal obligation of the father, except on a contract, express or implied; but admits that such "contract is implied where the father fails in his duty to support the child, or drives him from home. Then the father is liable for a suitable maintenance." In *Varney v. Young*, 11 Vt. 258 (1839), the court appear to deny altogether that the moral obligation of the father constitutes any legal obligation. *Bennett, J.*, says: "There must be proof of a contract, *express or implied*, a *prior* authority, or a *subsequent recognition* of the claim." So *Kelley v. Davis*, 49 N. H. 187; *Freeman v. Robinson*, 38 N. J. L. 383; *Gordon v. Potter*, 17 Vt. 350; see also *Raymond v. Loyl*, 10 Barb. 483; *Chilcott v. Trimble*, 13 Barb. 502; *Shelton v. Springett*, 20 E. L. & E. 281; s. c. 11 C. B. 462; *Atkyns v. Pearce*, 2 C. B. (n. s.) 763; *Brown v. Deloach*, 28 Ga. 486; *White v. Mann*, 110 Ind. 74; *Harris v. Harris*, 5 Kan. 46; *Johnson v. Onsted*, 74 Mich. 437; *Rogers v. Turner*, 59 Mo. 116; *Carney v. Barrett*, 4 Oreg. 171.

(x) See *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781; *Zilley v. Dunwiddie*, 98 Wis. 428, 74 N. W. 126, 67 Am. St. Rep. 820, 40 L. R. A. 579; *Lamson v. Varnum*, 171 Mass. 237, 50 N. E. 615.

The child's funeral expenses are primarily chargeable to the father, if he has means, rather than to its own estate. *Rowe v. Raper*, 23 Ind. App. 27, 54 N. E. 770, 77 Am. St. Rep. 411.

or under his control, his judgment as to what are necessities will be so far respected, that he will be held liable only for things furnished to the infant to relieve him from absolute want; where the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps, in cases of absolute necessity; and where he has been deserted by the father, or driven away from him, either by command or by cruel treatment, there the infant carries with him the credit and authority of the father for necessities. And wherever the question is how far the father is liable for necessities supplied to the child, this word "necessaries" will not generally be understood in the very liberal sense given to it when the question is as to the capacity of the infant to contract, but will be interpreted according to the circumstances of the case. And if the child be of sufficient age and strength to earn by proper exertions the whole or a part of his subsistence, it will not be deemed "necessary" that the aid should be rendered to him which it would be

* 306 "necessary" to *give to an infant incapacitated by tender years, or by debility of mind or body, from contributing to his own support.

So far as the duty of support certainly belongs to the parent as a legal obligation, and is neglected, any other person may perform it, and will be regarded as performing it for him; and, on general principles, the law will raise a promise on the part of the parent, to compensate the party who thus did for him what he was bound by law to do. (*m*) But this rule is carried no further than its reason extends; and is guarded by many restrictions from becoming the means of injury to the parent. Thus, we have seen, that if the child be living with the parent, or, as it is said in some cases, if he be *sub potestate parentis*, the law will not presume that the parent neglects the child, but will presume a due care of him, until the contrary is shown; and of the propriety and sufficiency of the clothing, etc., the parents must judge; and if a stranger under such circumstances supplies the child even with necessities he certainly cannot hold the parent upon the contract implied by his duty, without proving a clear and unquestionable abandonment and neglect of that duty.

If the supplier seeks to make the parent responsible, on the

(*m*) In the matter of Ryder, 11 Paige, 185, *Walworth*, Ch., says: "A stranger may furnish necessities for the child, and recover of the parent compensation therefor, where there is a clear and palpable omission of duty, on the part of the parent,

in supplying the child with necessities." Equally strong are *Van Valkinburgh v. Watson*, 13 Johns. 480, and *Pidgin v. Cram*, 8 N. H. 350. [See notes (*k*) and (*l*), *supra*, p. *304.]

ground that his authority was given to the child, then, if the goods supplied were necessities, it would seem from the cases, as we have said, that slight evidence is sufficient to prove such authority; as that the father saw the son wear the clothes, or knew that he had received them, and made no objection. But if the things supplied are strict and absolute necessities, needful for the child's subsistence, or if the child is living away from the parent, under circumstances which indicate a desertion by the parent, or that the child has been expelled from his house, or caused to leave it by the wrongful acts of the parents, then the authorities and *dicta* to which we have referred lead to the conclusion that whoever supplies the wants of the child may recover from the parent. (*n*)

* It has been held in England that a father was under no * 307 legal obligation to educate his child, and could not be made liable for the expenses of his instruction, where the wife, being cruelly treated at the husband's house, left it, taking the children with her. This precise question has not occurred in this country, but the weight and tendency of authorities would not require us to believe that the decision would be the same here as in England. It has been held in Massachusetts that where a wife leaves a husband from his cruelty, taking her child, he is liable not only for her maintenance, but for that of the child, if he makes no effort to reclaim it; and this liability is not discharged by her return to his house. (*nn*) If the wife be divorced, with alimony, and the care of the children be given to her, the father has been held liable not only to her for the expenses she incurs in their support and education, but also to a stranger whom she marries, and who continues to support the children; but the authority of this case has been, to say the least, weakened. (*o*) And where the father and

(*n*) We are unable to discriminate these cases, on principle, from any which may occur, in which compensation is sought from a father for things supplied to an infant, which were absolutely needed for his subsistence, and which the child would not have had unless they were supplied by a stranger. Where the infant has unnecessarily and in his own wrong left his parent and renounced the filial relation, it seems to be held that the liability of the parent ceases. *Angel v. McLellan*, 16 Mass. 28, where the child had absconded to avoid arrest for felony; and although the case finds that "he was in distress in a foreign country," it does not appear that he might not have supported himself by labor, or, in other words, that

the things supplied were strict and absolute necessities. We are disposed to regard the rule of law, in this country generally, if not universally, as imposing a liability on the father for all supplies to an infant, which were so absolutely needed that he must have them or perish. The liability may be put on different grounds — of contract and of implied authority, or on the legal obligation growing out of the moral obligation, — but on some ground we think it would generally be enforced.

(*nn*) *Reynolds v. Sweetser*, 15 Gray, 78. And see *Bazely v. Forder*, L. R. 3 Q. B. 559.

(*o*) *Stanton v. Willson*, 3 Day, 37, denied in *Finch v. Finch*, 22 Conn. 411, deciding, by a majority of the court, that a divorced

mother separate, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and is bound by her contract for necessities for them. (*p*) (*x*) There is, indeed, authority in England and in this country, for holding that if a parent of sufficient ability to provide suitably for his children neglect to do so he is guilty of an indictable offence. (*q*)

It becomes a different question when the child has an independent property sufficient for his own maintenance; what then is the father's obligation? It would seem that the rule of

* 308 law * formerly was, that if the parent had abundant means himself, he was bound to provide for his children, even if they had independent property. (*r*) And this rule is enforced even now in some instances. (*s*) It is, however, in general, relaxed; and courts go far in appropriating the means of the child to his own support, although the father may also be entirely able to maintain him. (*t*) And where the father is without means to educate and support his children in a manner which is rendered suitable by their position and expectations, courts of equity will not only make an allowance out of the estate of the children, but will, if necessary, take from the principal of a vested legacy for the proper maintenance and education of the legatee. (*u*) Such decrees are usually made for the future maintenance of the child; but it cannot be said that there is a positive rule preventing retrospective allowances. (*v*) But a court will not, unless for very strong and special reasons, make an allowance to the father, out of the infant's estate, for the *past* maintenance of his child. (*w*)

wife could not maintain an action against her former husband to recover for the support of their infant children, the custody of whom was awarded to her.

(*p*) *Rawlins v. Vandyke*, 3 Esp. 251; *Holt v. Holt*, 42 Ark. 495; *McMillen v. Lee*, 78 Ill. 443; *Gilley v. Gilley*, 79 Me. 292; *Pretzinger v. Pretzinger*, 45 Ohio St. 452. But see *Wallace v. Ellis*, 42 Ind. 582; *Husband v. Husband*, 67 Ind. 583; *Harris v. Harris*, 5 Kan. 46.

(*q*) *Rex v. Friend*, Russ. & R. 20. See also, in the matter of *Ryder*, 11 Paige, 185.

(*x*) *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340. So the father is not released from his duty to support his minor child because, by reason of his conduct, he is deprived of its custody. *Leibold v. Leibold* (Ind.), 62 N. E. 627. If the mother separates from the father without

(*r*) *Dawes v. Howard*, 4 Mass. 97; *Hines v. Mullins*, 25 Ga. 696; *Evans v. Pearce*, 15 Gratt. 513.

(*s*) In the matter of *Kane*, 2 Barb. Ch. 375.

(*t*) *Jervoise v. Silk*, Cooper, Ch. 52; *Maberly v. Turton*, 14 Ves. 499; *Simon v. Barber*, 1 Tamlyn, 22.

(*u*) *Newport v. Cook*, 2 Ashm. 332; *Ex parte Green*, 1 Jac. & W. 253. See also *Carter v. Rollard*, 11 Humph. 339.

(*v*) In the matter of *Kane*, 2 Barb. Ch. 375.

(*w*) *Presley v. Davis*, 7 Rich. Eq. 105;

sufficient cause, he is not liable for the support of the children whom she takes with her; in such case the seller of necessities for the children has the burden of proof to show that the wife was justified in taking the children away. *Hyde v. Leisenring*, 107 Mich. 490, 65 N. W. 536.

Whether the mother is under an equal obligation with the father to maintain the child, the father being dead, seems not to be quite certain; but the weight of authority, both in England and in this country, might justify the conclusion that she is not under a legal obligation, (x)¹ or that it is very greatly qualified in important particulars. Thus, if the * child * 309 has property, the mother is not bound for the child's maintenance where the father would be. (y) And a court of equity has refused to compel a mother to furnish the means of educating a child, even where she was entirely able to do so; and it is even said that the court has no power to do this. (z) A husband is not responsible for the child of his wife by a former husband, unless he takes him into his house; but if he does, he assumes the responsibility for his maintenance, so long as he retains him as one of his family. (a) But, on the other hand, the relation which he in this case sustains to the child rebuts any presumption which might otherwise exist, of a promise or obligation to pay the child for his services, (b) as it does in the case of his own children. (c)

Where the parent is thus obliged to provide for the child a home, and a sufficient maintenance, so, on the other hand, he has a right to the custody of the child during his minority, and

and see *Carmichael v. Hughes*, 6 E. L. & E. 71; *Starkey v. Perry*, 71 Cal. 495; *Kinsey v. State*, 98 Ind. 351; *Tanner v. Skinner*, 11 Bush, 120; *Walker v. Crowder*, 2 Fred. Eq. 478; *Beardsley v. Hotchkiss*, 96 N. Y. 201.

(x) The chancery cases which assert this obligation, appear to do so, on the ground of the ability of the mother and the need of the children. See *Hughes v. Hughes*, 1 Bro. Ch. 387. In *Benson v. Remington*, 2 Mass. 113, the court say: "The law is very well settled that *parents* are under obligations to support their children, and that they are entitled to their earnings." In *Nightingale v. Withington*, 15 Mass. 274, *Parker, C. J.*, says: "Generally the father, and in case of his death the mother, is entitled to the earnings of their minor children. This right must be founded upon the obligation of the parents to nurture and support their children." But it is only a *dictum* in either case; and in neither do the court refer to any authority for this rule; nor

are we aware of any direct adjudication that the mother and the father stand on the same footing in this respect. See, against the mother's obligation, *Tilton v. Russell*, 11 Ala. 497; *Raymond v. Loyl*, 10 Barb. 483; *Pray v. Gorham*, 31 Me. 241; *Commonwealth v. Murray*, 4 Binn. 487; *Passenger R. Co. v. Stutlen*, 54 Penn. St. 375.

(y) In *Dawes v. Howard*, 4 Mass. 97, it is said that where minor children have property of their own, the father is, notwithstanding, bound to support them, if of ability; but it is otherwise with the mother.

(z) In the matter of *Ryder*, 11 Paige, 185.

(a) *Stone v. Carr*, 3 Esq. 1; *Cooper v. Martin*, 4 East, 82; *Tubb v. Harrison*, 4 T. R. 118; *Freto v. Brown*, 4 Mass. 635; *Minden v. Cox*, 7 Cowen, 235.

(b) *Williams v. Hutchinson*, 5 Barb. 122; s. c. 3 Comst. 312.

(c) See *post*, Book III., Ch. IX., Sect. 1.

¹ By statute in some States, as California and Louisiana, she is under such obligation. Cal. Civ. Code, §§ 196-208; La. Civ. Code, Art. 227. See also *Harris v. Harris*, 5 Kan. 46. — W.

is entitled to all his earnings. (*d*) And a husband taking the children of his wife by a former marriage into his family, has, *prima facie*, a right to their custody and their earnings. (*dd*) (*x*) On this ground it has been held that the father might recover the wages of the son, even for services which it was a violation of law to render, if the father did not know of this violation. (*e*) For these two things, this obligation and this right, go together. Thus, if the father separates from the mother, and permits the child to leave him and go with her, he is no longer entitled to the earnings of the child, and has no power to avoid his reasonable contracts; (*f*) and therefore the son may in such case make a special contract with his employer, which is valid against the father's will. And if the parent be himself an insane person and a pauper, and therefore under no obligation to maintain the child, he is not entitled to the child's earnings, nor is the town which supports the parent entitled to receive the child's wages, so long as the child himself is not a pauper. (*g*) And it has * 310 been said that * wherever the son is not living with the father, the son may of necessity be entitled to receive the wages of his labor, and that the father's consent to the son's receipt and appropriation of them would be inferred in such case from very slight circumstances. (*h*)

It is certain that a father may, by an agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and will then have no right to demand those wages, either from the employer or from the child. (*i*) And such an agreement may be inferred from circumstances; as where a father left his child to manage his own affairs, and make and execute his own contracts for a considerable time. (*j*) Or

(*d*) See note (*x*), *supra*, and *State v. Baird*, 3 Green, 196; *McBride v. McBride*, 1 Bush, 15.

(*dd*) *Mulhern v. McDavitt*, 16 Gray, 404.

(*e*) *Emery v. Kempton*, 2 Gray, 257. See, in this connection, *Jenness v. Emerson*, 15 N. H. 486.

(*f*) *Wodell v. Coggeshall*, 2 Met. 89; *Chilson v. Philips*, 1 Vt. 41.

(*g*) *Jenness v. Emerson*, 15 N. H. 486.

(*h*) *Gale v. Parrott*, 1 N. H. 28.

(*i*) *Jenny v. Alden*, 12 Mass. 375; *Morse v. Welton*, 6 Conn. 547; *Whiting v. Earle*, 3 Pick. 201; *Varney v. Young*, 11 Vt. 258; *Burlingame v. Burlingame*, 7 Cowen, 92; *Bray v. Wheeler*, 3 Williams, 514. In *Tillotson v. McCrillis*, 11 Vt. 477, it is held that a father may give to his minor son *a part* as well as the whole of his time.

(*j*) *Canover v. Cooper*, 3 Barb. 115; *Clinton v. York*, 26 Me. 167; *Stiles v. Granville*, 6 Cush. 458; *Wodell v. Cogges-*

(*x*) A man, though not bound to maintain the children of his wife by a former marriage, may, if he chooses, place himself *in loco parentis*; if he does so, there is no contract implied on his part to pay them for services rendered by them while

in his family, nor on their part to pay him for their maintenance. *Livingston v. Hammond*, 162 Mass. 375, 38 N. E. 968; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023.

even if the father knew that the son had made such a contract for himself, and interposed no objection. (*k*) And it has been held that an infant whose father is dead, and whose mother is married again, is entitled to his own earnings. (*l*)

It is very common in this country to see in the newspapers an advertisement signed by a father, stating that he has given to his minor son "his time," and that he will make no future claim on his services or for his wages, and will pay no debts of his contracting. Such a notice would undoubtedly have its full force in reference to any party to whom a knowledge of it was brought home. And if a stranger, not knowing this arrangement, should employ the son, he might still interpose it as a defence, if the father claimed the son's wages. But if a stranger supplied a son, at a distance from his home, with suitable necessities, in ignorance of such arrangement, there is no sufficient reason for holding that it would bar his claim against the father. And we think that he might recover from the father for *strict* necessities, even if he knew this arrangement. * On what * 311 ground could the father discharge himself from his liability by such a contract? Even if the father had paid the son a consideration for the release of all further obligation, it would be a contract with an infant, and void or voidable, because certainly not for necessities. And the whole policy and reason of the law of infancy would seem to be opposed to permitting a father to cast his son in this way upon the public, and relieve himself from the obligation of maintenance.

It may be added, that while an infant remains under the care and control of his father, and is in fact supported by him, the infant is not liable, even on his express contract, to a stranger for necessities furnished for him. One reason given for this is, that it would interfere with his father's right of judging how he should be supported. (*n*) Where services are rendered at the parent's request, it will be presumed that credit is given to him alone, and in that case the infant cannot be liable even for necessities. (*o*) And it is held that the emancipation of an infant by his father does not enlarge his capacity to contract. (*oo*)

hall, 2 Met. 91; Cloud v. Hamilton, 11 Humph. 104; Farrell v. Farrell, 3 Houst. 633.

(*k*) Whiting v. Earle, 3 Pick. 201; Armstrong v. McDonald, 10 Barb. 300.

(*l*) Freto v. Brown, 4 Mass. 675; and see Hollingsworth v. Swedenborg, 49 Ind. 378.

(*n*) Angel v. McLellan, 16 Mass. 28; Wailing v. Toll, 9 Johns. 141; Hull v.

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Connolly, 3 McCord, 6; Kline v. L'Amour, 2 Paige, 419; Guthrie v. Murphy 4 Watts, 80; Simms v. Norris, 5 Ala. 42; Johnson v. Lines, 6 W. & S. 80; Phelps v. Worcester, 11 N. H. 51.

(*o*) Duncomb v. Tickridge, Aleyn, 94; Phelps v. Worcester, 11 N. H. 51; Simms v. Norris, 5 Ala. 42.

(*oo*) Person v. Chase, 37 Vt. 647.

The common-law liability of a parent to support his child ceases altogether when the infant becomes of full age; and then a parent would not be bound even by his express promise to pay for necessities previously furnished to the child, *not* at the request of the parent. (*p*)¹ If they were furnished at his request it would be otherwise. (*q*)

If a son or daughter remains with the parent after coming of age rendering services, it is held that neither he nor she can recover wages, without a contract for them. (*qq*) Because if a child after becoming adult continues to live with his or her parent, the law implies no promise of wages on the part of the parent. (*qr*) But the jury will judge from all the evidence whether there was such a contract. (*qs*)

By statute of 43 Eliz. c. 2, the father, "being of ability," is liable to contribute to his child's support even after he becomes of age. And in some of our States similar provision is made. (*r*) But such a liability is wholly statutory, and does not accrue until proceedings are had pursuant to the statute. (*s*) So at common law a son is not liable for the support of an infirm * 312 * and indigent parent. (*t*) Nor is a father liable at common law for the support of his illegitimate child. The only remedy is under the statute, procuring an order of filiation, and the like. (*u*)

It should be added, that a father is not liable for the wilful tort of his infant child. (*v*) And it is said that he has no right, resulting from the parental relation, to maintain an action for

(*p*) *Mills v. Wyman*, 3 Pick. 207. See also *Cook v. Bradley*, 7 Conn. 57.

(*q*) *Loomis v. Newhall*, 15 Pick. 159.

(*qq*) *Leidig v. Coover's Ex'ors*, 47 Penn. St. 534; *Adams v. Adams' Adm.*, 23 Ind. 50.

(*qr*) *Luney v. Vantyne*, 40 Vt. 501.

(*qs*) *Hart v. Hart's Adm'x*, 41 Mo. 441.

(*r*) The provision in the Mass. Rev. Stats. ch. 46, § 5, was very broad. In the Revision of 1902, ch. 81, § 10, it reads: "The kindred of any such poor persons, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living in this commonwealth, and of sufficient ability, shall be bound to support such poor persons, in proportion to their respective ability. The mother shall be under

the same legal obligation to support her pauper children as the father, but she shall not be liable to criminal prosecution for the enforcement of such obligation."

(*s*) *Loomis v. Newhall*, 15 Pick. 169; *Mortimore v. Wright*, 6 M. & W. 488; *Gordon v. Potter*, 17 Vt. 348; *Shelton v. Springett*, 20 E. L. & E. 281; s. c. 11 C. B. 462.

(*t*) *Edwards v. Davis*, 16 Johns. 281; *Rex v. Munden*, 1 Stra. 190. But see *Gilbert v. Lynes*, 2 Root, 168; *Ex parte Hunt*, 5 Cowen, 284.

(*u*) *Furillio v. Cretwther*, 7 Dow. & R. 612; *Cameron v. Baker*, 1 C. & P. 268; *Moncrief v. Ely*, 19 Wend. 405.

(*v*) As for setting the father's dog upon the hog of the plaintiff. *Tift v. Tift*, 4 Denio, 175.

¹ Nor would a subsequent express promise render a parent liable to pay for goods furnished an infant, for which the parent was not otherwise bound to pay. *Freeman v. Robinson*, 38 N. J. L. 383. — W.

injury to his child, unless there be some injury to the father; (*w*) but it is enough if the father be put to any expense for the care or cure of the child. (*x*) Neither can he give a valid release for an assault on his minor child. (*y*)

It seems to be held that a father cannot maintain an action, for loss of service, against a railroad company, by whose negligence the child was killed. (*z*) If this be law, it may perhaps be regretted that the action "*per quod servitium, amisit*" does not extend to such a case.

A father may devise away all his property, leaving nothing whatever to his infant children, or for their support, if he mentions them in the will so as to show that he intends this. (*a*)

SECTION III.

VOIDABLE CONTRACTS FOR NECESSARIES.

As an infant is not permitted to enter into general contracts, because his immature judgment would expose him to injury, and as he is nevertheless permitted to contract for necessities, because otherwise he might suffer for the want of them, so this

* exceptional permission is qualified in an important particular, for the same purpose of protecting him from wrong. * 313

He cannot contract to pay even for necessities, in such wise as to bar an inquiry into the price and value. The law permits persons to supply him with necessities, and have a valid claim against him therefor for their fair worth; but it does not permit them to make a bargain with him as to the price, which shall bind him absolutely, because it does not permit him to determine this price for himself, by reason of his presumed inability to take proper care of his own interests; but the value and the price may be determined by a jury. And a seal to the instrument would give it no additional force in this respect, but the infant would still be bound only for a fair value. For the same reason an infant cannot be bound for the amount in an account stated; (*b*) nor for

(*w*) *Stephenson v. Hall*, 14 Barb. 222.

(*x*) *Dennis v. Clark*, 2 Cush. 347.

(*y*) *Loomis v. Cline*, 4 Barb. 453; *Eades v. Booth*, 8 A. & E. (N.s.) 718.

(*z*) *Carey v. Berkshire R. R. Co.*, 1 Cush. 475. [Many other cases are collected in *Cooley on Torts*, p. 27.] See, however, *Ford v. Monroe*, 20 Wend. 210.

(*a*) See Lord *Alvanley's* remarks on

this power of the father, in *Rawlins v. Goldfrap*, 5 Ves. 444.

(*b*) *Inglelew v. Douglas*, 2 Stark, 36; *Trueman v. Hurst*, 1 T. R. 40; *Hedgeley v. Holt*, 4 C. & P. 104; *Oliver v. Woodroffe*, 4 M. & W. 650; *Williams v. Moor*, 11 id. 256; *Beeler v. Young*, 1 Bibb. 519.

the sum mentioned in his note, although given for necessities; (c) nor for the amount due on his bond, for the ancient distinction which held him on a bond without a penalty, but not on a bond with penalty, would probably be now disregarded. (d) If, however, an infant gives his note, his bond, or any other instrument, for necessities, he may be sued upon the instrument, but the plaintiff shall recover only the value of the necessities. (e)¹

Neither can an infant enter into contracts of business and * 314 * trade; for this is not necessary, and might expose him to the misfortune of entering upon adult life with the burden of bankruptcy resting upon him. (f) (x) But if he uses, as neces-

(c) *McCrillis v. How*, 3 N. H. 348; *Bouchell v. Clary*, 3 Brevard, 194; *Swasey v. Vanderheyden*, 10 Johns. 83; *Fenton v. White*, 1 Southard, 100; *McMinn v. Richmonds*, 6 Yerg. 9; *Hanks v. Deal*, 3 McCord, 257. Some of these cases declare an infant's note, though given for necessities, void, but it is conceived they mean voidable only, and not that such note is not susceptible of ratification.

(d) The older cases hold that an infant's bond, at least if given *with a penalty*, is absolutely void, not voidable merely, although given for necessities. *Ayliff v. Archdale*, Cro. E. 920; *Fisher v. Mowbray*, 8 East, 300; *Baylis v. Dinely*, 3 M. & Sel. 447; *Hunter v. Agnew*, 1 Fox & S. 15; *Allen v. Minor*, 2 Call. 70; *Colcock v. Ferguson*, 3 Desaus. 482. — It is conceived, however, that in this country, bonds, like other contracts, are only voidable, and may be ratified. *Conroe v. Birdsall*, 1 Johns. Cas. 127; the marginal note to this case erroneously uses the word void, in relation to such bond.

(e) *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221. See also *Stone v. Dennison*, 13 Pick. 1; *Breed v. Judd*, 1 Gray, 455, that wherever the form of an infant's contract for necessities is such that the consideration is open to enquiry, he may be sued upon the contract itself. And in *Bradley v. Pratt*, 23 Vt. 378, interest was allowed on a promissory note given by an infant, and it is declared that there is no general rule exempting infants from a liability to pay interest on their just debts.

(f) *Whittingham v. Hill*, Cro. J. 494; *Whywall v. Champion*, 2 Stra. 1083; *Dilk v. Keighley*, 2 Esp. 480; *Latt v. Booth*, 3 Car. & K. 292. But if with his guardian's consent he is carrying on a certain business, it has been held that he might bind himself to pay for articles suitable and necessary for that business. *Rundell v. Keeler*, 7 Watts, 237. *See quere*. Although an infant cannot trade, and would not be bound to execute any contract of trade he may have entered

¹ An infant "is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay from the necessity of his situation, just as in the case of a lunatic. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them." *Trainer v. Trumbull*, 141 Mass. 527, 530.

It seems, therefore, that an action for necessities should properly be brought on this *quasi* contractual liability, or promise implied by law, rather than on an express promise or note or bond. See cases of notes, in note (e), *supra*. Also *Ayers v. Burns*, 87 Ind. 245. In *In re Soltykoff*, (1891), 1 Q. B. 413, it was held that the acceptance of a bill of exchange is not binding on an infant, though given for necessities, Lord *Esher* saying: "He is not liable upon a bill of exchange or promissory note under any circumstances."

But as no injustice is thereby done to the infant, recovery is generally, though not universally, allowed on the express contract or note or bond, the amount of the recovery being restricted to the real value of the necessities. See cases in note (e), *supra*. Also *Ray v. Tubbs*, 50 Vt. 688; *Walter v. Everard*, (1891), 2 Q. B. 369. In the latter case it was held that an infant was liable on a bond (without penalty) to pay £300 for instruction as an apprentice. — W.

(x) Necessaries for an infant do not include supplies for his becoming a trader or starting in business: *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109; see

saries for himself or his family, the goods furnished to him for the purposes of trade, he is so far liable. (g) This liability to pay

into, yet if he has in part executed such contract himself he may sue the adult for non-performance on his part, and this while he is yet an infant. *Warwick v. Bruce*, 2 M. & Sel. 205. As to bank-

ruptcy of an infant see *post*, Chapter on Bankruptcy and Insolvency in Third Volume.

(g) *Turberville v. Whitehouse*, 1 C. & P. 94; s. c. 12 Price, 692.

Jimmerson v. Lawrence, 112 Ga. 340, 37 S. E. 371; *In re Brice*, 93 Fed. 942; *Brown v. Farmers' Nat. Bank*, 88 Texas, 265, 31 S. W. 285; or articles of luxury. *Hewlings v. Graham*, 70 L. J. Ch. 568, 84 L. T. 497; *Craig v. Van Bebber* (100 Mo. 584), 18 Am. St. Rep. 569, 651 n. A bicycle is not a necessary in this country; in England, it may be found to be so. *Pyne v. Wood*, 145 Mass. 559, 14 N. E. 775; *Gillis v. Goodwin*, 179 Mass. 140, 61 N. E. 813; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 51 N. Y. S. 1149, 47 L. R. A. 303, 73 Am. St. Rep. 703; *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296.

Medical services for a sick or injured infant are necessities, and his estate is liable therefor, though primarily charged to his father, who is his guardian. *Williams v. Bonner*, (Miss.) 31 So. 207. An infant is not liable for necessary medical services rendered on its mother's credit at her home. *Tharp v. Connelly*, 48 Mo. App. 59.

An attorney's services may be necessities. *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821; see *Lang v. Belloff*, 53 N. J. Eq. 298, 31 Atl. 604; *Richardson v. Tyson*, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697. As to the authority of such attorney, see *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933. Only the actual value of an attorney's services can be recovered against a female infant for conducting a suit against her seducer: *Petrie v. Williams*, 68 Hun, 589; or for defending an infant charged with a crime. *Askey v. Williams*, 74 Texas, 294. See *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577; *Hamilton v. Vaughan-Sherrin E. Co.*, [1894] 3 Ch. 589. An attorney employed by an infant's next friend to procure a judicial sale may be allowed compensation for his services out of the proceeds of such sale. *Senseney v. Repp* (Md.), 50 Atl. 416. See *Richardson v. Tyson*, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 936.

Doubtless a minor, when emancipated by his father, can contract for services. *Granrud v. Rea* (Tex. Civ. App.), 59 S. W. 841. See *Hardy v. Eagle*, 54 N. Y. S.

1045, 25 Misc. Rep. 471; *Lieberman v. Third Ave. R. Co.*, 55 N. Y. S. 677, 25 Misc. Rep. 704; *Nicolaus v. Snyder*, 56 Neb. 531, 76 N. W. 1083; *Munday v. Kaufman*, 48 La. Ann. 591, 19 So. 619; *Taylor v. Hill*, 115 Cal. 143, 151, 44 Pac. 336; *Robinson & Co. v. Hathaway*, 150 Ind. 679, 50 N. E. 883. But an infant's marriage with his father's consent is an emancipation only to the extent of enabling him to make contracts for his own services, and to apply his wages to the support of his family; and as he cannot create an agency, he cannot appoint a servant, or delegate powers to another. *Burns v. Smith* (Ind. App.), 64 N. E. 94.

Necessaries cannot include more than is needed, or articles with which the infant is already supplied, or with which his parents stand ready to supply him. It is a question of law, or of mixed law and fact, what are necessities. See *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, 647, 652 note; *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 105, 55 L. R. A. 781, 50 N. Y. S. 884; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Melton v. Katzenstein* (Tex. Civ. App.), 49 S. W. 173; *Brent v. Williams*, 79 Miss. 355, 30 So. 713; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852.

An infant's contracts are also held to be binding when beneficial to him. See *Corn v. Matthews*, [1893] 1 Q. B. 310; 24 Irish L. T. 315; *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345; *Stern v. Meikleham*, 56 Hun, 475; *State v. New Orleans*, 105 La. 768, 30 So. 97; *Pardey v. American Ship Windlass Co.*, 20 R. I. 147, 37 Atl. 706, 78 Am. St. Rep. 844. Thus, the lease of a room by a minor who is a college student, is beneficial; but he is liable on the lease only so long as he occupies. *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. The following contracts are not binding upon an infant, because not beneficial to him: a contract to build or repair a dwelling house for an infant: *Allen v. Lardner*, 78 Hun, 603, 29 N. Y. S. 213; *Phillips v. Lloyd*, 18 R. I. 199, 25 Atl. 909; *Horstmeyer v. Connors*, 56 Mo. App. 115; or the purchase of material, so as to make

even for necessities seems to be founded only on his actual necessities, and if he had already supplied himself with sufficient clothing, it was held that he was not bound to pay for similar articles subsequently purchased, although they might be suitable in themselves,¹ and although he had avoided payment for the first purchase on the ground of his infancy. (*h*) As he cannot trade, neither can he subject himself to the incidents of trade, as bankruptcy or insolvency, (*i*) nor is he liable as a partner of a mercantile firm. (*j*)² (*x*) Nor can he be sued on his covenant

(*h*) *Burghart v. Angerstein*, 6 C. & P. 690.

(*i*) For no man can be a bankrupt for debts which he is not obliged to pay. *Rex v. Cole*, 1 Ld. Raym. 443, per *Holt, C. J.*; *Ex parte Sydebotham*, 1 Atk. 146; *Ex parte Jones*, 18 Ch. D. 109. — And a commission of bankruptcy against an infant is void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365; *O'Brien v. Currie*, 3 C. & P. 283. This is the English rule; but in this country it has been held that an infant was entitled to the benefit of the U. S. bankrupt law of 1841, and that the proceedings might be in his own name. *In re Samuel Book*, 3 McLean, 317.

(*j*) If, however, an infant engages in a partnership, he must, within a reasonable

time after coming of age, notify his disaffirmance thereof; otherwise he will be deemed to have confirmed it, and will be bound by subsequent contracts made on the credit of the partnership. *Goode v. Harrison*, 5 B. & Ald. 147. So in *Miller v. Sims*, 2 Hill (S. C.), 479, it was held that an infant partner, who afterwards confirmed the contract of partnership, by transacting the business and receiving the profits, became thereby liable on all the previous liabilities of the firm, even such as were not known to him. But as to the last point, see *contra*, *Crabtree v. May*, 1 B. Mon. 289. See also *Adams v. Beall*, 67 Md. 53; *Osburn v. Farr*, 42 Mich. 134; *Penn v. Whitehead*, 17 Gratt. 503; *Tobey v. Wood*, 123 Mass. 88.

¹ *Foster v. Redgrave*, L. R. 4 Ex. 35; *Barnes v. Toye*, 13 Q. B. D. 410; *Johnstone v. Marks*, 19 Q. B. D. 509; *McKanna v. Merry*, 61 Ill. 177, 180; *Trainer v. Trumbull*, 141 Mass. 527, 530; *Decell v. Lewenthal*, 57 Miss. 331; *Nichol v. Steger*, 6 Lea, 393.

"It is immaterial whether the plaintiffs did or did not know of the existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor." Per *Lopes, J.*, *Barnes v. Toye*, 13 Q. B. D. 410, 414. And see *Trainer v. Trumbull*, *supra*. — W.

² An infant cannot be held personally liable on the contracts of a partnership of which he is a member. *Mason v. Wright*, 13 Met. 306; *Folds v. Allardt*, 35 Minn. 488; and see *Kerr v. Bell*, 44 Mo. 120. And he may avoid his contract of partnership while still an infant. *Shirk v. Shultz*, 113 Ind. 571; *Adams v. Beall*, 67 Md. 53. *Contra* is *Dunton v. Brown*, 31 Mich. 182. But it is held that if an infant actually enters into partnership, he cannot withdraw a share of the partnership property, on the insolvency of the firm, the law devoting the assets of the firm to the discharge of partnership obligations. *Shirk v. Shultz*, *supra*; *Bush v. Linthicum*, 59 Md. 344; *Yates v. Lyon*, 61 N. Y. 344. So, on dissolution of the partnership, as between himself and his partners an infant must bear his share of the loss of capital actually invested in the business. *Moley v. Brine*, 120 Mass. 324. But see *Sparman v. Keim*, 83 N. Y. 245. — W.

his property subject to a mechanic's lien: *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039; *Wornock v. Loar* (Ky.), 11 S. W. 438; *Hall v. Acken*, 47 N. J. L. 340; a purchase of stocks on margin: *Mordecai v. Pearl*, 63 Hun, 553; *Crummey v. Mills*, 40 Hun, 370; the chair and furnishings of a barber shop: *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109; an agreement exempting a railroad from its negligence

in consideration of reduced fares. *Flower v. North-Western Ry. Co.*, [1894] 2 Q. B. 65; a settlement and release of damages for personal injuries fraudulently effected by the attorney of an infant without a guardian or next friend. *Lansing v. Michigan Cent. R. Co.*, 126 Mich. 663, 86 N. W. 147.

(*x*) See *supra*, p. *148, n. (*y*). In England, when a partnership of which an infant is a member, is sued for goods sold to

as an * apprentice. (k) Nor is his contract for labor and * 315 service generally binding.¹ But enlistments in the navy, though made without the consent of the parent or guardian, are

(k) It is clear that an infant cannot be sued on his covenants of indenture. See *Gylbert v. Fletcher*, Cro. C. 179; *Jennins v. Pitman*, Hutton, 63; *Lyly's case*, 7 Mod. 15; *Whitley v. Loftus*, 8 Mod. 190; *Frazier v. Rowan*, 2 Brevard, 47; *McKnight v. Hogg*, 3 Brevard, 44, *Clark v. Goddard*, 39 Ala. 164. — But if the infant is a party to the indenture, or his consent is expressed in it, many cases have held that the contract of apprenticeship is binding absolutely upon him, and that he cannot dissolve the relation thus created. See *Rex v. Great Wigston*, 3 B. & C. 484; *Walter v. Everard*, (1891) 2 Q. B. 369. — And a right of action necessarily results to the injured party for a breach thereof. *Woodruff v. Logan*, 1 Eng. (Ark.) 276. — And this, because it was said that such

contracts *must be* for the infant's benefit, and therefore he should not avoid them. But analogy and principle seem to require that, independent of any statutory provisions regulating this matter, this contract, like all others, should be voidable at his election. See the cases cited in the next note. Where a statute allows a parent to bind his son as an apprentice, undoubtedly an indenture executed in pursuance of such statute would bind all the parties to it, and the infant could not dissolve the relation thus created, but it would not necessarily follow that the remedy of the adult, for the desertion of the apprentice, would be an action against him on his covenants. See also *Harper v. Gilbert*, 5 Cush. 417.

¹ *Peters v. Lord*, 18 Conn. 337; *Moses v. Stevens*, 2 Pick. 332; *Nickerson v. Easton*, 12 Pick. 110; *Vent v. Osgood*, 19 Pick. 572; *Francis v. Felmit*, 4 Dev. & B. 498; *Thomas v. Dike*, 11 Vt. 273. And if an infant avoids such a contract when partly performed, he may recover on a *quantum meruit* for the labor actually performed under it. *Ray v. Haines*, 52 Ill. 485; *Dallas v. Hollingsworth*, 3 Ind. 537; *Van Pelt v. Corvine*, 6 Ind. 363; *Judkins v. Walker*, 17 Me. 38; *Vehue v. Pinkham*, 60 Me. 142; *Gaffney v. Hayden*, 110 Mass. 137; *Lowe v. Sinklear*, 27 Mo. 308; *Danville v. Amoskeag Mfg. Co.* 62 N. H. 133; *Medbury v. Watrous*, 7 Hill, 110 (overruling the contrary cases of *Weeks v. Leighton*, 5 N. H. 343, *McCoy v. Hoffman*, 8 Cow. 84); *Hoxie v. Lincoln*, 25 Vt. 206. Compare *Spicer v. Earl*, 41 Mich. 191.

It has been held that any injury the adult may have sustained by such avoidance should be deducted. *Judkins v. Walker*, 17 Me. 38; *Moses v. Stevens*, 2 Pick. 332; *Lowe v. Sinklear*, 27 Mo. 308; *Thomas v. Dike*, 11 Vt. 273; *Hoxie v. Lincoln*, 25 Vt. 206. But this is in effect allowing the adult a cross action on the contract against the infant, and the better view is that such a deduction cannot be made. *Derocher v. Continental Mills*, 58 Me. 217; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Whitmarsh v. Hall*, 3 Denio, 375. See also *Shurtleff v. Millard*, 12 R. I. 272.

If an infant has been fully paid for his services in money or necessities, he has no further claim. *Waugh v. Emerson*, 79 Ala. 295; *Breed v. Judd*, 1 Gray, 455; *Spicer v. Earl*, 41 Mich. 191; *Hagerty v. Nashua Lock Co.*, 62 N. H. 576. But he may recover the value of his services without deduction if he has received property other than necessities in payment during infancy. *Morse v. Ely*, 154 Mass. 458.

In *Spicer v. Earl* it was held that if a contract of service was apparently fair and reasonable and was executed on both sides, the infant was bound, *Cooley, J.*, saying "So long as the employer who is acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement."

In *Dubé v. Beaudry*, 150 Mass. 448, an infant with the consent of his mother agreed to work for a creditor of his deceased father, half of his wages to be applied in payment of the debt. The jury found that the agreement was "not so unreasonable as to raise any suspicion of fraud," and that the plaintiff had not been overreached. The agreement was fully executed, but it was held that the infant might subsequently sue for the value of his services, less what he had been paid in cash. — W.

it, judgment can be recovered only against the other members; and if an act of bankruptcy is committed, a receiving order can be made only against the firm other than

the infant partner, and not against the firm simply. *Lovell v. Beauchamp*, [1894] A. C. 607.

binding, and the infant cannot avoid them; (*m*) and it is the same as to the army. (*n*) Neither can he avoid a contract whereby he undertakes to do what he is under a legal obligation to do; as a bond executed under a statute, to indemnify a town for the support of an illegitimate child; for which an order of filiation has been made upon him. (*o*) He is not responsible as an * 316 innkeeper for * losses sustained by his guests. (*p*) Nor will joining her husband in a conveyance bar an infant *feme covert* of her right of dower. (*q*)

It may be added, that an infant may be an attorney or agent to execute a new power, or, indeed, to perform any act which he has physical and mental capacity to perform. (*r*)

SECTION IV.

ON THE TORTS OF AN INFANT.

An infant is protected against his contracts, but not against his frauds or other torts. (*s*) But only for those committed by himself, and not for those of persons representing him, as he cannot have an agent, in the legal sense of the word. (*ss*) His promissory note given as a compensation for his torts is not binding. (*t*) If such

(*m*) *Com'th v. Gamble*, 11 S. & R. 93; *Com'th v. Murray*, 4 Binn. 487; *United States v. Bainbridge*, 1 Mason, 71; *United States v. Blakeney*, 3 Gratt. 405.

(*n*) The U. S. statutes provide that the enlistment of a minor without the consent of his parent or guardian cannot be avoided. But no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age. 12 Stat. at Large, 339.

(*o*) *People v. Moores*, 4 Denio, 518. And see *Stowers v. Hollis*, 83 Ky. 544. So where a father entered on land in the name of his minor son, for the purpose of defrauding his creditors, and afterwards sold the land, which his son by his direction conveyed by his own deed, during his infancy, to the purchaser, it was held that such deed was one which the law would have compelled him to make, and therefore could not be avoided by him on arriving at full age. *Elliot v. Horn*, 10 Ala. 348. In like manner equal partition of lands binds an infant. *Bavington v. Clark*, 2 Penn. St. 115; *Commonwealth v. Hantz*, id. 333. The binding effect of proceedings in partition in Pennsylvania,

where a purpart is accepted by the guardian, depends upon statutes. *Gilbach's appeal*, 8 S. & R. 205.

(*p*) *Holt*, C. J., *Williams v. Harrison*, Carth. 161; *Crosse v. Androes*, 1 Roll. Abr. 2, D. pl. 3.

(*q*) *Cunningham v. Knight*, 1 Barb. 399.

(*r*) *Sheldon v. Newton*, 3 Ohio St. 494; *Thompson v. Lyon*, 20 Mo. 155.

(*s*) See *Stone v. Withpool*, Latch, 21; *Bullock v. Babcock*, 3 Wend. 391; *Hanks v. Deal*, 3 McCord, 257; *Green v. Sperry*, 16 Vt. 390; *Lewis v. Littlefield*, 15 Me. 233; *Hartfield v. Roper*, 21 Wend. 615, 620; *Brown v. Maxwell*, 6 Hill (N. Y.), 592, 594; *Homer v. Thwing*, 3 Pick. 492; *School Dist. v. Bragdon*, 3 Foster (N. H.), 516; *Walker v. Davis*, 1 Gray, 506. He is even liable for his own torts, though he act by his father's command, *Humphrey v. Douglass*, 10 Vt. 71, or through the agency of a third person, *Sikes v. Johnson*, 16 Mass. 389.

(*ss*) *Robbins v. Mount*, 4 Rob. 553.

(*t*) *Hanks v. Deal*, 3 McCord, 257; *Shaw v. Coffin*, 58 Me. 254, 256; *contra*, *Ray v. Tubbs*, 50 Vt. 688.

tort or fraud consists in a breach of his contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract merely by a change in the form of the action, which the law does not permit. (u)¹ But where the tort, though connected by circumstances with the contract, is still distinguishable from it, there he is liable. (x) As if he hires a horse for an unnecessary ride he is not liable for the hire, but if in the course of the ride he wilfully abuses and injures the * horse, he is liable for the tort. (v)² And if he should * 317 sell the horse, trover would lie, nor would his infancy be

(u) See *West v. Moore*, 14 Vt. 447; *Brown v. Durham*, 1 Root, 273; and *Morrill v. Aden*, 19 Vt. 505, that infancy is a bar to an action founded on a false and fraudulent warranty. But *contra*, *Word v. Vance*, 1 Nott & McC. 197; *Peigne v. Sutcliffe*, 4 McCord, 387; *The People v. Kendall*, 25 Wend. 399; *Jennings v. Rundall*, 8 T. R. 337; *Gilson v. Spear*, 38 Vt. 311.

(v) *Campbell v. Stakes*, 2 Wend. 137.

And so he will be liable in trover if he drive the horse further, or on a different route from that for which he had engaged him. *Homer v. Thwing*, 3 Pick. 492. Approved in *Green v. Sperry*, 16 Vt. 390; *Towne v. Wiley*, 23 Vt. 353. And see *Vasse v. Smith*, 6 Cranch, 226. But see *Witt v. Welsh*, 6 Watts, 9; *Penrose v. Curren*, 3 Rawle, 351; 1 Am. Lead. Cas. 116, 119 (1st ed.); 10 Am. Jur. 98; 11 id. 69; 20 id. 264.

¹ That infancy is a bar to an action for false and fraudulent representations by a vendor or pledger as to his ownership of property sold or pledged, see *Doran v. Smith*, 49 Vt. 353, and 17 Am. Law Reg. N. S. 42, and the elaborate note of E. H. Bennett in the latter, at p. 44. — K.

² But not for the failure to drive the horse skilfully. *Eaton v. Hill*, 50 N. H. 235. — K.

(x) See *Craig v. Van Bebber* (100 Mo. 569), 13 S. W. 906, 18 Am. St. Rep. 569, 729 note; *Churchill v. White*, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; *Watson v. Wrightsman*, 26 Ind. App. 437, 59 N. E. 1064; *McCabe v. O'Connor*, 38 N. Y. S. 572, 4 App. Div. 354. An infant is liable for circulating a libel: *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; and doubtless, also for malicious prosecution. *Ross v. Hixon* (46 Kans. 550), 26 Am. St. Rep. 123, 132. The degree of care and judgment required of immature infants is not the same as in the case of adult persons; and in such matters as the careless use of fire-arms it is a question of fact for the jury whether the infant is chargeable with negligence. *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87; *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; *Chaddock v. Tabor*, 115 Mich. 27, 72 N. W. 1093; *Young v. Muhling*, 63 N. Y. S. 181, 48 App. Div. 617; *Lowery v. Cate*, 108 Tenn. , 64 S. W. 1068. The same principle often permits a minor to recover for

personal injuries where an adult would be defeated because of his contributory negligence. See *e.g.* *Smith v. Pittsburgh & W. Ry. Co.*, 90 Fed. 783; *Briggs v. Consolidated Barb-Wire Co.*, 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655; *Westbrook v. Mobile & Ohio R. Co.* (66 Miss. 560), 14 Am. St. Rep. 587, 590 n.; *Borck v. Michigan Bolt & Nut Works*, 111 Mich. 129, 69 N. W. 254; *Lehman v. Eureka Iron & Steel Works*, 114 Mich. 260, 72 N. W. 183; *Allen v. Jakel*, 115 Mich. 484, 73 N. W. 555; *Henderson v. Detroit Citizens' St. Ry. Co.*, 116 Mich. 368, 74 N. W. 525; *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855. But an infant cannot, any more than an adult, shift upon another the consequences of his own wrongdoing, trespass, or negligence. *McGuinness v. Butler*, 159 Mass. 233, 34 N. E. 259; *Gay v. Essex Electric St. Ry. Co.*, 159 Mass. 238, 34 N. E. 186, 38 Am. St. Rep. 415, 21 L. R. A. 448; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831; *Fort Worth & Denver City R. Co. v. Robertson (Tex.)*, 14 L. R. A. 781 and note.

a good defence. Nor need this tort or fraud be subsequent to the contract. Thus, in the case of a bond given by an infant and received by the obligee in reliance upon his false and fraudulent representations of his being of full age, the bond cannot be enforced against him. (w) But as soon as the infant makes and delivers it, he is guilty of a fraud, for which an action may at once be maintained for any loss sustained. (x) As long as the bond

(w) *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Brown v. McCune*, 5 Sandf. 224. Neither will his warrant of attorney to confess judgment bind him, and the court cannot make it good, although there be fraud in the infant. *Saunderson v. Marr*, 1 H. Bl. 75. See also *Burley v. Russell*, 10 N. H. 184; *Stoolfoos v. Jenkins*, 12 S. & R. 399.

(x) *Fitts v. Hall*, 9 N. H. 441 (overruling *Johnson v. Pie*, 1 Lev. 169). Com. Dig. *Action on the Case for Deceit*, A. 10; 2 Kent Com. 241, n. (c); *Reeves' Dom. Rel.* 259. — And in *Wallace v. Morss*, 5 Hill (N. Y.), 391, an infant who had fraudulently obtained goods upon credit, not intending to pay for them, was held liable in an action for the tort. But see *contra*, *Brown v. McCune*, 5 Sandf. 224; *Price v. Hewett*, 18 E. L. & E. 522; s. c. 8 Exch. 146. The case of *Fitts v. Hall*, *supra*, is decidedly condemned in 1 Am. Lead. Cas. pp. 117, 118, where the learned editors say: "This decision, which directly overrules *Johnson v. Pie*, 1 Lev. 169, is clearly unsound; the representation by itself was not actionable, for it was not an injury; and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant." In the case referred to, *Parker, C. J.*, says: "But *Johnson v. Pie*, 1 Lev. 169, was 'case, for that the defendant being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100, and so he had cheated the plaintiff by this false affirmation.' After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. *Kelynge* and *Wyndham* held that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, &c., for there is a fact done. *Troysden* doubted, for that infants are chargeable for trespasses, *Dyer*, 105; and so, if he cheat with false dice, &c. The report in *Levinz* states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judg-

ment was arrested. If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron *Comyns*, a high authority, seems to have taken no notice of this case in his *Digest*, 'Action on the case for Deceit,' but lays down the rule that 'if a man affirms himself of full age when he is an infant, and thereby procures money, to be lent to him upon mortgage,' he is liable for the deceit; for which he cites 1 Sid. 183; Com. Dig. *Action*, &c. A. 10. This seems the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds (2 Kent, Com. 197), as for slander (*Hodsdon v. Grissel*, Noy, 129), and goods converted (auth. *ante*), there is no sound reason that occurs to us why an infant should not be chargeable in damages for a fraudulent misrepresentation whereby another has received damage." But it is believed that the true ground of the decision in *Fitts v. Hall* was mistaken in the Am. Lead. Cases, the learned authors being misled perhaps by the marginal note, in which it is said that "An infant is answerable for a fraudulent representation and deceit, which is not connected with the subject-matter of a contract, but by which the other party is induced to enter into one with him, if he afterwards avoids the contract by reason of his infancy." Such may have been the case before the court; but the principle to be deduced from the decision is, that a fraudulent misrepresentation, whereby money or goods are obtained by an infant, is itself an actionable injury. It is stated in *Bac. Abr. Infancy & Age* (I.), 3: "If an infant without any contract wilfully takes away the goods of another, trover lies against him. Also it is said, that if he take the goods under pretence that he is of full age, trover lies, because it is a wilful and fraudulent trespass." So an infant is liable for a fraudulent execution of a trust confided to him. *Loop v. Loop*, 1 Vt. 177.

runs, * it is not clear that he will not pay it; and this * 318 uncertainty should perhaps reduce the damages to a nominal amount. But when he refuses to pay, and avoids the bond, by this refusal he gives no new cause of action, but now in the action grounded upon the original tort, full damages may be given. It might be held, however, that before any action could be maintained for the fraud in making such a bond, either he must have refused payment, or else the bond should be returned to him; and then the plaintiff would be entitled to recover the full amount of the bond. And if goods were sold to an infant in reliance upon his fraudulent representations that he was of full age, the seller may reclaim them, certainly on his refusal to pay, if not before, on the ground that he had never parted with his property. (y) ¹ (x)

(y) *Badger v. Phinney*, 15 Mass. 359; *Mills v. Graham*, 4 B. & P. 140, per *Mansfield*, C. J.; *Furnes v. Smith*, 1 Roll. Abr. 530, C. pl. 3. It has been suggested that the mere silence of the infant as to his age, knowing that the other party believed him an adult, would be a sufficient ground to enable the other party to reclaim the goods so parted with. See 20 Am. Jur. 265. But in *Stikeman v.*

Dawson, 1 De Gex & S. 90, it was held that in the absence of any positive misrepresentation, the mere omission of the infant to disclose his minority was not a sufficient fraud to invalidate the contract. So his note is voidable, although the payee did not know of his infancy, and although he was carrying on trade as an adult. *Van Winkle v. Ketcham*, 3 Caines, 323.

¹ In accord with *Fitts v. Hall*, 9 N. H. 441, it has been held that an infant is liable in tort for fraudulent misrepresentations as to his age. *Rice v. Boyer*, 108 Ind. 472; *Ferguson v. Bobo*, 54 Miss. 121, 129; *Yeager v. Knight*, 60 Miss. 730; *Eckstein v. Frank*, 1 Daly, 334. And see *McKamy v. Cooper*, 81 Ga. 679. A contrary decision is *Nash v. Jewett*, 61 Vt. 501.

In Kansas there is a statutory enactment providing that an infant cannot avoid contracts made with one who from the infant's misrepresentations, or from his having engaged in business as an adult, had good reason to believe him capable of contracting. *Dillon v. Burnham*, 43 Kan. 77. And there is a somewhat similar statute in Iowa. See *Jaques v. Sax*, 39 Iowa, 367.

Concealment or misrepresentation of his age will not estop a minor either in law or in equity from avoiding contracts made with him on the supposition that he was of full age. *Bartlett v. Wells*, 1 B. & S. 836; *DeRoo v. Foster*, 12 C. B. N. s. 272; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Sims v. Everhardt*, 102 U. S. 300; *Wieland v. Kobick*, 110 Ill. 16 (cf. *Davidson v. Young*, 38 Ill. 145, 150); *Alvey v. Reed*, 115 Ind. 148; *Baker v. Stone*, 136 Mass. 405; *Conrad v. Lane*, 26 Minn. 389; *Brantley v. Wolf*, 60 Miss. 420; *Burley v. Russell*, 10 N. H. 184; *Studwell v. Shapter*, 54 N. Y. 249; *Whitcomb v. Joslyn*, 51 Vt. 79.

In a few cases, however, it has been held that if an infant entraps an adult into buying land from a third person, to which the infant has a secret title, he will be estopped from asserting it. *Ferguson v. Bobo*, 54 Miss. 121; *Galbraith v. Lunsford*, 87 Tenn. 89. See also *Telegraph Co. v. Davenport*, 97 U. S. 369; *Bull v. Sevier*, 88 Ky. 515. And this doctrine is defended in *Bigelow on Estoppel* (5th ed.), p. 606, as avoiding the circuity of allowing a recovery by the infant and putting the adult to a cross-action for the tortious misrepresentation.

If an adult is led to make a contract with an infant by fraudulent misrepresentations of his age by the infant, the adult may avoid the contract on the ground of fraud. *Lemprière v. Lange*, 12 Ch. D. 675. — W.

(x) By the weight of authority one who sells goods to an infant cannot sue him in trover for their conversion because he has

obtained them by misrepresenting his age, and such misrepresentation does not estop the infant. See the older decisions re-

If he allows a person to buy his property, in good faith on the part of the purchaser, and without informing the purchaser that he is an infant, it has been intimated that he cannot recover his property from the purchaser. (z) The reasons for this view are

not satisfactory, and the doctrine is denied in another case

* 319 in the same State. (a) * When goods not necessities are sold to an infant, without fraudulent representations by him, with a knowledge by the seller of his infancy, and the infant refuses to pay for them, and also refuses to return the goods, although they are within his possession and control, the refusal of the infant to deliver them seems to be a tort wholly independent of the contract, on which trover may be maintained. (b)

* 320 It seems to be admitted that if the infant has received the goods and paid for them, he cannot avoid the contract and recover the money paid, without redelivering the goods. (c)

OF THE EFFECT OF AN INFANT'S AVOIDANCE OF HIS CONTRACT.

Every executory contract may be avoided by an infant, and then the adult dealing with him is relieved from his part of the contract; as if the contract were for the sale of a horse, by the infant,

(z) *Hall v. Timmons*, 2 Rich. Eq. 120.

(a) *Norris v. Wait*, 2 Rich. Eq. 148.

And see *Buchanan v. Hubbard*, 96 Ind. 1.

(b) See *Reeve* on Domestic Relations, 244. *Vasse v. Smith*, 6 Cranch, 226, rests upon similar principles. And see *Walker v. Davis*, 1 Gray, 506. We think that *Badger v. Phinney*, 15 Mass. 359,

and *Fitts v. Hall*, 9 N. H. 441, imply similar principles.

(c) *Holmes v. Blogg*, 8 Taunt. 508; *Bailey v. Barnberger*, 11 B. Mon. 113; *Smith v. Evans*, 5 Humph. 70; *Cummings v. Powell*, 8 Tex. 80. And see *Harney v. Owen*, 4 Blackf. 337; *Weeks v. Leighton*, 5 N. H. 343; *Medbury v. Watrous*, 7 Hill (N. Y.), 110.

viewed in *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 78 Am. St. Rep. 510, 49 L. R. A. 560; *Harrison v. Burns*, 84 Iowa, 446, 51 N. W. 165; *Sewell v. Sewell* (Ky.), 18 S. W. 162; *Wilson v. Wilson* (Ky.), 50 S. W. 260; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040; *Johnson v. Clark*, 51 N. Y. S. 238, 23 Misc. Rep. 346; *Carolina Interstate Building Ass'n v. Black*, 119 N. C. 323, 25 S. E. 975; *New York Building Co. v. Fisher*, 45 N. Y. S. 795, 48 id. 152; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176. *Contra*, *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Neff v. Landis*, 110 Penn. St. 204. So, also, in general an infant cannot

create an estoppel against himself or make a binding election; but as a court of equity may elect for him, he may be bound by an equitable estoppel. *Hobbs v. Nashville, &c. Ry. Co.*, 122 Ala. 602, 26 So. 139; *Blakeslee v. Sincepaugh*, 71 Hun (N. Y.), 412, 24 N. Y. S. 947; *Marx v. Clisby* (Ala.), 30 So. 517. See *In re Sefton*, [1893] 2 Ch. 378; *Norris v. Wait* (2 Rich (S. C.), 148), 44 Am. Dec. 283 and note; *Conrad v. Lane* (26 Minn. 389), 37 Am. Dec. 412 and note; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 266; *Pemberton Building Ass'n v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280.

and the infant refuses to deliver the horse, the adult of course may refuse to pay the price. But if it be executed on the part of the adult,—as, for instance, by the payment in advance for the horse,—and the infant then annuls the contract, and refuses to deliver the horse, the rights of the other party are not so certain. (d) If, previous to the contract, the infant fraudulently represented himself as of age, we have seen that for this fraud he may be answerable. But, if there were no such representations, it is not certain that the adult party has any remedy. He cannot bring trover for the horse, for it was never his; nor case, unless he can found his action upon a wrong independent of the contract; we should say, however, he can now recover the money on the ground that the entire avoidance of the sale has left the infant in possession of money that belongs only to the adult. If the infant disaffirms a sale that he has made, and reclaims the property he sold, it seems now quite well settled that he must return the purchase-money. (e)¹ (x)

(d) See *Shaw v. Boyd*, 5 S. & R. 309; *N. H.* 280; *Heath v. West*, 28 id. 101. *Crymes v. Day*, 1 Bailey, 320; *Jones v. Todd*, 2 J. J. Marsh. 361, 20 Am. Jur. 260. So if the indorsee of an infant payee is paid, the infant cannot avoid his indorsement, because he cannot restore the maker of the bill or note to the same condition as before. See *Dulty v. Brownfield*, 1 Barr, 497; *Willis v. Twambly*, 13 Mass. 204; *Nightingale v. Withington*, 15 Mass. 272.

(e) *Badger v. Phinney*, 15 Mass. 363; *Hubbard v. Cummings*, 1 Greenl. 13; *Smith v. Evans*, 5 Humph. 70; *Farr v. Sumner*, 12 Vt. 28. See also *Taft & Co. v. Pike*, 14 Vt. 405; *Carr v. Clough*, 26

¹ It is generally admitted that an infant may avoid his contract, though executed or partly executed, and recover what he has given. On principle there should be no difference whether the infant has given and seeks to recover money or goods, or whether the money was paid in advance or not. An early *dictum* of Lord Mansfield has, however, led to some confusion in the law as to recovering money. In *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, he is reported as saying: "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." This was approved and followed in *Holmes v. Blogg*, 8 Taunt. 508; s. c. 2 Moore, 552; *Wilson v. Kearsse*, Peake Add. Cas. 196, and *Ex parte Taylor*, 8 DeG. M. & G. 254. But inconsistent decisions were made in *Corpe v. Overton*, 10 Bing. 252, and in *Everett v. Wilkins*, 29 L. T. 846. In this country also the later cases allow recovery of money paid by an infant, whether paid as an advance, as a gift, or in present exchange for goods, at least if the goods are returned. *Robinson v. Weeks*, 56 Me. 102; *Holt v. Holt*, 59 Me. 464; *McCarthy v. Henderson*, 138 Mass. 310; *Ruchizky v. DeHaven*, 97 Pa. 202; *Shurtleff v. Millard*, 12 R. I. 272, and cases cited below.

There is much conflict of authority as to how far it is necessary for an infant on avoiding a contract to return what he has received under it as a condition of recovering what he has given.

It has been held that an infant cannot recover what he has given or paid without restoring or offering to restore what he has received, in *Bailey v. Barnberger*, 11 B. Mon. 113, 115; *Bartholomew v. Finnemore*, 17 Barb. 428; *Crummey v. Mills*, 40 Hun, 370 (cf. *Green v. Green*, 69 N. Y. 553); *Kilgore v. Jordan*, 17 Tex. 341; *Bingham v. Barley*, 55 Tex. 281; *Taft v. Pike*, 14 Vt. 405 (cf. *Price v. Furman*, 27

(x) In New York it is held that, on disaffirmance after majority of a purchase of chattels made by an infant, he must return the consideration, if he has it, and

If, during infancy, he has destroyed or parted with the property he purchased before a demand was made upon him for it sub-

Vt. 268; *Whitcomb v. Joslyn*, 51 Vt. 79). And if what he has received cannot be restored, or can only be restored in part or in an imperfect condition, he can only recover what he has paid or given subject to a deduction of the value of what he has received and does not restore. *Heath v. Stevens*, 48 N. H. 251; *Kimball v. Bruce*, 58 N. H. 327; *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408; *City Savings Bank v. Whittle*, 63 N. H. 587. But these decisions are not generally accepted to their full extent. And if an infant has lost, wasted, or destroyed what he received, he is usually allowed to recover what he gave without deduction. *Manning v. Clarkson*, 26 Ala. 446; *St. Louis, &c. Ry. v. Higgins*, 44 Ark. 293; *Corey v. Burton*, 32 Mich. 30; *Miller v. Smith*, 26 Minn. 248; *Craig v. Van Bebbler*, 100 Mo. 584; *Green v. Green*, 69 N. Y. 553; *Lemmon v. Beeman*, 45 Ohio St. 505; *Shurtleff v. Millard*, 12 R. I. 272; *Price v. Furman*, 27 Vt. 268; *Whitcomb v. Joslyn*, 51 Vt. 79; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; *Gillespie v. Bailey*, 12 W. Va. 70, 92.

Indeed, if, as generally admitted, an infant's disaffirmance of his contract makes it void, it is difficult to resist the conclusion that he may always recover what he has given without returning or tendering what he has received, even though it is within his power to do so. And this is supported by much authority. *Eureka Co. v. Edwards*, 71 Ala. 248, 256; *Stull v. Harris*, 51 Ark. 294; *Shuford v. Alexander*, 74 Ga. 293; *White v. Branch*, 51 Ind. 210; *Clark v. Van Court*, 100 Ind. 113; *Shirk v. Shultz*, 113 Ind. 571; *Chandler v. Simmons*, 97 Mass. 508, 514; *Walsh v. Young*, 110 Mass. 396. The adult has then a right to demand the return of what he gave, if it is still in the possession of the infant, and may recover in trover or other appropriate action. *Stull v. Harris*, 51 Ark. 294; *Strain v. Wright*, 7 Ga. 568; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571; *Walker v. Davis*, 1 Gray, 506; *Fitts v. Hall*, 9 N. H. 441; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Nichol v. Steger*, 6 Lea, 393; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340.

But if it is no longer in the infant's possession, the adult is without remedy. *St. Louis, &c. Ry. v. Higgins*, 44 Ark. 293; *Dill v. Bowen*, 54 Ind. 204; *Vallandingham v. Johnson*, 85 Ky. 288; *Bartlett v. Drake*, 100 Mass. 176; *Corey v. Burton*, 32 Mich. 30; *Dawson v. Helmes*, 30 Minn. 107, 113; *Green v. Green*, 69 N. Y. 553.

It is frequently laid down that if an infant goes into equity to avoid a transaction, he will be granted relief only on the condition of restoring what he has received or its value. *Eureka Co. v. Edwards*, 71 Ala. 248, 256; *Bozeman v. Browning*, 31 Ark. 364; *Bryant v. Pottinger*, 6 Bush, 473; *Hillyer v. Bennett*, 3 Edw. Ch. 222, 225; *Folts v. Ferguson*, 77 Tex. 301. But the prevailing view is that this rule does not apply when the infant no longer has the consideration. *Eureka Co. v. Edwards*, 71 Ala. 248; *Stull v. Harris*, 51 Ark. 294; *Reynolds v. McCurry*, 100 Ill. 356; *Brandon v. Brown*, 106 Ill. 519; *Brantley v. Wolf*, 60 Miss. 420; *Bedinger v. Wharton*, 27 Gratt. 857. — W.

also account for their deterioration or injury. *Gray v. Lessington*, 2 Bosw. (N. Y.) 257; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275; *Wheeler & Wilson Manuf. Co. v. Jacobs*, 21 N. Y. S. 1006. See *Sanger v. Hibbard* (Ind. Tex.), 53 S. W. 330; *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274.

In Massachusetts and other States, the general rule is that, on avoiding the contract, the minor need not put the other party *in statu quo*, or return the consideration received; and this appears to be now the prevailing rule in other States. *Dubé v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 18 Am. St. Rep. 228, 6 L. R. A. 146; *Morse v. Ely*, 154 Mass.

458, 28 N. E. 577; *White v. New Bedford Cotton-Waste Corp.*, 178 Mass. 20, 59 N. E. 642. See *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569 and note; *Price v. Blankenship*, 144 Mo. 203, 48 S. W. 1123; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *MacGreal v. Taylor*, 167 U. S. 688, 17 S. C. 961, 42 L. Ed. 326; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040; *Featherstone v. Betlejewski*, 75 Ill. App. 59; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9; *Hobbs v. Nashville, &c. Ry. Co.*, 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103; *Bullock v. Sprowle*, 93 Texas, 188, 54 S. W. 661, 77 Am. St. Rep. 849; *Lane v. Dayton Coal and Iron Co.*, 101

sequently to his disaffirmance, the seller, as we have said, may be remediless; unless he does this in such a way, or * under such circumstances, as to amount to a tort; but if * 322 he destroys or disposes of the property after coming of age, this must be regarded as a confirmation of the contract. (f) And it has been held that an infant can rescind his purchase and recover the price he paid, only when he is ready to return the thing purchased; nor do we think the rule would be unjust to the infant if it did not permit him to rescind his purchase, unless he was both willing and able to return the thing purchased in substantially as good a condition as when he purchased it. (ff)

If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud.¹ Whether an infant who has engaged to labor for a certain period, and, after some part of the work is performed, rescinds the contract, can recover for the work he has done, has been differently decided. (g) The principle upon which the rule

(f) *Cheshire v. Barrett*, 4 McCord, 241; *Deason v. Boyd*, 1 Dana, 45; *Lawson v. Lovejoy*, 8 Greenl. 405.

(ff) *Riley v. Mallory*, 33 Conn. 201.

See also *Bryant v. Pottinger*, 6 Bush, 473; *Kerr v. Bell*, 44 Mo. 120; *Middleton v. Hoge*, 5 Bush, 478.

(g) See note (l), *supra*, p. * 315.

¹ This is probably not law. See note 1, *supra*. — W.

Tenn. 581, 48 S. W. 1094; *Jennings v. Hare*, 47 S. C. 279, 27 S. E. 198; *Whyte v. Rosencrantz*, 123 Cal. 634, 56 Pac. 436; *Napier v. Chappell* (Ky.), 62 S. W. 21; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350; *Donath v. Germania Land Co.*, 56 N. Y. S. 313, 25 Misc. Rep. 641; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88; *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *O'Connor v. Vineyard* (Tex. Civ. App.), 43 S. W. 55. Clearly restitution is not required when the thing itself has been consumed or has ceased to exist. *MacGreal v. Taylor*, 167 U. S. 688, 17 S. Ct. 961, 42 L. Ed. 326. An infant can recover his wages in full, though he has contracted for and received cattle from his employer on account thereof. *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577. So money paid to an infant for his property and spent by him need not be refunded by him upon rescission before reaching full age. *Ibid.*; see *Petrie v. Williams*, 68 Hun, 589; *Stull v. Harris*, 51 Ark. 294; *Dickerson v. Gordon*, 5 N. Y. S. 310; *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, *id.* 408. And an

infant who rescinds a sale of his horse and tenders the price received, need not again tender it even to a *bona fide* purchaser, in order to recover the horse or its value. *Downing v. Stone*, 47 Mo. App. 144; see *Searcy v. Hunter*, 81 Texas, 644. But when the contract has been executed, and is beneficial to the infant, he cannot, according to some cases, disaffirm without putting the other party in *statu quo*. *White v. New Bedford Cotton-Waste Corp.*, 178 Mass. 20, 59 N. E. 649.

In England, an infant's mortgage of land is void under the Infants Relief Act, 1874; his purchase and mortgage of land are distinct transactions, so that he can repudiate one and not the other. *Thurstun v. Nottingham P. B. Building Society*, [1902] 1 Ch. 1. In such case, in Massachusetts, when the mortgage is given for the purchase money and is made at the same time as the deed, they are not distinct transactions, and the infant cannot, after majority, retain and convey the land without ratifying the mortgage. *Ready v. Pinkham*, 181 Mass. , 63 N. E. 887.

is founded that forbids the infant's recovery of money advanced by him on a contract which he has rescinded, would appear to lead to the conclusion that he could not recover for the work he had done; but the weight of authority seems to be the other way. As to the time of an infant's disaffirmance of his contract, it may be said, in general, that he cannot avoid a sale of lands, conclusively, until of full age, (*h*) although he may enter while under age, and take and hold the profits. (*i*) The disaffirmance may be by any appropriate legal process, or by any act on his part showing conclusively his purpose of annulling the sale. Contracts which relate only to the person or to personal property may be avoided at any time, and by any act clearly manifesting this purpose. (*j*) Thus he may avoid a sale, and his guardian may bring trover for the chattel sold. (*k*) And this right may be exercised against all equities of purchasers from the grantee, or other persons. (*l*)

An infant stands on the same footing as an adult, in respect to his rights to reclaim money on a failure of consideration, or because obtained by fraud, or to rescind contracts for good cause.

OF RATIFICATION.

As the liability of the infant is defeated by the law, for his protection, therefore, as we have already seen, when he is of full age, he may, if he pleases, confirm and ratify a contract entered into by him during infancy, and this he may do by parol. (*m*)

(*h*) *Stafford v. Roof*, 9 Cowen, 626; *Bool v. Mix*, 17 Wend. 120; *Matthewson v. Johnson*, 1 Hoff. Ch. 560; *Shipman v. Horton*, 17 Conn. 481; *Cummings v. Powell*, 8 Tex. 80. See also *ante*, p. *294, note (*j*).

(*i*) *Stafford v. Roof*, 9 Cowen, 626.

(*j*) See *supra*, note (*h*). For a *dictum* to the contrary, see *Boody v. McKenney*, 23 Me. 517. See also *Farr v. Sumner*, 12 Vt. 28.

(*k*) See cases *supra*, and *Shipman v. Horton*, 17 Conn. 481; *Carr v. Clough*, 6 Foster (N. H.), 280. See also *Cummings v. Powell*, 8 Tex. 80.

(*l*) *Harrod v. Myers*, 21 Ark. 592; *Howard v. Simpkins*, 70 Ga. 322; *Buchanan v. Hubbard*, 96 Ind. 1; *Jenkins v. Jenkins*, 12 Iowa, 195, 200; *Myers v. Sanders*, 7 Dana, 506; *Hill v. Anderson*, 5 Sm. & M. 216; *Vallandigham v. Johnson*, 85 Ky. 288; *Brantley v. Wolf*, 60

Miss. 420; *McMorris v. Webb*, 17 S. C. 558; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329.

(*m*) In England, after stat. 9 Geo. IV. c. 14, § 5, it became necessary that the new promise or ratification should be in writing, and signed by the party to be charged thereby. And any written instrument signed by the party, which in an adult would be an adoption or ratification of an act done by one acting as agent, was held sufficient. *Harris v. Wall*, 1 Exch. 122; *Hartley v. Wharton*, 11 A. & E. 934. But see *Mawson v. Blane*, 10 Ex. 206; 26 E. L. & E. 560. See also *Rowe v. Hopwood*, L. R. 4 Q. B. 1; *Maccord v. Osborne*, 1 C. P. D. 568. [The Infants' Relief Act, 37 & 38 Victoria, c. 62, §§ 1, 2, now provides that contracts of infants, except for necessities, and except as specially provided by enabling statutes, shall be void and incapable of ratification.]

But, for this ratification, a mere acknowledgment that the debt existed, or that the contract was made, is not enough. (n) (x) By a well-recognized distinction, while the deed of an infant cannot be avoided except by some act of equal force with the deed, acts insufficient to avoid a deed may suffice to affirm or ratify it. (nn) It need not be a precise and formal promise; but it must be a direct and express confirmation, and *substantially* (though it need

(n) *Robbins v. Eaton*, 10 N. H. 561; *Thrupp v. Fielder*, 2 Esp. 628; *Ordinary v. Wherry*, 1 Bailey, 28; *Benham v. Bishop*, 9 Conn. 330; *Alexander v.*

Hutcheson, 2 Hawks, 535; *Ford v. Phillips*, 1 Pick. 203.

(nn) *Irvine v. Irvine*, 9 Wall. 617.

(x) See *Hilton v. Shepherd*, 92 Me. 160, 42 Atl. 387; *Kincaid v. Kincaid*, 157 N. Y. 715, 53 N. E. 1126, 85 Hun, 141; *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Glover v. Patten*, 165 U. S. 394, 17 S. Ct. 411, 41 L. Ed. 760; *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *Craig v. Van Bebbler* (100 Mo. 584), 18 Am. St. Rep. 569, 706 n.; *Eagan v. Scully*, 51 N. Y. S. 680, 29 App. Div. 617; *New York Building Co. v. Fisher*, 48 N. Y. S. 152, 23 App. Div. 363; *American Freehold M. Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; *Hobbs v. Nashville, etc. Ry. Co.*, 122 Ala. 602, 26 So. 139; *Bresee v. Stanly*, 119 N. C. 278, 25 S. E. 870; *Allen v. Ruddell*, 51 S. C. 366, 29 S. E. 198; *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518; *Treadaway v. Veasey*, 97 Ga. 329, 22 S. E. 915, affirming *Treadaway v. Richards*, 92 Ga. 264. The infant may ratify after majority, though he did not know the legal effect of infancy. *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Bentley v. Greer*, 100 Ga. 35, 27 S. E. 974; *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Kennedy v. Baker*, 159 Penn. St. 146, 28 Atl. 252; *Nanny v. Allen*, 77 Texas, 240; *Clark v. Van Court*, 100 Ind. 113; *Haynes v. Bennett*, 53 Mich. 15; see *In re Hodson*, [1894] 2 Ch. 421. There can be no valid ratification during infancy. *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350. His ratification is a question of fact for the jury. *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908. In strictness it can be established when made after majority, only upon clear and convincing proof, and it must be made with full knowledge of all material facts.

Glidden v. Chamberlin, 167 Mass. 486, 495, 497, 46 N. E. 103.

A judgment affecting an infant's property will not be set aside, when he is not materially injured, and was represented by a guardian *ad litem*. See *Harris v. Brown*, 123 N. C. 419, 31 S. E. 877; *Lowe v. Equitable Mortgage Co.*, 102 Ga. 103, 29 S. E. 148; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Thornton v. Thornton* (Ky.), 64 S. W. 524. See, as to judgments entered against infants and other persons under disability, *Conto v. Silvia*, 170 Mass. 152, 49 N. E. 86; *Neenan v. St. Joseph*, 126 Mo. 89, 28 S. W. 963; *Jewell v. Kirk* (Ky.), 47 S. W. 766; *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095; *Owings v. Hunt*, 53 S. E. 187, 31 S. E. 237; *Fox v. Fee*, 49 N. Y. S. 292, 24 App. Div. 314; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Burnham v. Burnham*, 165 N. Y. 659, 59 N. E. 1119, 62 N. Y. S. 120, 46 App. Div. 513; *Judd v. Gray*, 156 Ind. 278, 59 N. E. 849; *Shelburn v. McCrocklin* (Tex. Civ. App.), 42 S. W. 329; *Manson v. Duncanson*, 166 U. S. 533, 17 S. Ct. 647, 41 L. Ed. 1105; *Kansas City, &c. R. Co. v. Morgan*, 76 Fed. 429, 21 C. C. A. 468; *Fuqua v. Sholem*, 60 Ill. App. 140; *Levystein v. O'Brien*, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707; *Frost v. Frost*, 37 N. Y. S. 18, 15 Misc. Rep. 167; *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; *Taylor v. Cline* (Ky.), 35 S. W. 109; *Hawk v. Harris*, 112 Iowa, 543, 84 N. W. 664, 84 Am. St. Rep. 352; *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47, 43 Pac. 315.

The entry of judgment against an infant who is not represented by a guardian is erroneous, although the suit is defended by his parents' attorney on his behalf. *Johnson v. Waterhouse*, 152 Mass. 585, 26 N. E. 234.

not be *in form*) a promise to pay the debt or fulfil the contract. * 324 tract. (o) It must be made with the deliberate * purpose of assuming a liability from which he knows that he is discharged by law, and under no compulsion ; (p)¹ and to the party

(o) See *Goodsell v. Myers*, 3 Wend. 479 ; *Rogers v. Hurd*, 4 Day, 57 ; *Wilcox v. Roath*, 12 Conn. 550 ; *Bennett v. Collins*, 52 Conn. 1 ; *Hale v. Gerrish*, 8 N. H. 374 ; *Bigelow v. Grannis*, 2 Hill (N. Y.), 120 ; *Willard v. Hewlett*, 19 Wend. 301 ; *Emmons v. Murray*, 16 N. H. 385 ; *Hatch v. Hatch's Est.*, 60 Vt. 160. The cases are well collected in 18 Am. St. Rep. 709. No particular words seem necessary to a ratification, and provided they import a recognition and confirmation of his promise, they need not be a direct promise to pay. *Whitney v. Dutch*, 14 Mass. 460, *Parker, C. J.* ; *Hale v. Gerrish*, 8 N. H. 376 ; as "I have not the money now, but when I return from my voyage I will settle with you ;" and "I owe you, and will pay you when I return," have been held a sufficient ratification. *Martin v. Mayo*, 10 Mass. 137 ; also these words, "I will pay it (the note) as soon as I can make it, but not this year. I understand the holder is about to sue it, but she had better not." *Bobo v. Hansel*, 2 Bailey, 114. So a promise to endeavor to procure the money and send it to the creditor is sufficient. *Whitney v. Dutch*, 15 Mass. 457 ; and where a minor after coming of age wrote to the plaintiff, "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time," this was held a sufficient ratification. *Hartley v. Wharton*, 11 A. & E. 934. See also *Harris v. Wall*, 11 Exch. 128, where it is said, that any written instrument signed by the infant, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. A declaration of an intention to pay a note, and authorizing an agent to take it up, has been held a good ratification, although the agent had done nothing about it. *Orvis v. Kimball*, 3 N. H. 314 ; see further, *Best v. Givens*, 3 B. Mon. 72 ; *Taft v. Sergeant*, 18 Barb. 320. On the other hand, an admission by an infant that he owed the debt, and that the adult *would get his pay*, but at the same time refusing to give his note, was considered no ratifi-

cation of the original promise. *Hale v. Gerrish*, 8 N. H. 374 ; and so these words, "I owe the plaintiff, but am unable to pay him, but will endeavor to get my brother bound with me." *Ford v. Phillips*, 1 Pick. 202 ; likewise the language, "I consider your claim as worthy my attention, but not my first attention," adding he would soon give it the attention due it. *Wilcox v. Roath*, 12 Conn. 550. And see *Dunlap v. Hales*, 2 Jones (N. C.), 381 ; and where a minor gave his note, a part of which he subsequently paid, and in his will made after attaining majority, directed the payment of his just debts, this was held no ratification as to the residue of the note. *Smith v. Mayo*, 9 Mass. 62 ; but see *Wright v. Steele*, 2 N. H. 51 ; 20 Am. Jur. 269 ; *Merchants v. Grant*, 2 Edw. Ch. 544. And where a minor received money, which he promised in writing to pay to another when requested, and on being applied to, said it was not convenient to pay then, but expressed an *intention* to do so on his arrival at Honduras ; this was held no ratification of his *promise* to repay, however otherwise he might have been liable. *Jackson v. Mayo*, 11 Mass. 147. Neither is a submission to arbitration, whether he is liable or not, on his note, a ratification. *Benham v. Bishop*, 9 Conn. 330 ; nor is a partial payment any ratification of the remainder. *Thrupp v. Fielder*, 2 Esp. 628 ; *Robbins v. Eaton*, 10 N. H. 561 ; *Hinely v. Margaritz*, 3 Barr. 428. If the ratification is conditional, as, to pay when able, the plaintiff must show the happening of the contingency, but not that the defendant could pay *without inconvenience*. *Thompson v. Lay*, 4 Pick. 48 ; *Cole v. Saxby*, 3 Esp. 159. See also *Davis v. Smith*, 4 Esp. 36 ; *Besford v. Saunders*, 2 H. Bl. 116 ; *Martin v. Mayo*, 10 Mass. 141 n. (c) ; *Everson v. Carpenter*, 17 Wend. 419.

(p) *Ford v. Phillips*, 1 Pick. 202 ; *Smith v. Mayo*, 9 Mass. 64 ; *Curtin v. Patton*, 11 S. & R. 307 ; *Harmer v. Killing*, 5 Esp. 102 ; *Brooke v. Gally*, 2 Atk. 34 ; *Hinely v. Margaritz*, 3 Barr. 428 ; *Sims v. Everhardt*, 102 U. S. 300, 312 ; *Chandler v. Simmons*, 97 Mass. 508, 512 ; *Turner v. Gaither*, 83 N. C. 357, 363.

¹ It has been held, however, in some cases, that knowledge of the legal validity of the defence of infancy is not necessary to make a ratification binding. *Clark v. Van Court*, 100 Ind. 113 ; *Ring v. Jamison*, 66 Mo. 424 ; *Anderson v. Soward*, 40 Ohio St. 325. — W.

himself or his agent. (*q*) It may be conditional, and in that case the party relying upon it must show that the condition has been fulfilled. (*r*) But it seems to be now settled that a ratification will not maintain an action brought before such ratification. (*s*)¹

The mere fact that an infant does not disaffirm a contract after he is of full age is not, necessarily, of itself a confirmation (*t*) (*x*), * but this fact may be made significant by cir- * 325 cumstances; thus, if coupled with a continued possession

(*q*) *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill (N. Y.), 120; *Hoit v. Underhill*, 9 N. H. 439.

(*r*) *Thompson v. Lay*, 4 Pick. 48; *Cole v. Saxby*, 3 Esp. 159. See also *Davis v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116; *Everson v. Carpenter*, 17 Wend. 419.

(*s*) *Thornton v. Illingworth*, 2 B. & C. 824; *Ford v. Phillips*, 1 Pick 202; *Freeman v. Nichols*, 138 Mass. 313; *Hyer v. Hyatt*, 3 Cranch, C. C. 276; *Thing v.*

Libbey, 16 Me. 55; *Merriam v. Wilkins*, 6 N. H. 432 (overruling the earlier case of *Wright v. Steele*, 2 N. H. 51); *Hale v. Gerrish*, 8 N. H. 374; *Goodridge v. Ross*, 6 Met. 487.

(*t*) *Bennett's note to Dublin & Wicklow Railway Co. v. Black*, 16 E. L. & E. 558. But see *post*, notes (*u*) and (*y*). As to the necessity for a positive act of confirmation, see *Ferguson v. Bell*, 17 Mo. 347; *Dunlap v. Hales*, 2 Jones (N. C.), 381. Also *Harris v. Wall*, 1 Exch. 122.

¹ As it is now generally admitted that the action is brought on the original promise, it would seem that the effect of a ratification is simply to meet the defence of infancy, and should therefore be sufficient though made after action brought. *Best v. Givens*, 3 B. Mon. 72; *Slator v. Trimble*, 14 Ir. C. L. 342, 353. — W.

(*x*) Infant's contracts are valid unless he disaffirms within a reasonable time after coming of age. *Viditz v. O'Hagan*, [1899] 2 Ch. 569; *Edwards v. Carter*, [1893] A. C. 360; *Carter v. Silber*, [1891] 3 Ch. 553; *Haywood v. Tidy*, 63 L. T. 679; *Brown v. Harper*, 68 L. T. 488; *McKey v. Hyde Park*, 134 U. S. 84; *Hegler v. Faulkner*, 153 U. S. 109, 38 S. Ct. 653, 38 L. Ed. 653; *Dolph v. Hand*, 156 Penn. St. 91, 27 Atl. 114; *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. 81; *Rapid T. L. Co. v. Sanford* (Texas), 24 S. W. 587; *Johnson v. Storie*, 32 Neb. 610; *Hill v. Nelins*, 86 Ala. 442; *Peacock v. Binder*, 57 N. J. L. 374, 31 Atl. 215; *Englebert v. Troxell*, 40 Neb. 195, 202, 26 L. R. A. 177 and note; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96; *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933; *Kendrick v. Neisz*, 17 Col. 506, 30 Pac. 245; *O'Rourke v. Hall*, 56 N. Y. S. 471, 38 App. Div. 534; *Mission Ridge Land Co. v. Nixon* (Tex. Civ. App.), 43 S. W. 405; *Walker v. Pope*, 101 Ga. 665, 29 S. E. 8; *Barney v. Rutledge*, 104 Mich. 289, 62 N. W. 309. In *Gilkinson v. Miller*, 74 Fed. 131, thirteen years was held not an unreasonable time for disaffirmance of an infant's release of his rights. See *Hegler v. Faulkner*, 153 U. S. 109, 14 S. Ct. 779, 38 L. Ed. 653: In Mississippi, and probably by the weight

of authority, an infant's deed may be avoided at any time after he reaches majority until he is barred by the statute of limitations, when there is nothing more than silence; and silent acquiescence for any period less than the period of limitation is not a bar. *Shipp v. McKee* (Miss.), 32 So. 281.

The rule may be considered settled now that none of an infant's contracts are void on account of nonage, but all of them are voidable merely, with the exception of his contracts for the reasonable value of necessities, and his contracts made in pursuance of statutory authority, which are binding. *Peck v. Cain* (Tex. Civ. App.), 63 S. W. 177. A minor's agreements are valid when they fulfil obligations imposed by law, such as the support of his illegitimate child. *Stowers v. Hollis*, 83 Ky. 544. But bail given by an infant for the defendant in a civil suit is voidable. *Reed v. Lane*, 61 Vt. 481. As to his oath, see *Damron v. Com'th* (Ky.), 61 S. W. 459. An infant cannot appoint an agent: *Holden v. Curry*, 85 Wis. 504, 510; *Burns v. Smith* (Ind.), 64 N. E. 94; *Turner v. Bondalier*, 31 Mo. App. 582; or convey his land without consideration. *Robinson v. Coulter*, 90 Tenn. 705.

An infant cannot bind himself by ac-

and use of the property, or a refusal to redeliver the same, and an assertion of ownership, it may frequently raise, by implication of law, such confirmation, and a promise to pay for the property, especially if either this intention and promise to pay must be presumed, or else a fraud. Indeed any act of ownership, after full age, should have this effect; but it must be unequivocal.

The purchases of an infant may be far more easily ratified than his conveyances of real estate. To affirm the latter some positive act seems to be necessary, and mere acquiescence, or failure to *disaffirm*, although continued beyond a reasonable time, has been adjudged not sufficient to bind the minor. (*u*) But it is held in New York that a continuance of possession and acts of ownership after coming of age, ratify the contract. (*uu*) It has been * 326 held in England that an infant's bond *could not be ratified but by an instrument of equal solemnity. But this has been doubted for strong and we think sufficient reasons. (*v*) Whether his verbal declarations can, in any event, ratify his instrument under seal, may not be certain; but it is quite certain that if, in an instrument under seal, a person recites or refers to a former instrument also under seal, made while he was a minor, this is a ratification of the first. (*w*) Thus, the grant of lands received during infancy, by way of exchange for other lands, has

(*u*) See *Jackson v. Carpenter*, 11 Johns. 539; *Bool v. Mix*, 17 Wend. 120. In *Tucker v. Moreland*, 10 Pet. 58, Mr. Justice *Story* observed: "The mere recognition of the fact that a conveyance has been made, is not, *per se*, proof of a confirmation of it." In *Lessee of Drake v. Ramsay*, 5 Hamm. 251, the court remarked: "In our opinion lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title [of the first purchaser]; but of itself it does not take away the right to avoid *until the Statute of Limitations takes effect*." Affirmed in *Cresinger v. Lessee of Welch*, 15 Ohio, 193. See *Doe v. Abernathy*, 7 Blackf. 442. In *Boody v. McKenney*, 23 Me. 523, *Shepley, J.*, said: "When a person has made a conveyance of real estate during his infancy, and would affirm or disaffirm it after he becomes of age, in such case the mere acquiescence for years to disaffirm it affords no proof of a ratification. There must be some positive

and clear act performed for that purpose." This point was discussed in *Hoyle v. Stowe*, 2 Dev. & B. 320, where it was held that some act of affirmance was clearly necessary, and that if declarations were sufficient they must be clear and unequivocal, and made with a view to ratification. In *Houser v. Reynolds*, 1 Hayw. 143, such declarations were held sufficient. See, however, *Clamorgan v. Lane*, 9 Mo. 446, and note (*y*) below.

(*uu*) *Henry v. Root*, 33 N. Y. 526.

(*v*) Parol ratification was claimed in *Baylis v. Dinely*, 3 M. & Sel. 477. But see, *contra*, *Hoyle v. Stowe*, 2 Dev. & B. 320; *Wheaton v. East*, 5 Yerg. 41; *Houser v. Reynolds*, 1 Hayw. 143; *Scott v. Buchanan*, 2 Humph. 468. But see *Clamorgan v. Lane*, 9 Mo. 446.

(*w*) See *Story v. Johnson*, 2 Y. & Col. 586; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Phillips v. Green*, 5 Monr. 344; *Losey v. Bond*, 94 Ind. 67; *Allen v. Poole*, 54 Miss. 323.

cepting a bill of exchange though given for necessities supplied to him. *In re Soltyskoff*, [1891] 1 Q. B. 413; see 35 Cent. L. J. 203; 12 L. R. A. 859, *Kilgore v. Rich*, 83 Maine, 305. An infant's promis-

sory note, though not enforceable by a *bona fide* holder, may be ratified after majority. *Heady v. Boden*, 4 Ind. App. 475; *Howard v. Simpkins*, 70 Ga. 322 *Baker v. Stone*, 136 Mass. 405.

been held to be a confirmation of the original conveyance. (x) And if a minor receives and retains the proceeds of a sale of real estate, he is estopped from denying the validity of the sale. (xx)

In some cases it has been urged, that even a silent acquiescence for a considerable time by an infant, after arriving at full age, is itself a ratification of his conveyance. (y)¹

(x) *Williams v. Mabee*, 3 Halst. Ch. 500.

(xx) *Pursley v. Hays*, 17 Iowa, 311.

(y) See *Kline v. Beebe*, 6 Conn. 494; *Richardson v. Boright*, 9 Vt. 368, where *Redfield, J.*, said: "In the case of every act of an infant merely voidable, he must disaffirm it on coming of full age, or he will be bound by it." See also *Holmes v. Blogg*, 8 Taunt. 35, *Dallas, J.*; 2 Kent, Com. 238. — In *Wallace v. Lewis*, 4 Harring. (Del.) 75, silence for four years after he became of age was a waiver of an infant's right to disaffirm, and that he could not recover. And see also *Scott v. Buchanan*, 11 Humph. 468. But see *Moore v. Abernathy*, 7 Blackf. 442. So in *Wheaton v. East*, 5 Yerg. 41, it was held that any act of a minor, from which his assent to a deed executed during his minority may be inferred, will operate as a confirmation, and prevent him thereafter from electing to disaffirm it. As to purchases, the law is well settled; and if an infant retains property purchased, whether real or personal, and gives no notice of an intention to disaffirm, for an unreasonable length of time after he arrives at full age, and especially if he uses the property, sells it, or mortgages it, or exercises any unequivocal act of ownership over it, without any notice to the other party of an intention to disaffirm, this is clearly sufficient evidence of a ratification. Leading cases on this subject are *Boyd v. Boyd*, 9 Met. 519; *Boody v. McKenny*, 23 Me. 517; *Hubbard v. Cummings*, 1 Greenl. 11, where this doctrine is applied to the purchase of real estate. Co. Lit. 51 b; *Robbins v. Eaton*, 10 N. H. 561; *Cheshire v. Barrett*, 4 McCord, 241; *Lawson v. Lovejoy*, 8 Greenl. 405 (*Bennett's ed. n.*); *Alexander v. Heriot*, *Bailey, Ch.* 223; *Armfield v. Tate*, 7 Ired. L. 258; *Kitchen v. Lee*, 11 Paige, 107; *Deason v. Boyd*, 1 Dana, 45, *McKamy v. Cooper*, 81 Ga. 679; *Henry v. Root*, 33 N. Y. 526; *Hook v. Donaldson*, 9 Lea, 56; *Langdon v. Clayton*, 76 Mich. 204, 211; *Ellis v. Alford*, 64 Miss. 8; *McClure v. McClure*, 74 Ind. 108. And where an infant, a few

days before he became twenty-one, purchased a note and drew an order on a third person for the payment, but which was not paid, of which he had notice, it was held, in a suit on such order several years afterwards, that his failure to return the note and disaffirm the contract, after he became of age, warranted the inference that he intended to abide by it, and was a sufficient answer to the defence of infancy. *Thomasson v. Boyd*, 13 Ala. 419. In *Delano v. Blake*, 11 Wend. 85, where an infant took the note of a third person in payment for work done, and retained it for eight months after he came of age, and then offered to return it, and demanded payment for his work, it was held, in an action for the work and labor performed by him, that the retaining of the note for such a length of time was a ratification of the contract made during infancy, especially when, in the mean time, the maker of the note had become insolvent, the debt lost, and the offer to return made on the heel of that event. In *Aldrich v. Grimes*, 10 N. H. 194, an infant bought personal property, with a right of return if it was not liked. He kept it two months after he was of full age, and after he had been requested to return it if he did not like it. It was held a confirmation. And see *Smith v. Kelley*, 13 Met. 309; *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 id. 368; *Robbins v. Eaton*, 10 N. H. 562; *Dana v. Coombs*, 6 Greenl. 89; *Hubbard v. Cummings*, 1 id. 11; *Lynde v. Budd*, 2 Paige, 191; *Curtiss v. McDougal*, 26 Ohio St. 66; *Collis v. Day*, 38 Wis. 643; *Uecker v. Köhn*, 21 Neb. 559; *Langdon v. Clayton*, 75 Mich. 204; *Smith v. Henkel*, 81 Va. 524. See also *Biederman v. O'Conner*, 117 Ill. 493; *Knaggs v. Green*, 48 Wis. 601. — Upon the whole it may be said, that an infant's conveyances are not ratified by a bare recognition of the existence of, or a silent acquiescence in his deed, for any period less than the period of statutory limitation. See the cases already cited. *Hastings v. Dollarhide*, 24 Cal. 195.

¹ The solution of this question, as of several others in regard to the law of ratification of infants' contracts, depends largely on the meaning given to the word "voidable"

* 327 * If any act of disaffirmance is necessary to enable an infant after attaining his majority to avoid his conveyance made while * a minor, it is now well settled that the execution of a second deed, which is inconsistent with the former deed, is itself a disaffirmance of the former deed, although the infant had not previously manifested any intention to avoid it and had made no entry upon the premises conveyed. The old rule, requiring such entry before the infant could make another conveyance, has long since been done away. (z) In some of our States, however, a sale of lands can be made only by one in possession; and in that case the infant should enter before making his conveyance.

A question has been raised in relation to ratification by an infant, whether, if the contract be one of those which is declared

(z) *Cresinger v. Welch*, 15 Ohio, 156; *Hoyle v. Stowe*, 2 Dev. & B. 320; *Tucker v. Moreland*, 10 Pet. 53; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 id. 124; *Bagley v. Fletcher*, 44 Ark. 153; *Losey v. Bond*, 94 Ind. 67, 70; *Corbett v. Spencer*, 63 Mich. 731; *Dawson v. Helmes*, 30 Minn. 107; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329. But to constitute a disaffirmance, the second deed must be so inconsistent with the first, that both cannot consistently stand. *Eagle Fire Company v. Lent*, 6 Paige, 635; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

as applied to such contracts. Does it mean that such contracts are good until avoided, or does it mean that they are entirely inoperative till confirmed? If the latter, the conclusion follows that silence or acquiescence can never in itself amount to confirmation, though by adverse possession for the statutory period land conveyed by an infant may be acquired by the grantee. And so it is held in *Sims v. Erhardt*, 102 U. S. 300; *Hill v. Nelms*, 86 Ala. 442; *Stull v. Harris*, 51 Ark. 294; *Hoffert v. Miller*, 86 Ky. 572; *Davis v. Dudley*, 70 Me. 236; *Prout v. Wiley*, 28 Mich. 164; *Tyler v. Gallop Est.*, 68 Mich. 185; *Wallace v. Latham*, 52 Miss. 291; *Huth v. Carondelet, &c. Co.*, 56 Mo. 202; *Green v. Green*, 69 N. Y. 553. (But see *Beardsley v. Hotchkiss*, 96 N. Y. 201); *Gillespie v. Bailey*, 12 W. Va. 70. See also *Durfee v. Abbott*, 61 Mich. 471; *Wilson v. Branch*, 77 Va. 65; *Birch v. Linton*, 78 Va. 584; *Darraugh v. Blackford*, 84 Va. 509.

If, however, an infant's contract or deed is good till avoided, laches on the part of the infant after he has attained majority would naturally bar his rights. This doctrine is supported by *Hastings v. Dollarhide*, 24 Cal. 195; *Kline v. Beebe*, 6 Conn. 494, 506; *Wallace's Lessee v. Lewis*, 4 Harr. 75; *Nathans v. Arkwright*, 66 Ga. 179; *McKamy v. Cooper*, 81 Ga. 679 (statutory); *Keil v. Healey*, 84 Ill. 104; *Tunison v. Chamblin*, 88 Ill. 378 (statutory); *Green v. Wilding*, 59 Iowa, 679 (statutory); *Sims v. Bardoner*, 86 Ind. 87; *Richardson v. Pate*, 93 Ind. 423; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; *O'Brien v. Gaslin*, 20 Neb. 347; *Matherson v. Davis*, 2 Cold. 443, 451; *Ferguson v. Houston, &c. Ry. Co.*, 73 Tex. 344. See also *Eisenmenger v. Murphy*, 42 Minn. 84.

The latter view seems to be more in accord with the nature of other voidable contracts known to the law, and also to be necessarily assumed when it is held that an adult is bound by a bilateral contract entered into with an infant, *Holt v. Ward Clarencieux*, 2 Strange, 937; for unless both parties are bound when the contract is entered into, neither is bound. It is probable that the idea formerly prevailing, and now wholly discredited, that the cause of action was based on the ratification or promise made after maturity, for which the transaction during minority furnished a moral consideration, has done much to confuse the law.

In some cases it is held that an infant's executed contracts are good till avoided, but his executory contracts inoperative till confirmed. *Minock v. Shortridge*, 21 Mich. 304, 315; *Edgerly v. Shaw*, 25 N. H. 514; *State v. Flaisted*, 43 N. H. 413; *Beardsley v. Hotchkiss*, 96 N. Y. 201.—W.

to be not voidable, but void, any ratification could restore it. And contracts by an infant for purposes of trade have been declared absolutely void. But the exact distinction between the void and the voidable contracts of an infant is rather obscure, and the better opinion, as well as the stronger reason, seems to be, as we have already stated, that in reference to its *ratification, no * 329 contract is void; or, in the language of *Parke, B.*, in *Williams v. Moore*, (a) "the promise of an infant is not *void* in any case, unless the infant chooses to plead his infancy." (b)

The rules of the common law concerning infancy are varied in many of our States by statutory provisions. In some of them the ratification must be in writing; but a note or memorandum expressing the intention of ratification is sufficient. (bb)

SECTION VII.

WHO MAY TAKE ADVANTAGE OF AN INFANT'S LIABILITY.

It is a general rule that the disability of infancy is the personal privilege of the infant himself, and no one but himself or his legal representatives can take advantage of it. (c) (x) *There- * 330

(a) 11 M. & W. 256.

(b) The words "void" and "voidable" are often vaguely used when applied to contracts, and the word "void" has been frequently used to denote merely that the contract was not *binding*, and as expressing no opinion whether such contract might or might not be ratified. Thus, in *Conroe v. Birdsall*, 1 Johns. Cas. 127, the marginal note indicates that the court held the contract "void," and the case is so cited in *Mason v. Denison*, 15 Wend. 71; and in 2 Kent, Com. 241; but the language of the court was: "The bond is *voidable*, only at the election of the infant." So in *Curtin v. Patton*, 11 S. & R. 311, Mr. Justice *Duncan*, speaking of an infant's contract of suretyship, calls it in one place "absolutely void," but in the very next line he makes use of such expressions as "confirming," "distinct acts of confirmation," &c., plainly showing that, while calling the contract *void*, he did not mean to deny that it was *susceptible* of ratification, and if so, that it was not "absolutely void," but only voidable, as it has often been held by the same court. *Hinely v.*

Margaritz, 3 Barr, 428. In a similar manner, *Bayley, J.*, in *Thornton v. Illingworth*, 2 B. & C. 824, speaking of an infant's contract of trade, calls it *void*, but the case clearly shows that if the ratification which was shown in the case had been *before* the action was commenced, instead of *after*, the infant would have been bound, a conclusion impossible had the contract been really void. So an infant's acceptance of a bill of exchange has been called "void," but is only voidable, and is susceptible of a ratification. *Gibbs v. Merrill*, 3 Taunt. 307. Another instance occurs in the application of the word "void" to fraudulent contracts, but they are only *voidable*, and if the person defrauded choose to ratify he may do so, and hold the other party. *Ayers v. Hewett*, 19 Me. 281. These instances illustrate the indefinite use of the word "void," and may reconcile the conflicting language of some cases. See also *Arnold v. Richmond Iron Works*, 1 Gray, 434, and *ante*, p. *295, note (u).

(bb) *Stern v. Freeman*, 4 Met. (Ky.) 309.

(c) *Parker v. Baker*, Clarke, Ch. 136;

(x) Infancy is a personal privilege, but after the infant has disaffirmed his con-

tract, any one may take advantage of such disaffirmance. *Peck v. Cain* (Tex. Civ.

fore other parties who contract with an infant are bound by it, although it be voidable by him. Were it otherwise this disability might be of no advantage to him, but the reverse. (*d*) Thus, an infant may sue an adult for a breach of promise of marriage, although no action can be brought against an infant for that cause. (*e*) And an infant may bring an action on a mercantile contract, though none can be brought against him. (*f*) So in

Gullett v. Lumberton, 1 Eng. (Ark.) 109; *Rose v. Daniel*, 3 Brevard, 438; *Voorhees v. Wait*, 3 Green (N. J.), 343; *Trustees v. Anderson*, 63 Ind. 367; *Monaghan v. Agriculture Fire Ins. Co.*, 53 Mich. 238; *Bordentown v. Wallace*, 50 N. J. L. 13, 14; *Beardsley v. Hotchkiss*, 96 N. Y. 201. This privilege extends to the infant's personal representatives. *Smith v. Mayo*, 9 Mass. 62; *Jefford v. Ringgold*, 6 Ala. 544; *Martin v. Mayo*, 10 Mass. 137; *Hussey v. Jewett*, 9 Mass. 100; *Jackson v. Mayo*, 11 Mass. 147; *Parsons v. Hill*, 8 Mo. 135; *Slocum v. Hooker*, 13 Barb. 536, and to his privies in blood, *Bac. Abr. Infancy* (l.), 6; *Austin v. Charlestown Female Seminary*, 8 Met. 196; *Nelson v. Eaton*, 1 Redfield, 498; *Bozeman v. Browning*, 31 Ark. 364; *Illinois, &c. Co. v. Bonner*, 75 Ill. 315; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Veal v. Fortson*, 57 Tex. 482. But not to his assignees, or privies in estate only. *Id.*; *Whittingham's case*, 8 Rep. 43; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Hoyle v. Stowe*, 2 Dev. & B. 323; *Mansfield v. Gordon*, 144 Mass. 168. Nor to a guardian. *Oliver v. Houdlet*, 13 Mass. 237; *Irving v. Crockett*, 4 Ribb. 437. But see *Chandler v. Simmons*, 97 Mass. 508. It is on this ground, connected with others, that parties to negotiable paper cannot take advantage of the infancy of any prior party. *Jones v. Darch*, 4 Price, 300; *Grey v. Cooper*, 3 Dougl. 65; *Nightingale v. Withington*, 15 Mass. 272; *Taylor v. Coker*, 4 Esp. 187; *Dulty v. Brownfield*, 1 Barr. 497.

(*d*) *Boyden v. Boyden*, 9 Met. 519, 521, *Shaw, C. J.*, *McGinn v. Shaffer*, 7 Watts, 412, 414.

(*e*) *Hunt v. Peake*, 5 Cowen, 475; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252; *Willard v. Stone*, 7 Cowen, 22; *Holt v. Ward Clarendieux*, 2 Stra. 937. And the infant may sue for a breach of such promise without averring consent of his or her parent or guardian. *Cannon v. Alsbury*, 1 A. K. Marsh. 76.

(*f*) In *Warwick v. Bruce*, 2 M. & Sel. 205, the defendant on the 12th of October, agreed to sell to the plaintiff, a minor, all the potatoes then growing on three acres of land, at so much per acre, to be dug up and carried away by the plaintiff; and the plaintiff paid £40 to the defendant under the agreement, and dug a part, and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue. It was held that the infant was entitled to recover for this breach of the agreement. *Lord Ellenborough, C. J.*: "It occurred to me at the trial on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid £40, and therefore it was most immediately for his benefit, that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would have been correct; but here the plaintiff was the infant, and sues upon a

App., 63 S. W. 177. See *Craig v. Van Bebber* (100 Mo. 584), 18 Am. St. Rep. 569, 695. A third person may thus take advantage of a plea of infancy made by the infant in the same action. *Shrock v. Croul*, 83 Ind. 243. A guardian cannot ratify an unauthorized sale of the land of his infant ward: *Hobbs v. Nashville, &c. Ry. Co.* 120 Ala. 600, 26 So. 139; *Young v. Downey*, 150 Mo. 317, 51 S. W. 751; see *Page v. Louisville & N. R. Co.*, 129 Ala. 232,

29 So. 676; or bind the ward by his admissions. *White v. Miller*, 158 N. S. 128, 15 S. St. 788, 39 L. Ed. 921. An infant's heirs may disaffirm his contracts if he dies before he is of age, or within the reasonable time allowed for disaffirmance after his majority. *O'Rourke v. Hall*, 56 N. Y. S. 471, 38 App. Div. 534; *Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Harvey v. Briggs*, 68 Miss. 60; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458.

contracts of apprenticeship, or in cases of hiring and service. (*g*) In none of these cases can the adult discharge himself by alleging that there was no consideration for his promise, on the ground that the promise of the infant did not bind him. The mutuality or reciprocity of the contract or obligation is not complete, but it is sufficient to bind the party of adult age to his part of the contract. But if a person of adult age marry one who is under the age of consent (in males fourteen, in females twelve years), such marriage is binding upon neither party; and it is by the rules of the common law in the power of either to disagree when the infant * comes to the age of consent, though not before. (*h*) * 331 But we shall speak of this more fully when treating of the Contract of Marriage.

SECTION VIII.

OF THE MARRIAGE SETTLEMENTS OF AN INFANT.

The power of an infant in respect to marriage settlements has been much discussed. It seems to be determined, that a marriage settlement upon a female infant, and her release of dower in consideration of such settlement, are valid. (*i*) But whether she can bind herself by a settlement of her own estate in contemplation of marriage, seems still to be regarded as an open question. (*j*) It is certain that a female infant may marry; and therefore it might be supposed that a prudent settlement of her property, in view of marriage, would come within the reason of the rule which makes valid the contracts of an infant for necessaries. Of course such a settlement would be within the power of chancery, for correction or avoidance, on the ground of fraud, mistake, or undue influence, and any injurious effect would be prevented. The court always pays due regard to the immature judgment of the infant

contract partly executed by him, which it is clear that he may do. It is certainly for the benefit of infants, where they have given the fair value for any article of produce, that they should have the thing contracted for. And it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage, and I am not aware that this objection has ever been taken since the case in *Strange*."

(*g*) *Eubanks v. Peak*, 2 Bailey, 497.

(*h*) *Bac. Abr. Infancy and Age* (A.).

(*i*) *Drury v. Drury*, 2 Eden, 39; *Earl of Buckinghamshire v. Drury*, 2 Eden, 60; *Wilmot Opinions*, p. 177; *McCarter v. Teller*, 2 Paige, 511.

(*j*) Previous to *Milner v. Harewood*, 18 Ves. 259, the weight of authority seemed to be in favor of her having such power. See *Atherley, Treatise on Marriage Settlements*, pp. 18-45. But in that case Lord *Eldon* held that she was not so bound by such conveyance or agreement to convey as that she might not avoid it on coming of age.

wife; and her disability as an infant is a shield and protection, not a burden and injury. Such settlement is only voidable, and no one but herself can avoid it; she need not, but may affirm or avoid * 332 it when of full age. The * question then occurs, whether she can so disaffirm it after majority, if still married; and it has been said that the preponderance of opinion is that she cannot. (*k*) So whether a male infant may bind himself irrevocably by a marriage settlement of his own estate is not quite certain. (*l*) It is not easy to find any very good reason for distinguishing between the sexes in this particular. We consider this whole subject open for further adjudication.¹ (*x*)

SECTION IX.

INFANT'S LIABILITY WITH RESPECT TO FIXED PROPERTY ACQUIRED BY HIS CONTRACT.

It is of importance to know how the ordinary principles governing the contracts of infants are applied to the case where an interest in property, of a *fixed and permanent nature*, is vested in an infant by means of his contract. Are the duties attendant upon the occupation of fixed property separated therefrom when the occupier is within the privilege of minority? Where the interest devolves by direct operation of law (as upon marriage or by descent), it is clear that the duty is received along with it — *transit terra cum onere*. (*m*) This fundamental maxim thus undergoes no *general* relaxation in favor of infants; its operation is only affected, if at all, when that other maxim, that an infant's contract shall never be his burden, comes in conflict with it.

The question arising here is undoubtedly one of no little * 333 difficulty; but it has been so determined as to reconcile * the

(*k*) Temple v. Hawley, 1 Sandf. Ch. 153.

(*l*) In Slocomb v. Glubb, 2 Bro. Ch. 645, it seems to be the doctrine that a male infant may bar himself by covenants before marriage of his estate by curtesy, and of all right in or to his wife's personal property. And that both male and

female infants can settle their personal estate before marriage, definitively. See Strickland v. Coker, 2 Ch. Cas. 211; and Warburton v. Lytton, cited in Lytton v. Lytton, 4 Bro. Ch. 441.

(*m*) Leeds & Thirsk Railway Co. v. Fearnley, 4 Exch. 26.

¹ There are statutory provisions in some jurisdictions, allowing infants to bind themselves under certain circumstances by marriage settlements. 18 & 19 Victoria, c. 43; Georgia, Code §§ 1784, 2734; Texas, Paschal's Dig. § 4640. — W.

(*x*) See note, in 18 Am. St. Rep. 569, 593, to Craig v. Van Bebber, 100 Mo. 484, 13 S. W. 906.

two principles without impairing either of them. It is held that if one under age take a lease, and enter, and continue in possession after claim of the rent, he, like any other person (and by the same *process* as any other person), (*n*) may be compelled to pay the rent he has contracted to pay. (*o*) Yet he may, if he choose, disclaim at any time, and thereby exonerate himself; (*p*) or at least he may disclaim at any time before the rent day comes, and have relief from liability for the past occupation. (*q*) No necessity obliges him to put off his disclaimer until his majority; for it is common learning that an infant may void matters *in fait*, either within age or full age, (*r*) but matters *of record* (for the reason that when such come in question, his nonage is to be ascertained by inspection of the court, and not by the country) must be avoided during his minority, and not afterwards. Yet when it is said he may avoid during minority, what is to be understood is rather a suspension than an avoidance, — an avoidance, as it were, only *de bene esse*. Upon arriving at full age he may disaffirm that disaffirmance, and revive the original contract. (*s*) In this case the debt incurred by his former occupation under the lease, and the recovery of which he had prevented by disavowing, also revives. Where an interest vests in the infant (as it appears it does in all cases where he accepts a lease or other conveyance of land, or an assignment of a share in permanent stock), no express ratification on coming of age is requisite. The interest, being vested, continues until divested by repudiation, * which may be by parol; and his acquiescence * 334 after majority will be taken, after a reasonable time, as a waiver of his right to disclaim, and an adoption at mature age of the act of his infancy. (*t*) It seems (though the point is still

(*n*) Per *Parke, B.*, *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Exch. 569.

(*o*) *Newton, C. J.*, *Bottiller v. Newport*, 21 H. 6, 31 B., cited and approved by *Parke, B.*, in *Northwestern Railway Co. v. McMichael*, 5 Exch. 126; *Ketsey's case*, Brownl. 120; s. c. under various names, Cro. J. 320, 2 Bulst. 69, Roll. Abr. *Infants*, K.; *Blake v. Concannon*, 4 Ir. Rep. C. L. 323; *Kelly v. Coote*, 5 Ir. C. L. 469. But see *Flexner v. Dickerson*, 72 Ala. 318.

(*p*) *Northwestern Ry. Co. v. McMichael*, 5 Exch. 125.

(*q*) *Ketsey's case*, Cro. J. 320; 1 Platt on Leases, 528, 529; *Lemprière v. Lange*, 12 Ch. D. 675.

(*r*) Co. Lit. 380 b; Bac. Abr. *Infancy and Age* (I.), 7.

(*s*) *Northwestern Ry. Co. v. McMichael*,

5 Exch. 114, 127; with which compare *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Exch. 572, 575, 578. In the former case the law is thus summarily stated in the judgment of the court: "It seems to us to be the sounder principle, that as the estate vests as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority." — See *Bool v. Mix*, 17 Wend. 119, 132, per *Brownson, J.*

(*t*) Bac. Abr. *Infancy and Age* (I.), 8; Com. Dig. *Infants* (C.), 6; *Evelyn v. Chichester*, 3 Burr. 1717; *Lawson v. Love-*

unsettled), that the fact that the rent reserved upon a lease made to an infant is greater than the land is worth, in no respect alters the case; although the contract is now manifestly an injurious one. (*u*)

Even if shares in a railway corporation, or other public company holding land, are personal property, (*v*) the holder of such shares since they acquire a vested interest of a permanent nature, fill a position analogous in this respect to that of occupiers of real estate; and the infant purchaser of a share in such a corporation incurs a liability similar to that of an infant lessee. (*w*) Thus the simple plea of infancy is no defence to an action for calls. (*x*) What limits are to be set to the analogy is undetermined. It cannot be said that the cases which have as yet been adjudicated are authority for extending it to other than stock based, like railroad stock, in some measure upon the possession of land.

There is no principle of law (though such has sometimes been supposed to exist), placing infants on the same footing as other persons whenever they enter into contracts which owe their validity, and the means of their enforcement to *statutes*. In all statutes containing general words, there is an implied or virtual exception in favor of persons whose disability the common law recognizes. (*y*) (*xx*) Thus where a company is incorporated by statute, and by a general clause all shareholders are subjected * 335 * to certain liabilities, and enjoined certain duties; here the same abatement of the rigor of the provision is to be made with regard to infants, lunatics, and *femes covert*, which the common law would make in applying a common-law rule. (*z*)¹

joy, 8 Greenl. 405; Robbins v. Eaton, 10 N. H. 562; Holmes v. Blogg, 8 Taunt. 39, 40, per *Dallas*, J.

(*u*) *Northwestern Ry. Co. v. McMichael*, 5 Exch. 114.

(*v*) *Bligh v. Brent*, 2 Y. & Col. 268; *Bradley v. Holdsworth*, 3 M. & W. 422, 424.

(*w*) In *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Exch. 577, where the point was discussed, *Rolfe*, B., indeed said: "I must say I doubt whether the doctrine as to a lease granted to an infant who enjoys the land demised would apply here, be-

cause this liability rests entirely in contract, and there is no *possession* of anything; all that the party gets is a *right* to a portion of the profits of the undertaking." But see *Leeds & Thirsk Ry. Co. v. Fearnley*, 4 Exch. 26, and especially the judgment of the court as given by Baron *Parke* in *Northwestern Ry. Co. v. McMichael*, 5 Exch. 123.

(*x*) *Birkenhead, Lancashire, & Cheshire Ry. Co. v. Pilcher*, 5 Exch. 121.

(*y*) *Stowell v. Roch*, Plowd. 364.

(*z*) In the *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935, two of the judges,

¹ *Bradford v. French*, 110 Mass. 365, was a decision that an infant mortgagee might make the "demand" necessary under a statute, providing that a mortgagee might

(*xx*) As a judicial sale should be to the highest and best bidder, a contract by an intending purchaser which tends to prevent the sale of an infant's land for its full value is void; and when an infant is

a part owner of land, a contract for its sale as an entirety is illegal altogether, because bad as to the infant. *Clark v. Stanhope* (Ky.), 59 S. W. 856.

The case of an infant whose interest in his land or stock is acquired by marriage or descent is (as we have seen) quite different; for his liability is cast upon him by direct operation of law. (a) So where a minor is held to service in the navy by force of a statute; (b) it is not the contract of enlistment which binds him, but the statutory *duty*. In all cases, "the only criterion is whether the liability is derived from contract." (c) If it be derived from contract the common-law exceptions apply to it; otherwise, not.

Respecting the manner of pleading the defence of infancy (x) in

Lord *Denman* and *Patteson*, J., expressed the opinion that since, by the statute, a shareholder was liable to the company for calls in his character of shareholder, the fact of infancy made no difference. The Court of Exchequer, which had previously refused assent to this doctrine (see *Newry Ry. Co. v. Coombe*, 3 Exch. 565, and *Leeds Ry. Co. v. Fearnley*, 4 Exch. 26, 32), thus observed upon it in the *Northwestern Ry. Co. v. McMichael*, 5 Exch. 124: "We cannot say that we concur in the opinion of the Court of Queen's Bench, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that *all* shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favor of infants and lunatics in statutes containing general words (*Stowel v. Lord Zouch*, Plowd. 364), though that depends, of

course, on the intent of the legislature in each case (see *Wilmot's Notes of opinions and Judgments*, p. 194, the *Earl of Buckinghamshire v. Drury*), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate or any other permanent interest, he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due."

(a) *Parke*, B., *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Exch. 574; *Leeds & Thirsk Ry. Co. v. Fearnley*, 4 Exch. 26.

(b) See *United States v. Bainbridge*, 1 Mason, 71.

(c) *Parke*, B., *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Exch. 569.

demand of a creditor or an officer attaching mortgaged personalty the amount due, failure to pay which would dissolve the attachment. — K.

(x) Infancy must be pleaded. *Foster v. Eoff* (Tex. Civ. App.), 47 S. W. 399; *McMullin v. McMullin*, 92 Me. 338, 42 Atl. 499; *Wise v. Loeb*, 15 Pa. Sup'r Ct. 601. The plea of infancy, filed by the defendant in an action, soon after his coming of age, is a sufficient disavowance of the infant's contract. *Peck v. Cain* (Tex. Civ. App.), 63 S. W. 177; *Stack v. Cavanaugh*, 67 N. H. 149, 155, 30 Atl. 350. A defendant, setting up the defence of infancy, has the burden of proof, and it has even been held that he must prove the fact beyond a reasonable doubt. *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071.

An infant cannot accept service of proc-

ess. *Whitesides v. Barber*, 24 S. C. 373. Process served upon an infant does not become effective on his becoming of age. *Welch v. Agar*, 84 Ga. 583, 11 S. E. 149. An infant party to a suit cannot be required to answer interrogatories, or to make discovery of documents. *Mayor v. Collins*, 24 Q. B. D. 261; *Redfern v. Redfern*, [1891] P. 139; *Curtis v. Mundy*, [1892] 2 Q. B. 178. So a deposition cannot be read against an infant whose guardian *ad litem* was not served with notice. *Walker v. Grayson*, 86 Va. 337, 10 S. E. 51. Service of process is now largely regulated, as to infants, by local statutes which often require an additional

cases where a liability is charged on account of the occupation of land, or the possession of stock, and of replying to that defence, the following conclusions may be drawn from the decisions in

England. First. Where a *prima facie* liability appears in consequence of such holding of land or stock, the simple plea of infancy is not sufficient; the defendant must also aver that the interest on account of which he is charged came to him *by contract* and that he has *disaffirmed* that contract, (d) and if the disaffirmance be after he arrived at age he must aver that it was within a reasonable time after becoming of age. (e) Second. If upon the simple plea of infancy being put in, the plaintiff take issue thereon, and the defendant obtain a verdict, the plaintiff is entitled to judgment *non obstante veredicto*. (f) Third. Where infancy, the contract, and the disaffirmance are all pleaded, it is a good bar; and if the defendant has, upon coming of age, reaffirmed the contract, it is for the plaintiff to allege this fact in his replication. (g) Fourth. Supposing the law to be (which, however, it seems it is not) that an infant occupying under a lease, wherein exorbitant rent is reserved, may defend against the recovery of such rent, *without giving up possession*, his plea, in addition to the other requisites, must distinctly show that at the time of pleading it he is still a minor. (h)

(d) *Leeds & Thirsk Ry. Co. v. Fearnley*, 4 Exch. 26; *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935; s. c. 11 Jur. 802.

(e) *Dublin & Wicklow Ry. Co. v. Black*, 16 E. L. & E. 556; s. c. 8 Exch. 181.

(f) *Birkenhead, Lancashire & Cheshire Ry. Co. v. Pilcher*, 5 Exch. 121.

(g) *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Exch. 565.

(h) *Northwestern Ry. Co. v. McMichael*, 5 Exch. 128.

service upon the guardian or parent; such statutes must be strictly observed, but when the proper court has determined that the service was sufficient, the subsequent proceedings based thereon are not void, but voidable only on proper application. *Myers v. Davis*, 47 Iowa, 329; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 641, 61 N. W. 243; *Sanford v. Edwards*, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482, 492 n.

A decree cannot properly be entered *pro confesso* against an infant defendant unless he has a guardian *ad litem*. *In re Wood's Estate*, 75 N. Y. S. 272, 70 App. Div. 321; *White v. Joyce*, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921; *Daily v. Reid*, 74 Ala. 415; *Griffith v. Ventress*, 91 Ala. 366, 8 So. 312, 11 L. R. A. 193; *Bennett v. Bradford*, 132 Ill. 269, 24 N. E. 630; *State v. Atkins*, 53 Ark. 303. A decree against infants is valid as to *bona fide* purchasers with respect to mere mis-

takes. *Lloyd v. Kirkwood*, 112 Ill. 329; *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537; *Franklin Savings Bank v. Taylor*, 53 Fed. 854, 154 U. S. 503. An infant cannot, if there is no fraud or collusion, re-open a decree rendered in his favor on a bill by his next friend. *Gusdofer v. Grondy*, 72 Miss. 312, 16 So. 432; *Harman v. Davis*, 30 Gratt. (Va.) 461. As to judgments at law against infants, see *Kansas City, &c. R. Co. v. Morgan*, 76 Fed. 421, 21 C. C. A. 468; *Joyce v. McAvoy* (31 Cal. 273), 89 Am. Dec. 172 and note.

An adult defendant in equity, who aims to vacate a decree entered against him during his minority, must proceed by original bill and not by bill of review. *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847; see *Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047; *Ogden v. Stevens* (Ky.), 33 S. W. 932.

SECTION X.

OF ILLEGITIMATE CHILDREN.

All persons are illegitimate who are both begotten and born out of lawful wedlock. If begotten before wedlock, and born an hour after, they are legitimate at common law. By the statutes of most of our States, (*i*) following the doctrine of the Roman civil law, and of most of the nations of Europe, a *subsequent marriage of the parents legitimates such * 337 children. (*j*)

In England the common law conclusively presumed every child to be legitimate, if the parents were married and within the realm, when the child might have been begotten, and the husband not proved to be impotent. (*k*) Now, however, there as well as here, it is a question for the jury; but the presumption in favor of legitimacy can be overthrown only by clear proof. (*l*) It has been held in England that the evidence of the husband is not admissible to prove his access to his wife; (*m*) and in this country, that the evidence of the wife is not admissible to prove his non-access. (*n*) At common law bastards have no inheritable blood; but in nearly all of our States they inherit from their mothers, and their mothers inherit from them, under various qualifications. In England, and generally in this country, the putative father is chargeable, by statute provisions (and by them only), for the support of his illegitimate child.

In England, Courts of Equity have, in some cases, been very

(*i*) This is so in California, Dakota, Idaho, Illinois, Iowa, Maine, Michigan, Minnesota, Montana, Nevada, New Mexico, Oregon, Pennsylvania, Washington. And if the father acknowledges the child as his in Alabama, Arizona, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. Statutes of legitimation are valid, *Beall v. Beall*, 8 Ga. 210; and to be construed favorably. *Swanson v. Swanson*, 2 Swan, 446. But see *Edmondson v. Dyson*, 7 Ga. 512.

(*j*) Code Civil, No. 331; 2 Domat, 361; 1 Ersk. Inst. 116; Butler's note (181), to Co. Lit. It was in reply to an attempt of the English Bishops to introduce this rule of the civil (and canon) law into England,

that the Lords made their famous answer, "*Nolumus leges Angliæ mutari.*"

(*k*) 1 Roll. Abr. 358; Co. Lit. 244 a.

(*l*) *Pendrell v. Pendrell*, Stra. 925; *Cross v. Cross*, 3 Paige, 139; *Commonwealth v. Wentz*, 1 Ashm. 269; *Commonwealth v. Shepherd*, 6 Binn. 286; *Stegall v. Stegall*, 2 Brock. 256; *Bury v. Phillpot*, 2 Myl. & K. 349; *Patterson v. Gaines*, How. 550, 589; *Plowes v. Bossey*, 31 L. J. Ch. 680; *Hargrove v. Hargrove*, 9 Beav. 255; *Illinois Loan Co. v. Bonner*, 75 Ill. 315. The presumption of law seems to be less in *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375. But see *Caujolle v. Ferrié*, 23 N. Y. 90.

(*m*) *Patchett v. Holgate*, 3 E. L. & E. 100.

(*n*) *People v. The Overseers*, 15 Barb. 286; *Parker v. Way*, 15 N. H. 45.

much disposed to favor bastards, in the consideration of settlements or devices in relation to them; (*p*) and in other cases have been extremely severe. (*q*) In this country, the courts have generally been liberal towards them. (*r*) But while a device in favor of an expected (and then begotten) illegitimate child has been

held valid, (*s*) a settlement in favor of future illegitimate children was held void. (*t*) * It has been held in England that bastards cannot marry within the prohibited degrees. (*u*)

The rights of the mother to the custody of the child have been maintained against the putative father. (*v*) (*x*)

(*p*) *Annandale v. Harris*, 2 P. Wms. 432.

(*q*) *Prec. Ch.* 475; 1 *Eq. Cas. Abr.* 123; *Gilb. Eq.* 139.

(*r*) *Bunn v. Winthrop*, 1 *Johns Ch.* 338; *Harten v. Gibson*, 4 *Desaus.* 139.

(*s*) *Pratt v. Flamer*, 4 *Har. & J.* 10.

(*t*) *Wilkinson v. Wilkinson*, N. Y. *Leg. Obs.* 191.

(*u*) *Haines v. Jeffell*, 1 *Ld. Raym.* 68.

(*v*) *Robalina v. Armstrong*, 15 *Barb.* 247; *Nine v. Starr*, 8 *Ore.* 49; *Pote's Appeal*, 106 *Pa. St.* 574.

(*x*) See 2 *Kent Com.* (14th ed.), 209, notes 1 and (*x*); *Reg. v. Nash*, 10 *Q. P. D.* 454, 13 *English Ruling Cas.* 24, 26, 29 n.;

Brooke v. Logan (112 *Ind.* 183), 2 *Am. St. Rep.* 177, 185 n.

* CHAPTER XVIII.

* 339

OF THE CONTRACTS OF MARRIED WOMEN.

SECT. I. — *Of the General Effect of Marriage on the Rights of the Parties.*

AT common law the disability of a married woman is almost entire. Her personal existence is merged for most purposes in that of her husband. This was not so among the Anglo-Saxons, nor with the earlier Teutonic races; and must be explained as one of the effects of the feudal system. It was a principal object of that system to make the whole strength of the State available as a military force; and to this purpose was sacrificed much of the consideration and respect which had been formerly paid by the German tribes to woman and her rights of property, and which had distinguished these tribes from the nations of Rome, Greece, and the East. As a married woman could not be a soldier, she was permitted to have but imperfect and qualified rights of property, because property was then bound to the State, and made the means of supplying it with an armed force. It is possible that the Teutonic respect for woman was intensified into the extravagance of chivalry, as a kind of compensation. All was done for her that could be done, in manners and in social usages; because in law, and in reference to rights of property, so little was allowed. Dower was carefully secured to her; but the exercise of her own free will over her property was forbidden. But the influence of the feudal system is broken, very much in England, and far more here. And among the effects of this decay of a system in which many of the principles and forms of our law originated, we count the changes which have been made in the law which defines the position and the rights * of the * 340 married woman. It seems to be everywhere conceded that the old rules were oppressive and unjust, and certainly not in conformity with the existing temper or condition of society. But in some parts of our country the slow progress of these changes indicates a belief that there is need of caution, in order to improve and liberalize the marital relation, without inflicting upon it great

injury. In those States in which the greatest changes have been made, there are those who think mischief has already been caused, and that a brief experience will prove the inconvenience and danger of permitting husband and wife to possess interests, properties and powers, altogether, or in a great degree, independent and equal. Too much change may make them bargainers with each other; and as watchful against each other, as careful for good security, as strict in making terms and compelling an exact performance of promises or conditions, and as prompt to seek in litigation a remedy for supposed wrongs, as seller and buyer, lender and borrower, usually are; and as these parties may be, more properly and safely, than husband and wife.

We place in a note at the end of this chapter, a synopsis of the statutory provisions of the several States affecting the law of husband and wife; but shall present in the text what may still be regarded as common law on this subject, and in force, where not changed as stated in the synopsis. (*aa*)

OF THE CONTRACTS OF A MARRIED WOMAN MADE BEFORE MARRIAGE.

The contract of a married woman made before her marriage inures to the benefit of her husband; but does not vest in him absolutely. It is a chose in action, which he may reduce to his own possession during her life. If he does not so reduce it to his possession, and dies, she surviving him, it becomes again absolutely hers. (*a*) If she dies before he has reduced it to possession, he surviving, he may enforce the contract as her administrator, for

(*aa*) The English Statute of 1870, ch. 93, changes the law of that country materially, providing, with much detail, that the property and earnings of a married woman shall be her own, and that her husband is not, and her property is, liable for her ante-nuptial debts. [And in 1882 the rights of married women were still further enlarged by the Statute 45 & 46 Victoria, c. 75 (*x*).]

(*a*) Co. Lit. 351 b; *Obrian v. Ram*, 3 Mod. 186; *Estate of Kiutzinger*, 2 Ashm. 455; *Legg v. Legg*, 8 Mass. 99; *Glasgow v. Sands*, 3 G. & J. 96; *Stephens v. Beale*, 4 Ga. 319; *Killcrease v. Killcrease*, 7 How. (Miss.) 311; *Rogers v. Bumpass*, 4 Ired. Eq. 385; *Sayre v. Flournoy*, 3 Kelly (Ga.), 541. See *Mitchell v. Holmes*, L. R. 8 Ex. 119.

(*x*) Sect. 16 of this Act was amended, June 23, 1884, by 47 & 48 Vict. c. 14. The Act was further amended considerably, Dec. 5, 1893, by 56 & 57 Vict. c. 63. See 7 Chitty's Statutes (5th ed.), title "Mar-

ried Women's Property," (annotated). See *In re Kuypers' Policy Trusts*, [1899] 1 Ch. 38; *Softlaw v. Welch*, [1899] 2 Q. B. 419; *In re Turnbull*, *Turnbull v. Nicholas*, 81 L. T. 438, 48 W. R. 136.

his own benefit. (b) (x) And it has been said that if he gets possession of her choses in action after her death, without suit, they are his, by a title as perfect as if he had received letters of administration. (c) And if administration be necessary, and the husband dies before taking out letters of administration, the right to take them goes to his personal representatives; and if another party becomes administrator, he will be regarded as a trustee for the husband or his personal representatives. (d) He may reduce such chose in action to his possession by receiving the money or other benefit due from it, or by a new contract with the debtor in substitution for the wife's chose in action, or by recovering a judgment on the contract. (e)¹ * But the husband's * 342

(b) 1 Roll. Abr. 910; *Elliot v. Collier*, 3 Atk. 526, 1 Ves. Sen. 15 1 Wils. 168; *Donnington v. Mitchell*, 1 Green, Ch. 243; *Brown v. Alden*, 14 B. Mon. 144. He holds the proceeds, however, as assets for the payment of her debts contracted before marriage. — *Heard v. Stamford*, 3 P. Wms. 409; *Cas. Temp. Talb.* 173; 2 Kent Com. 135; *Blennerhassett v. Monsell*, 19 Law Times, 36.

(c) *Whitaker v. Whitaker*, 6 Johns. 112. We cannot but entertain some doubts of this, see *Gill v. Woods*, 81 Ill. 64; *Woodman v. Woodman*, 54 N. H. 226; *Wilson v. Breeding*, 50 Iowa, 629. But see *Lowry v. Houston*, 3 How. (Miss.) 394; *Scott v. James*, 3 id. 307; *Wade v. Grimes*, 7 id. 425.

(d) And so if her husband, having been appointed administrator, die before the estate is all administered, his executor or ad-

ministrator is entitled to be administrator *de bonis non*, in preference to her next of kin. *Donnington v. Mitchell*, 1 Green, Ch. 243; *Hendren v. Colgin*, 4 Munf. 231.

(e) It seems that any act on the part of the husband, which clearly shows an intention to make the wife's chose in action his own, as mortgaging, releasing, taking a new security, procuring a judgment on it, appointing another as agent to collect the money who actually collects it, &c., is a sufficient reduction to possession, and bars the wife's right of survivorship. But mere receipt of interest on the wife's chose in action is not a reduction to possession. *Hart v. Stephens*, 6 Q. B. 937. Nor is the mere fact that he joined with her, in giving a receipt for the principal, sufficient evidence of a reduction to possession by the husband. *Timbers v. Katz*, 6 W. & S. 290.

¹ Payment to a husband of the cash proceeds of a sale of her real estate makes them his absolutely, *Plummer v. Jarman*, 44 Md. 632; or of the proceeds of a note for the purchase-money, *Humphries v. Harrison*, 30 Ark. 79; unless at the time he received them he promised her to make payment, and obtained possession only upon the faith of such promise, *Sabel v. Slingluff*, 52 Md. 132. The receipt by the joint agent of the husband and wife of money of an estate of which she is administratrix, and of which a dis-

(x) The husband's common-law right to reduce to possession, and to acquire, his wife's choses in action, still exists in the absence of statute; and this right survives to him after her death, together with the right to administer and take her estate for his own benefit. *Hardin v. Young* (Tenn. Ch.), 41 S. W. 1080; *Birmingham W. Co. v. Hume*, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43. Marriage does not sever the wife's joint tenancy in a chose in action not reduced into possession by her husband. *In re Butler's Trusts*, 38 Ch. D. 286, disapproving *Baillie v. Treharne*, 17 Ch. D. 388.

An express provision is necessary in a marriage settlement in order to exclude the husband's right to her personal property in the event of his surviving her. *Kistler v. Ernst*, 60 Kans. 243, 56 Pac. 18. An ante-nuptial agreement may be specifically enforced after the wife's death, by those intended to be benefited thereby. *White v. White*, 47 N. Y. S. 273. Marriage is not such part performance as validates an ante-nuptial parol settlement of land. *Flory v. Houck*, 186 Penn. St. 263, 40 Atl. 482.

pledging the wife's note, and afterwards redeeming it, is not a reduction by him. (*f*)

If the wife's choses in action are assigned by the husband, and not otherwise reduced to his possession, the question arises, whether this is of itself a reduction to possession. And if not, has the assignee acquired a right to reduce them to his own possession? And if so, and the assignee fails to do this during the life of the husband, and the wife survives the husband, is the right of reduction to possession by the assignee gone, and do the choses in action become the wife's absolute property?

The weight of authority is in favor of the latter view. The doctrine to be drawn from the cases may be stated thus: If the husband appoints an agent with authority to reduce to possession these choses in action, the agent may go on and do this, while the husband lives. But the death of the husband revokes the agency, and if the wife is living, the choses in action become absolutely hers, because they are unreduced by the husband. And if the husband assign them, but not for value, this assignment has only the effect of a naked authority to the assignee to reduce them to possession. But if the husband assign them for value, the assignment is now in itself a reduction to possession by the husband, and the choses in action do not, on the husband's death, return to the wife, although there was no further reduction during his life. (*g*)

The effect of an assignment in Bankruptcy and Insolvency is considered in the chapter on these subjects in the Third Volume.

* 343 * Whether a creditor of the husband can acquire by attachment in a suit against the husband, the wife's choses in action, has been much disputed. The adjudications of this country seem to be in favor of his right to do so; (*h*) not however

(*f*) *Bartlett v. Van Zandt*, 4 Sandf. Ch. 396; *Latourette v. Williams*, 1 Barb. 9. See as to reduction by agents, *Turton v. Turton*, 6 Md. 375.

(*g*) *Schuyler v. Hoyle*, 5 Johns. Ch. 196; *Cartaret v. Paschal*, 3 P. Wms. 197; *Jewson v. Moulton*, 2 Atk. 417; *Mitford v. Mitford*, 9 Ves. 87; *Kenny v. Udall*, 5 Johns. Ch. 464; *Lowry v. Thornton*, 3

How. (Miss.) 394. That the assignment must be for value, see *Saddington v. Kinsman*, 1 Bro. Ch. 44; *Johnson v. Johnson*, 1 Jac. & W. 472; *Hartman v. Dowdel*, 1 Rawle, 279.

(*h*) *Dold v. Geiger*, 2 Gratt. 98, holds that a husband cannot protect these choses in action from his creditors by settling them on his wife. *Andrews v. Jones*, 10

tributive share belongs to her, reduces it to the husband's possession. *Dardier v. Chapman*, 11 Ch. D. 442. [But possession of personalty by the husband as executor is not a reduction to possession of his wife's right as residuary legatee, *Sowles v. Witters*, 39 Fed. Rep. 403]; and where a husband never claimed his wife's money as his own, a disposition of it by his will will not make it a part of his estate, *Grebill's Appeal*, 87 Penn. St. 105. — K.

without high authority and strong reasons for the doctrine, that the husband's right to reduce these choses to possession is strictly marital, which he may perhaps himself transfer, but which cannot be taken from him *in invitum*. (*i*)

It seems now to be settled, that any court having equity powers, when an assignee of a wife's chose in action requires the aid of those powers to reduce them to his possession, will compel an adequate provision out of them, for the wife; reference being had not merely to this chose, but to all the property of the wife which passes to the husband.

But the court will not interfere where the assignee may acquire complete possession without its aid. (*j*) Whether, in this country, a court of law possessing equity powers, would use them for the protection of the wife, if an assignee of her choses in action sought its aid to reduce them to possession by an action at law, is not positively settled by adjudication. On general principles we should hope that it would do so.

Generally, in all cases where the right of action would survive to the wife, the husband and wife must join in an action therefor. (*k*) As all her beneficial contracts made before marriage inure to * the benefit of the husband, so, on the other hand, * 344 if she is liable for any debts when he marries her, this liability is cast on him jointly with her, by the marriage; (*l*) (*x*) even if he were an infant at the time of marriage. (*m*) And this is true

Ala. 400, qualifies, if it does not deny this. *Wheeler v. Bowen*, 20 Pick. 563; *Hayward v. Hayward*, id. 528, and *Strong v. Smith*, 1 Met. 476, assert that creditors have this power. *Vance v. McLaughlin*, 8 Gratt. 289, admits the validity of the attachment, but holds that it is avoided by the death of the husband while the suit is pending. *Skirner's Appeal*, 5 Penn. St. 262, holds that a general assignment by the husband of all his property for his creditors does not pass to them his wife's interest in a legacy not yet received. See, however, *Swoyer's Appeal*, id. 377. A note given to the wife during coverture is only a chose in action to which these rules apply, as it does not become the husband's unless he reduces it to possession. *Gates v. Madely*, 6 M. & W. 423; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 875.

(*i*) *Wheeler v. Moore*, 13 N. H. 478; *Poor v. Hazleton*, 15 N. H. 564. See also

Gallego v. Gallego, 2 Brock. 287, and *Peacock v. Pembroke*, 4 Md. 280; *Mellinger's Adm. v. Bausman's Trustee*, 45 Pa. 522, 528; *Perry v. Wheelock*, 49 Vt. 63, 67.

(*j*) *Duval v. Farmer's Bank*, 4 G. & J. 282; *Whitesides v. Dorris*, 7 Dana, 101; *Perryclear v. Jacobs*, 2 Hill (S. C.), Ch. 504; *Like v. Beresford*, 3 Ves. 506; *Sleeche v. Thorington*, 2 Ves. Sen. 562.

(*k*) *Morse v. Earl*, 13 Wend. 271; *Ramsey v. George*, 1 M. & Sel. 176; *Hoy v. Rogers*, 4 Monr. 225; *Milner v. Milnes*, 3 T. R. 631.

(*l*) *Morris v. Norfolk*, 1 Taunt. 212; *Howes v. Bigelow*, 13 Mass. 384; *Petkin v. Thompson*, 13 Pick. 64; *Haines v. Corliss*, 4 Mass. 659; *Dodgson v. Bell*, 3 E. L. & E. 542; s. c. 5 Exch. 967; *Alexander v. Morgan*, 31 Ohio St. 546.

(*m*) *Butler v. Breck*, 7 Met. 164; *Roach v. Quick*, 9 Wend. 238.

(*x*) This rule is not changed by the statutes which merely allow to the wife

her own property. *Kies v. Young*, 64 Ark. 381, 42 S. W. 669.

also, although the debts did not mature and become payable until after the marriage, (*n*) and although he received nothing with her. This, however, is only his personal liability, and does not survive him. If, therefore, he dies before a debt is paid, his estate is not liable for it, unless the debt was put in suit and reduced to a judgment in his lifetime, (*o*) even if that estate contains or consists wholly of what has been her personal property. But her separate liability revives by his death, (*p*) although her marriage may have taken from her and given to him or his representatives, all her means. So if she dies before the debt is paid or reduced to judgment, his liability also ceases. (*q*) But if she leaves choses in action unreduced to possession by the husband, and after her death he or his representative as her administrator, reduces them to possession, their proceeds must be applied, in the first place, to her unpaid debts, and only the balance can be held by the husband or his estate. (*r*)

A discharge of the husband in insolvency or bankruptcy bars a suit against husband and wife for her debt. Such discharge is held to extinguish her debt; (*s*) in which case it could not revive at her husband's death. But equity would decree a satisfaction of the debt from any separate estate held by her. (*t*)

Although a husband cannot contract with his wife, (*u*)

* 345 he * may make her a valid gift of a chattel or of a chose in action.¹ But a delivery of the chattel, or of the evidence of the chose in action, is indispensable. (*v*)²

(*n*) *Heard v. Stamford*, Cas. Temp. Talb. 173; s. c. 3 P. Wms. 409; *Thomond v. Earl of Suffolk*, 1 P. Wms. 469.

(*o*) Roll. Abr. 351; *Heard v. Stamford*, 3 P. Wms., 409; *Witherspoon v. Dubose*, 1 Bailey, Eq. 166; *Howes v. Bigelow*, 13 Mass. 384; *Chapline v. Moore*, 7 Monr. 179; *Buckner v. Smyth*, 4 Desaus. 371; *Mentz v. Reuter*, 1 Watts, 229.

(*p*) *Woodman v. Chapman*, 1 Camp. 189.

(*q*) See cases already cited.

(*r*) *Heard v. Stamford*, 3 P. Wms. 409, Cas. Temp. Talb. 173; *Donnington v. Mitchell*, 1 Green, Ch. 243; *Ryder v. Hulse*, 24 N. Y. 372.

(*s*) *Lockwood v. Salter*, 2 Nev. & M. 255.

(*t*) *Mallory v. Vanderheyden*, cited in 2 Kent, Com. 138, n. (*a*).

(*u*) See *post*, p. * 359.

(*v*) *Brown v. Brown*, 23 Barb. 565; *Lockwood v. Cullen*, 4 Rob. 129.

¹ And his reservation of a power of revocation or appointment to other uses does not impair the validity of the gift. *Jones v. Clifton*, 101 U. S. 225. A conveyance of real estate by deed from a husband to his wife, intended as a gift *in præsenti*, though void at law, may be sustained and enforced in equity. *Hunt v. Johnson*, 44 N. Y. 27. — K.

² As, for instance, against creditors in a gift of extravagant furniture in the common dwelling. *In re Pierce*, 7 Bissell, 426. — Letters alone from a husband to his wife, making a gift to his wife, will not effectuate it. *Breton v. Woolven*, 17 Ch. D. 416. And see Ch. xv. — K.

SECTION III.

OF THE CONTRACTS OF A MARRIED WOMAN MADE DURING HER MARRIAGE.

By the rules of the common law, a married woman has no power to bind herself by contract, or to acquire to herself and for her exclusive benefit any right, by a contract made with her. And as she can make no valid contract, the husband cannot be bound by any contract which she may attempt to make. He is responsible for her torts of every kind; but if the tort is essentially connected with a contract, as by borrowing money on false and fraudulent pretences, it is held that the husband is not liable for the tort. (*w*) (*xx*). If she receives money or property by gift to herself or in payment for her services, and lends it, her husband and not she has the right to recover it; and so if she sell anything, her husband has the right to recover the price. He may claim the earnings of her personal labor, and only where she alone is the meritorious cause of the debt due can she be joined in an action for it. In general, whatever she earns, she earns as his servant, and for him; for in law, her time and her labor, as well as her money, are his property. (*x*)¹

(*w*) *L. A. L. Assoc. v. Fairhurst*, 9 Exch. 422; *Woodward v. Barnes*, 46 Vt. 332.

(*x*) See *Legg v. Legg*, 8 Mass. 99; *Howes v. Bigelow*, 13 Mass. 384; *Winslow v. Croker*, 17 Me. 29; *Hoskins v.*

¹ The proceeds of their joint labor also belong to the husband, *Reynolds v. Robinson*, 64 N. Y. 589; *Shaeffer v. Sheppard*, 54 Ala. 244; *Bowden v. Gray*, 49 Miss. 547;

(*xx*) At common law the wife's torts or frauds, for which the husband was liable, were torts *simpliciter*, not including those based on the wife's contracts; and hence she was not liable in trover for a refusal to return property held under her contract. *De Wolff v. Lozier* (N. J.) 52 Atl. 303; *Brown v. Att. Gen. for New Zealand*, [1898] A. C. 234.

Since the statutes relating to married women, the wife is alone liable for such torts as are committed in the management and control of her separate property. *De Wolff v. Lozier*, *supra*; *Baum v. Mullen*, 47 N. Y. 577; *Cashman v. Henry*, 75 N. Y. 103, 113.

Such statutes making her a *feme sole* as to her own property do not, without express words, relieve the husband from his common-law liability for such torts as her slanders uttered during coverture out of his presence and without his consent. *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086;

Pett-Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912; *Quick v. Miller*, 103 Penn. St. 67. In Vermont husband and wife are liable in exemplary damages for the wife's malicious trespass, though the husband is without fault. *Lombard v. Batchelder*, 58 Vt. 558, 5 Atl. 511. The Hawaiian Civil Laws (1897), § 1890, provide wisely that the husband is liable only for such of the wife's torts as are done with his authority or consent. By the Illinois Rev. Stats. (1899, Hurd's ed.) p. 958, § 4, the husband is liable for his wife's torts only "when he would be jointly responsible with her, if the marriage did not exist." And so in Iowa and Alabama. *Infra*, pp. *371, *373. In England a husband is still subject to the same liability for his wife's torts committed during coverture as he was previously to the Married Women's Property Act, 1882. *Earle v. Kingscote*, [1900] 2 Ch. 585.

* 346 * If A enters into a contract with the wife of B, not knowing her marriage, and she having no authority to bind B, and not professing to act for him, the wife is not bound, neither is B liable upon such contract. (y) But whether B, who may certainly repudiate the contract, can elect to adopt it, and enforce it as his own against A, may well be doubted. Upon principle we should say he could not, because there is a total want of mutuality. Such a case would perhaps fall within the rule, that no act is capable of ratification by the principal which was not performed in his behalf, and by the agent *as agent*. (z)

The wife may be the agent of the husband, and in that
* 347 * character may make contracts which bind him, and this agency need not be expressed, but is raised by law from a variety of circumstances. Thus, the purpose and comfort of married and domestic life would be defeated or obstructed if the wife had not a general authority to hire servants, or to purchase such articles as are necessary for the use of the family; and the necessity is not to be a strict one, but includes whatever things are unquestionably proper to be used in the family, and suited to the manner of life which the husband authorizes; and this even after her adultery, if they have not separated. (a)¹ And

Miller, 2 Dev. 360; Hyde v. Stone, 9 Cowen, 230; Morgan v. Thames Bank, 14 Conn. 99; Matter of Grant, 2 Story, 312; Hawkins v. Craig, 6 Monr. 257; Merrill v. Smith, 37 Me. 394; McDavid v. Adams, 77 Ill. 155; Yopst v. Yopst, 51 Ind. 61. Even if the husband lives apart from his wife, and in a state of continued adultery, his right to her personal property is the same, so long as the relation of husband and wife continues. Russell v. Brooke, 7 Pick. 65; Turtle v. Muncy, 2 J. J. Marsh. 82; Vreeland v. Ryno, 11 C. E. Green, 160; including her earnings both before and after marriage. Glover v. Proprietors of Drury Lane, 2 Chitt. 117; Washburn v. Hale, 10 Pick. 429; Prescott v. Brown, 23 Me. 305. In Messenger v.

Clark, 5 Exch. 388, it was held that a husband is entitled to the money which his wife saves out of a weekly allowance given by him for her support, they living separate by agreement. Rolfe, B., puts the case on the ground that the wife had invested her savings in stock (which stock she afterwards sold and gave away the proceeds), and he held that although the money might have been hers to dispose of as she pleased, yet when she bought a specific chattel with a part of it, that chattel became the husband's.

(y) See Smith v. Plomer, 15 East, 607.

(z) See "Agents," ante, p. * 49, note (g).

(a) Robinson v. Greinold, 1 Salk. 119; s. c. 6 Mod. 171; Bac. Abr. *Baron & Feme* (H.).

including her personal apparel purchased with the same, Hawkins v. Providence, &c. R. Co., 119 Mass. 596. — K.

¹ Aside from the wife's power to pledge her husband's credit for necessities, with which he has failed to supply her, the question whether she has authority to act as his agent in any particular case is purely one of fact, and if in fact her husband has neither authorized her nor held her out as his agent, he is not liable unless made so by statute. Thus, if a husband is able and willing to supply his wife with necessities he cannot be held liable for necessities purchased by her of a tradesman who had not had previous dealings with the wife with the husband's consent, though the tradesman knew nothing of the husband's prohibition. Debenham v. Mellon, 5 Q. B. D. 394; 6 App. Cas. 24; Clark v. Cox, 32 Mich. 304. And see Morrison v. Holt, 42 N. H.

therefore the law clothes her with this authority. (b) So, whatever she purchases for herself, the husband is liable for, provided it be such in quality and no more in quantity, than is suitable for the station and means of the husband, and the manner in which he permits her to live. But beyond this she has no such authority, and her contracts for other things are wholly void. Thus, an agreement by a wife for the sale of her real estate, with the assent of her husband, and for a valuable consideration, is said to be void in law; and equity has refused to enforce it. (c)

As the wife may be the agent of the husband, so the husband may be the agent of the wife, in transacting such business as recent statutes enable her to do on her own account;¹ (x) and it is held in

(b) The wife is *prima facie* the husband's agent in managing the affairs of his household. *Pickering v. Pickering*, 6 N. H. 124; *Mackinley v. McGregor*, 3 Whart. 369; *Walling v. Hannig*, 73 Tex. 580; *Felker v. Emerson*, 16 Vt. 653. But not to lend his property, *Green v. Sperry*, 16 Vt. 390, although where the husband was absent from home, and she let her husband's horses out for hire, it was presumed that she had authority so to do. *Church v. Landers*, 10 Wend. 79. But whether the husband is at home or abroad, the wife is not presumed to be his agent generally, or to be intrusted with any other

authority than it is usual and customary to confer upon the wife. *Benjamin v. Benjamin*, 15 Conn. 347; *Sawyer v. Cutting*, 23 Vt. 456; *Leeds v. Vail*, 15 Penn. St. 184. And an innkeeper's wife has no authority during her husband's absence to board or lodge his guests at less than the usual rates. *Webster v. McGinnis*, 5 Binn. 235. And the wife cannot appear and manage a cause at *nisi prius* for her husband, although he is at the time in custody and cannot appear himself. *Cobbett v. Hudson*, 10 E. L. & E. 318; s. c. 15 Q. B. 988. (c) *Lane v. McKeen*, 15 Me. 304.

478; *Gulick v. Grover*, 31 N. J. L. 182; 33 N. J. L. 463; *Catlin v. Martin*, 69 N. Y. 393; *Delano v. Blanchard*, 52 Vt. 578, 584.

As to the right of recovery for necessities furnished the wife when she is not supported by her husband, see *Burkett v. Trowbridge*, 61 Me. 251; *Thorpe v. Shapleigh*, 67 Me. 235; *Barr v. Armstrong*, 56 Mo. 577; *McGrath v. Donnelly*, 131 Pa. 549. A wife left without support is not empowered to part with her husband's furniture in payment for necessities, *Edgerly v. Whalan*, 106 Mass. 307. *Contra* is *Ahern v. Easterby*, 42 Conn. 546. See also *Butts v. Newton*, 29 Wis. 632. — W.

¹ As such he may collect rents, *Walker v. Carrington*, 74 Ill. 446; purchase real estate, *Coolidge v. Smith*, 129 Mass. 554; sell it, *Lavassar v. Washburne*, 50 Wis. 200; sell her personal property, *Griffin v. Ramsdell*, 71 Ind. 440; give valid notes, *Freiberg v. Branigan*, 18 Hun, 344; act as her clerk and assistant in her business, *Cubberly v. Scott*, 98 Ill. 37; and carry on her farm, *Bennett v. Stout*, 98 Ill. 47. — K.

(x) In Massachusetts, if a married woman, owning an entire business, has not filed the required certificate, and her husband carries it on with her assent, he is her agent, and his creditors may attach the stock in trade. *Desmond v. Young*, 173 Mass. 90, 53 N. E. 151. As, in that State, husband and wife are still unable to contract with each other, the decision in *Slawson v. Loring*, 5 Allen, 340, that indorsements of a draft by a husband to his wife, and by her with his assent to a third person, pass a good title, is now treated as limited to its particular facts, and as

sustainable only on the ground that the wife acted as her husband's agent; and her note to her husband's order, indorsed by him and others, is invalid in the hands of a third person who received it in payment of a debt she owed. *Foster v. Leach*, 160 Mass. 418, 36 N. E. 60; *Nat. Granite Bank v. Whicher*, 173 Mass. 517, 53 N. E. 1004.

A contract for the building of a house on the wife's separate property, though signed by the husband alone, is impliedly her contract if she was present and discussed the terms, and afterwards directed as to

New York, the Chief Justice dissenting, that she may manage her separate property through the agency of the husband without subjecting it to the claims of his creditors. (*cc*) But the case shows, and it must be certain, that if she permits him to assume as to his creditors the aspect of owner of her property so that it would amount to actual fraud if it were withheld from them, this could not be permitted. If she holds him out as her agent, she is certainly bound by his acts. (*cd*)

In every case it is a question for the jury, under the instruction of the court, whether articles supplied to the wife, and for which it is sought to make the husband liable on his implied authority to her, are or are not necessities in this sense; (*d*)¹
 * 348 * and the husband may show that the articles are not necessities by proof that the wife had previously sufficiently supplied herself elsewhere. (*e*)

(*cc*) *Buckley v. Wells*, 33 N. Y. 518; *Abbey v. Deyo*, 44 Barb. 374.

(*cd*) *Read v. Earle*, 12 Gray, 423. See also *Owen v. Cawley*, 36 N. Y. 600; *Dyer v. Swift*, 154 Mass. 159.

(*d*) *Etherington v. Parrot*, Salk. 118; *McCutchen v. McGahay*, 11 Johns. 281; *Clifford v. Laton*, 3 C. & P. 15; *Holt v.*

Brien, 4 B. & Ald. 252; *Seaton v. Benedict*, 5 Bing. 28; *Montague v. Espinasse*, 1 C. & P. 356; *Spreadbury v. Chapman*, 8 id. 371; *Atkins v. Curwood*, 7 id. 756; *Waithman v. Wakefield*, 1 Camp. 120; *Furlong v. Hyson*, 35 Me. 333.

(*e*) *Reneaux v. Teakle*, 8 Exch. 680.

¹ Among necessities have been held to be medical services, *Spaun v. Mercer*, 8 Neb. 57; a gold watch and other jewelry, *Raynes v. Bennett*, 114 Mass. 424; a sewing-machine, *Wiley v. Beach*, 115 Mass. 559; reasonable legal expenses in the prosecution of the wife by the husband, *Warner v. Heiden*, 28 Wis. 517; and in divorce proceedings, *Porter v. Briggs*, 38 Iowa, 166 (*contra*, *Drais v. Hogan*, 50 Cal. 121; *Dow v. Eyster*, 79 Ill. 254; *Whipple v. Giles*, 55 N. H. 139); dentistry and false teeth, *Freeman v. Holmes*, 62 Ga. 556. Among non-necessaries, "religious instruction" or rent of pew, *St. John's Parish v. Bronson*, 40 Conn. 75; and a gold pencil-case, a cigar-case, a glove-box, a scent-bottle, a guitar, music, and a purse valued at £20, where the husband's income as clerk was £400 a year, *Phillipson v. Hayter*, L. R. 6 C. P. 38. — K.

the work, and the husband is properly treated as her agent. *Bankard v. Shaw*, 199 Penn. St. 623, 40 Atl. 230. See also *Antony v. Dickel*, 57 N. Y. S. 1090, 167 N. Y. 539, 60 N. E. 1106; *Kurtz v. Potter*, 60 N. Y. S. 764, 167 N. Y. 586, 60 N. E. 1114; *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 82 N. W. 112, 83 Am. St. Rep. 512, 518 n.; *Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114, 65 Pac. 329.

Where husband and wife are allowed to contract with each other, the general rule is that the utmost good faith and an adequate consideration must be shown to support such a contract. See *Minor v. Parker*, 72 N. Y. S. 549, 65 App. Div. 120. As to such contracts, see *Eckermeyer v. Hoffmeir* (Ky.), 34 S. W. 521; *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858; *Dailey v. Dailey*, 26 Ind. App. 14, 58 N. E. 1065.

When a husband transfers his property to his wife, his prior creditors, in order to reach it in equity, need not show an actual fraudulent intent on the part of either husband or wife; she cannot retain it on the plea of family support, and may owe a duty of restitution to such creditors without owing any such duty to him. *Trefethen v. Lyman*, 90 Me. 376, 382, 38 Atl. 335.

In many jurisdictions and in bankruptcy the wife may be a creditor of the husband for loans from her separate estate. See *e. g.* *Sanford v. Allen* (Tenn. Ch.), 42 S. W. 183; *Weeks & Potter Co. v. Elliott*, 93 Me. 286, 45 Atl. 29, 74 Am. St. Rep. 348; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638; 2 Kent Com. (14th ed.) 164, n. (x); 2 Perry on Trusts (5th ed.), § 666.

An important fact may be, the possession by the wife of a separate income or other distinct means of her own; and it may be necessary to ascertain whether the tradesman supplying her dealt with her on her own account, making charges to her alone, and receiving payment from time to time from her alone; for such facts would go far to show that he dealt with the wife on her own credit, and not on her husband's. (*f*) (*x*)

But if the articles be more or better than are necessary for the wife, still the husband may be held, not upon his authority as implied by the law, but upon sufficient evidence of his express authority or assent; and for this purpose comparatively slight evidence is sufficient; and the mere fact that he saw and knew that she possessed and used the property, or even that she had ordered it, and he made no objection, may be enough for this purpose. (*g*) For so long as the husband lives with his wife, he is liable to any extent for goods which he distinctly permits her to purchase. That the husband may withhold his authority, and is always saved from liability by express notice * and * 349 prohibition, is perhaps more clear by the earlier authorities than by the later. It was long since decided that if the

(*f*) It is always a question of fact for the jury whether the tradesman gives credit to the wife for articles delivered to her, and if the credit is once given to her the husband will not be liable, although the articles may be necessary, and although the wife lives with him, and he sees her wear them without objection. *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22; *Stammers v. Macomb*, 2 Wend. 454; *Moses v. Foggartie*, 2 Hill (S. C.), 335; *Shelton v. Pendleton*, 18 Conn. 417. And see *Powers v. Russell*, 26 Mich. 179; for the law does not allow a person who has once given credit to A, knowing all the facts, afterwards to shift his claim and charge B. *Leggat v. Reed*, 1 C. & P. 16. And wherever a married woman lives apart from her husband, having a separate estate and maintenance secured to her, there may be good ground to hold that all her debts contracted for such maintenance, and in the course of her dealings

with tradesmen, are understood by both parties to be upon the credit of her separate funds for maintenance. 2 Story Eq. § 1401. See also *Owens v. Dickinson*, 1 Craig & P. 48; *Murray v. Barlee*, 3 Myl. & K. 209; *N. A. Coal Co. v. Dyett*, 7 Paige, 9; *Gardner v. Gardner*, id. 112; *Smith v. Sullivan*, 11 How. Pr. 368; *Cromwell v. Benjamin*, 41 Barb. 558.

(*g*) *Waithman v. Wakefield*, 1 Camp. 120. The mere fact that the husband sees the wife wearing the goods does not vary the case, if it be shown that he disapproved of the conduct of the wife in ordering them. *Atkins v. Curwood*, 7 C. & P. 756. And where no express authority is shown, the extravagant nature of the wife's order is always proper to be taken into consideration by the jury, as showing that the wife had no such authority. *Lane v. Ironmonger*, 13 M. & W. 368; *Freestone v. Butcher*, 9 C. & P. 647; *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 28.

(*x*) The husband is primarily liable for necessities, including proper medical attendance and nursing furnished to his wife, though she has a separate estate. *Waesch's Estate*, 166 Penn. St. 204, 30 Atl. 1124; *Detwiler v. Bowers*, 9 Penn. Sup'r Ct. 473; *Wanamaker v. Weaver*, 76 N. Y. S. 390.

The husband is not liable for goods purchased by the wife on her own credit without his knowledge or acquiescence. *Jones v. Gutman*, 88 Md. 355, 41 Atl. 792. It is a question of fact in such case to whom credit was given. *Debenham v. Mellon*, 6 A. C. 24.

wife lives with the husband, and he prohibits a tradesman from supplying her with articles of dress, he cannot be made liable for them, because, in the language of Lord *Hale*, "it shall not be left to a jury to dress my wife in what apparel they think proper." (*h*) And this doctrine is maintained by many cases, and the rule to be gathered from them would seem to be, that the *implied* authority of the husband may always be rebutted by proof of express prohibition. This rule would, we think, be greatly modified, at least in this country, under circumstances which distinctly required such modification. As, for instance, suppose the husband to be rich and penurious, and that he gave his wife garments enough to prevent her suffering from cold, but only of such coarse fabric or materials that she could not wear them in the street; or that from bad temper or cruelty he gave her no clothing, so that for decency's sake she was obliged to remain always in her chamber and even there suffered from cold, — the husband would doubtless be held liable in such cases, the law resting his liability, if necessary, upon an absolute presumption of his authority; as has been held in the case of his turning her out of doors without her fault. And the reason and justice of the rule would be fully satisfied if the husband, living with his wife, were held answerable for necessities supplied to her, with or without notice of prohibition; but where there was express prohibition, then the jury should be instructed that the word "necessaries" should be construed very strictly. It is said: "The law will not presume so much ill as that a husband should not provide for his wife's necessities." (*i*) This should not be presumed; but when it is proved, the law should not do, nor permit, so much ill as to leave her without necessities. The later authorities seem to change for the better

* 350 the ground upon which the liability* of the husband for necessities furnished to the wife has hitherto rested. Generally, it has been put upon her agency and his authority; and undoubtedly this had been stretches very far. If we suppose the case, where a wife perfectly incapacitated by infirmity of body or mind from making any contract at all, is supplied with necessities by one who finds her driven from home and ready to perish, and who now comes to her husband for indemnity, we cannot doubt that he would recover. But the proposition would seem too absurd, even as a fiction, that the wife, when she received this aid,

(*h*) *Manby v. Scott*, 1 Sid. 122; *Bac. Abr. Baron & Feme* (H.); *Etherington v. Parrot*, 2 Ld. Raym. 1006, 1 Salk. 118;

Bolton v. Prentice, Stra. 1214; *Reneaux v. Teakle*, 8 Exch. 680.

(*i*) Lord *Hale*, in *Manby v. Scott*, 1 Sid. 109.

promised in the husband's name that he would pay for it, and that he had given her a sufficient authority to make this promise for him. For these and other reasons courts now show a tendency to rest the responsibility of the husband for necessities supplied to the wife, on the duty which grows out of the marital relation. He is her husband; he is the stronger, she the weaker; all that she has is his; the act of marriage destroys her capacity to pay for a loaf with her own money; and as all she then possesses, and all she may afterwards acquire, are his during life and marriage, upon him must rest, with equal fulness, if the law would not be the absolute opposite of justice, the duty of maintaining her, and supplying all her wants according to his ability.¹ And we think this plain rule of common sense and common morality is becoming a rule of the common law. (j)²

* If a married woman carries on trade, and her husband * 351 lives with her and receives the profits, or they are applied to the maintenance of the family, the law presumes that she was his agent in this trade, and had his authority to make the necessary purchases. (k) So an authority may be presumed from habitual * acts of agency, or from confirmation, which * 352 may be express or implied; as where a wife was in the

(j) See *Read v. Legard*, 6 Exch. 636. See also *Montague v. Benedict*, 3 B. & C. 631, and *Seaton v. Benedict*, 5 Bing. 28. (In these very interesting cases on the liability of the husband for goods furnished to the wife, Mr. Smith, in his work on Contracts, p. 286, says the name of the defendant is fictitious, and borrowed from Shakespeare's *Much Ado about Nothing*, the defendant being actually "a highly respectable professional gentleman," whose name is not given.) A similar doctrine was laid down in *Shaw v. Thompson*, 16 Pick. 198 (1834). *Shaw*, C. J., in that case says: "By law a husband is entitled to all the personal property of the wife, to all her earnings and acquisitions, and to the income of her real estate; it also throws on him the obligation to support and maintain her." And in *Sykes v. Halstead*, 1 Sandf. 483, it was *held*, that where a

husband turns his wife away, or compels her to go by ill-treatment, and refuses to provide for her, he gives her a credit with the whole community, although it be expressly forbidden by him; and she has a right to be supported by him. But in an action for goods supplied to the wife on her order alone, the question is (in the absence of such evidence of necessity as may show an agency in law) whether there was any agency, or authority in fact, and not whether the goods were necessary. *Read v. Teakle*, 24 E. L. & E. 332; s. c. 8 Exch. 680. See also *Keller v. Phillips*, 39 N. Y. 351.

(k) *Petty v. Anderson*, 2 C. & P. 38; *Clifford v. Burton*, 1 Bing. 199; *Oxnard v. Swanton*, 39 Me. 125; *Boas v. Malone*, 140 Pa. St. 572. But see *Smallpiece v. Dawes*, 7 C. & P. 40.

¹ Thus a notice by the husband not to supply his wife with goods on his credit, does not prevent him from being liable for necessities furnished her unless he has himself supplied her sufficiently. *McGrath v. Donnelly*, 131 Pa. 549. — W.

² A wife's services, and the comfort of her society, are due in return for the husband's support. *Randall v. Randall*, 37 Mich. 563; and any contract by her for a compensation to care for her husband is void, *Grant v. Green*, 41 Iowa, 88. — A husband who offers to support his wife and children in his father's house, having no house or means of his own, and she refuses because of the father's intemperance and abuse, is not liable for neglecting to support her. *People v. Pettit*, 74 N. Y. 320. — K.

habit of drawing, indorsing, accepting, or paying bills and notes for her husband, and this he knew and sanctioned, his authority to her will be presumed. (*l*) Or if such bills and notes are usually a part of a certain business which is intrusted to the wife by the husband, he would undoubtedly be held liable for them. Whether a married woman can borrow money, even for necessities, and her husband be held liable on his implied authority, seems not to be settled. (*m*) If the lender can show that the money was used by the husband, then he can hold him. It has been held in California that a promissory note made by husband and wife jointly does not bind the wife. (*mm*) The mortgage of a married woman to secure her own promissory note which she had power by law to make, is valid. (*mn*)

When the cohabitation with the husband ceases, and they live separately, then a new state of things arises, and with it new rules of law. The wife separates from her husband, either by his fault, or by her own, or by mutual consent and agreement. In the first case she carries with her all her rights to necessities, and he who supplies them to her may hold her husband liable for their price; (*n*)¹ and, as it has lately been held, for the expenses

(*l*) *Cotes v. Davis*, 1 Camp. 485; *Barlow v. Bishop*, 1 East, 432; *Prestwick v. Marshall*, 7 Bing. 565. His authority to her to make notes in his name cannot, however, be inferred from the mere fact that he knew she was carrying on business, and that she gave the note in the course of such business; and on a note so given the husband is not liable even to a *bona fide* indorsee. *Reakert v. Sandford*, 5 W. & S. 164. — Whenever the husband authorizes the wife to execute notes in his name, they must purport on their face to be made in his behalf, or by her as *agent*, or he will not be bound. *Minard v. Mead*, 7 Wend. 68. — But in *Lindus v. Bradwell*, 5 C. B. 582, where a bill of exchange addressed to "William B." was accepted by his wife, by writing her own name, "Mary B.," upon the back, which was presented to the husband after it became due, who said he knew all about it, that it was for a milliner's bill, and that he would pay it shortly, he was held liable as acceptor, although he had not expressly authorized his wife so to accept the bill.

(*m*) At law, a husband is not liable for money lent to the wife, unless his request

be averred and proved. *Stone v. Macnair*, 7 Taunt. 432; *Stephenson v. Hardy*, 3 Wils. 388; *Walker v. Simpson* 7 W. & S. 83; *Grendell v. Godmond*, 5 A. & E. 755; *Earle v. Peale*, 1 Salk. 387; *Darby v. Boucher*, id. 279. In equity, however, the lender will be allowed to stand in place of the tradesmen, and to have satisfaction as far as they could, had they been plaintiffs. *Harris v. Lee*, 1 P. Wms. 482, Prec. Ch. 502; *Walker v. Simpson*, *supra*; *Marlow v. Pitfield*, 1 P. Wms. 558. See *May v. Skey*, 16 Sim. 588, 18 Law Jour. 308; *Kenyon v. Farris*, 47 Conn. 510. And where money was advanced to the wife living with her husband, and he, after the wife's decease, promised to repay the same, "when convenient," but said he was not privy to the loan, it was *held* that there was evidence to go to the jury that the wife had borrowed the money with the sanction of her husband, or that he ratified the act, and the plaintiff had a verdict. *West v. Wheeler*, 2 Car. & K. 714.

(*mm*) *Brown v. Orr*, 29 Cal. 120.

(*mn*) *Beals v. Cobb*, 51 Me. 348; *Frary v. Booth*, 37 Vt. 78.

(*n*) *Bolton v. Prentice*, 2 Stra. 1214;

¹ If the wife has left him for good and sufficient cause, *Thorpe v. Shapleigh*, 67 Me. 235; *Hultz v. Gibbs*, 66 Penn. St. 360; but if a husband whose wife left him without her fault makes sufficient provision for her, or which she accepts, he is not then liable, *Crittenden v. Schermerhorn*, 39 Mich. 661; *Smyley v. Reese*, 53 Ala. 89. — K.

of her burial. (*nn*)¹ And we deem it to be the * same * 353 thing in law, as well as in reason, whether he actually expels her from his house without her fault, or compels her to leave his house by cruelty to her, or by his misconduct in it, as by introducing a prostitute into it. (*o*)² The *dictum* of Lord *Eldon*, that "where a man turns his wife out of doors he sends with her credit for her reasonable expenses," is undoubtedly law. (*p*) It applies when he obliges her to fly by that degree of ill-treatment which would warrant a divorce; and probably a less degree of cruelty would authorize her to escape from him and his house, and "carry his credit" with her. (*x*)

Harris v. Morris, 4 Esp. 41; *Rawlins v. Vandyke*, 3 Esp. 251; *Hodges v. Hodges*, 1 id. 441; *Aldis v. Chapman*, 1 Selw. N. P. 281; *McCutchen v. McGahay*, 11 Johns. 281; *Houliston v. Smyth*, 3 Bing. 127; *Howard v. Whetstone*, 10 Ohio, 365; *Emmett v. Norton*, 8 C. & P. 506; *Clement v. Mattison*, 3 Rich. 93; *Fredd v. Eves*, 4 Harring. (Del.) 385; *Allen v. Aldrich*, 9 Foster (N. H.), 63. And if a wife is justified in leaving her husband, a request on his part that she will return will not determine his liability for necessities supplied to her during the separation. *Emery v. Emery*, 1 Y. & J. 501. Where, however, the person supplying the wife with necessities relies upon her husband's ill-treatment as good cause for her leaving him, he must show affirmatively that the separation took place in consequence of the husband's misconduct.

It is not enough to prove that there were quarrels and personal conflicts *between* them, unless it be shown that the husband was the offending party. *Blowers v. Sturtevant*, 4 Denio, 46. And see *Reed v. Moore*, 5 C. & P. 200.

(*nn*) *Cunningham v. Reardon*, 98 Mass. 538.

(*o*) See *Harwood v. Heffer*, 3 Taunt. 421; *Houliston v. Smyth*, 10 Moore, 482; s. c. 3 Bing. 127; *Hunt v. DeBlaquiere*, 5 Bing. 562; *Fredd v. Eves*, 4 Harring. (Del.) 385. It is said by *Bronson, C. J.*, in *Blowers v. Sturtevant*, 4 Denio, 46, that the doctrine contained in *Harwood v. Heffer* cannot be law in a Christian country.

(*p*) *Rawlins v. Vandyke*, 3 Esp. 250. And see *Breinig v. Meitzler*, 23 Penn. St. 157.

¹ Whether he is her legatee or not, *Sears v. Giddey*, 41 Mich. 590; and may remove her remains from one burial-place to another, if he has not freely consented to their interment in the former place, *Weld v. Walker*, 130 Mass. 423. — K.

² *Bazeley v. Forder*, L. R. 3 Q. B. 559; *Hultz v. Gibbs*, 66 Penn. St. 360. But if a wife leaves her husband because of his cruelty, one receiving her for illicit purposes cannot recover for her support. *Almy v. Wilcox*, 110 Mass. 443. — K.

(*x*) When the husband's conduct compels the wife to live apart from him, he is liable for necessities suited to her condition in life, and for attorney's fees, though she has a separate estate and is able to pay for them. *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226; *Hatch v. Leonard*, 165 N. Y. 435, 59 N. E. 270; *Hahn v. Rogers*, 69 N. Y. S. 926, 34 Misc. Rep. 549.

As to the wife's liability for family expenses and necessities furnished to the husband in another State, see *Matthews v. Dickinson*, 73 N. Y. S. 190, 36 Misc. Rep. 187. A statute making the wife thus liable for family expenses, after execution against the husband therefor has been re-

turned unsatisfied, has recently been held constitutional in Nebraska. *Noreen v. Hansen* (Neb.), 90 N. W. 937. At common law family expenses are not chargeable to the wife's separate estate. *Baker v. Carter*, 83 Maine, 132; *Meads v. Martin*, 84 Mich. 306; *Towles v. Owsley*, 44 Mo. App. 436; *Harrison v. Hill*, 37 Ill. App. 30; *Harmon v. Siler*, 99 Ala. 306; *Robertson v. Claskey*, 64 Hun, 634; *Howe v. North*, 69 Mich. 1072; *Boss v. Jordan* (Iowa), 89 N. W. 270; *Dodd v. St. John* (Oregon), 15 L. R. A. 717 n.; *Neasham v. McNair* (Iowa), 38 id. 847; 33 Cent. L. J. 186. A married woman's funeral expenses are primarily chargeable to her separate estate. *Morrissey v. Mul-*

Where husband and wife live together, there is a presumption of law arising from cohabitation, that the husband assents to contracts made by the wife for the supply of articles suitable to their station, means, and way of life. (*q*) But when this cohabitation * 354 ceases, then, by the English authorities, the presumption of law is against his assent; and the husband is not liable unless such presumption be rebutted by showing his authority from the nature and circumstances of the separation, or the conduct of the husband, or the condition of the wife, and the nature of the articles supplied to her. (*r*) And where the husband and wife live separate, there the party supplying her may be regarded, in the words of Lord Mansfield, as standing in her place. And it is for him to make strict inquiry into the terms, cause, and character of the separation; for he trusts her at his peril. If the separation has taken place by the husband's act, and against the wife's will, still, if it be for her adultery, it was so far a justifiable act that the husband is no longer bound even for * 355 strict necessities supplied to his wife. (*s*) Whether * this

(*q*) *Etherington v. Parrot*, 1 Salk. 118; *McCutchen v. McGahay*, 11 Johns. 281; *Fredd v. Eves*, 4 Harring. (Del.) 385. Cohabitation is so strong evidence of assent and authority by the husband, that he will be liable for necessities furnished the wife, although they were not legally married, and although the tradesman knew it. *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167. But cohabitation is not *conclusive* evidence of an authority to purchase even necessities; and it may be rebutted, as by showing that the husband supplied her sufficiently himself, or that he gave her sufficient ready money to make the purchases. *Manby v. Scott*, 1 Sid. 109; Resolution iii. 2 Smith, Lead. Cas. (3d ed.) 264. Of course, the proof of such facts lies on the husband. *Clifford v. Laton*, 3 C. & P. 15; *Rea v. Durkee*, 25 Ill. 503.

(*r*) The English authorities are uniform that if the husband and wife live separate and apart, the presumption of law is against the husband's liability, even for the wife's necessities, and that the burden of proof is on the tradesman to show that the separation took place under such circumstances as to continue

the husband's liability. *Clifford v. Laton*, 3 C. & P. 15; *Mainwaring v. Leslie*, 2 id. 507; *Bird v. Jones*, 3 Man. & R. 121; *Edwards v. Towels*, 5 Man. & G. 624; *Hindley v. Westmeath*, 6 B. & C. 200; *Blowers v. Sturtevant*, 4 Denio, 46; *Walker v. Simpson*, 7 W. & S. 83; *Cary v. Patton*, 2 Asm. 140. But in *Rumney v. Keyes*, 7 N. H. 571, the rule is adopted that the burden of proof is on the husband to show that the separation was not through his fault, and *prima facie*, his liability still continues for his wife's necessities. See also *Frost v. Willis*, 13 Vt. 202; *Clancy on Husband and Wife*, 28; *Rea v. Durkee*, 25 Ill. 503.

(*s*) *Hardie v. Grant*, 8 C. & P. 512; *Hunter v. Boucher*, 3 Pick. 289; *Child v. Hardyman*, 2 Stra. 875; *Mainwaring v. Sands*, 1 id. 706; *Morris v. Martin*, id. 647. And in such case no notice to the tradesman of the wife's adultery and separation is necessary in order to discharge the husband from his liability. *Morris v. Martin*, 1 Stra. 647; *Mainwaring v. Sands*, id. 706. — Or if any notice is necessary, general notoriety is sufficient. *Parker, C. J.*, in *Hunter v. Boucher*, 3 Pick. 289. And in like manner if the husband and wife live apart by consent, he paying

hern, 168 Mass. 412, 47 N. E. 407. In *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692, a husband was held not liable by subrogation to one who loaned money to his wife to buy necessities. See An-

derson v. Cullen, 8 N. Y. S. 643; *Leuppie v. Osborn* (N. J.), 39 Cent. L. J. 187, note; *Kenyon v. Farris*, 47 Ct. 510; *Keener on Quasi-Contracts*, 341-353.

rule of law would be modified by the power given in our States to the husband, to obtain a divorce *a vinculo* from the wife for her adultery, may be doubted. We see no good reason why it should be, and our cases which touch upon this question seem to adopt the English view. (*t*) But more question may exist as to another part of the English law on this subject; for it has been there distinctly decided, that if the husband commits adultery, and brings his adulteress into his house, and treats his wife with great cruelty, and then turns her out into the streets, and she afterwards commits adultery, and then, being repentant, offers to return to him, and is wholly without means of subsistence, nevertheless no action for furnishing her with necessaries is maintainable. (*u*) But this is certainly very severe law, and our courts would be very reluctant to apply it. If the husband rests his defence upon the wife's adultery, it must be very strictly proved, and a verdict in an action for criminal conversation is not admissible as evidence to prove it. (*v*) If after such adultery the husband receives her back into his house, he must maintain her as before; and cannot discharge himself of his liability for necessaries supplied to her if she leaves him afterwards, or even if he sends her away, but by proof of a new act of adultery; so it has been held. (*w*)

If the wife leaves the husband without just cause, and refuses

her a sufficient maintenance, he is not liable for her necessaries, she having been guilty of adultery after the separation. *Cragg v. Bowman*, 6 Mod. 147. And the same rule applies where the wife voluntarily, and without any fault of the husband, elopes from him, but has not been guilty of actual adultery; in such case the husband cannot be made liable for necessaries furnished the wife by third persons, although they had no knowledge of the elopement. *Brown v. Patton*, 3 Humph. 135; *McCutchen v. McGahay*, 11 Johns. 281; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Cany v. Patton*, 2 Ashm. 140. However, although the wife be actually guilty of adultery, yet *if cohabitation continue*, the husband is still liable for her necessaries. *Norton v. Fazan*, 1 B. & P. 226; *Harris v. Morris*, 4 Esp. 41. Let a woman be ever so vicious, yet while she cohabits with her husband, he is bound to provide necessaries for her, and is liable to the actions of such persons as furnish her with them; for his bargain was to take her for better or for worse. Per *Holt*, C. J., in *Robinson v. Gosnold*, 6 Mod. 171. For contin-

ued cohabitation after knowledge of her adultery is a condonation of her offence. *Quincy v. Quincy*, 10 N. H. 272; *Hall v. Hall*, 4 id. 462. And even if the husband had no knowledge of her adultery, yet if he continue to live with her he would be liable for her necessaries; for as we have before seen, any man living with any woman, *as man and wife*, is liable for her support, although they were never married, and the tradesman knew it. *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167.

(*t*) See *Hunter v. Boucher*, 3 Pick. 291.

(*u*) *Govier v. Hancock*, 6 T. R. 603. And it has likewise been held in England that a husband is not liable to the penalty of stat. 5 Geo. IV. c. 83, § 3, for neglecting and refusing to maintain his wife, who has left him and committed adultery, although he has himself since her departure been guilty of the same crime. *King v. Flintan*, 1 B. & Ad. 227.

(*v*) *Hardie v. Grant*, 8 C. & P. 512. Because it is *res inter alias partes*.

(*w*) See *Harris v. Morris*, 4 Esp. 41.

* 356 *to cohabit with him, then it is certain that she loses all right to a maintenance from him. For the opposite rule would encourage a wilful breach of the marriage vow and duty, and weaken the wholesome influences which keep together those who have solemnly agreed to live together. (x) By the civil law also, if a wife leave her husband without his fault, he is not obliged *ei æqualiter subministrare*. (y) But if after deserting him she offers to return, we think his obligation to receive or maintain her must depend upon the circumstances of her separation, its length, and her conduct during the separation; thus, if she commit adultery, before or after her elopement, he is under no obligation whatever to receive her. If no sufficient objection arises from these circumstances, then he is bound to receive her; otherwise not. (z)¹ And if she leaves him involuntarily, even by compulsion of law, as by imprisonment for non-payment of a fine and costs, it would seem that the husband is not discharged from his liability to maintain her. (a) We repeat, therefore, that if the wife lives separate from her husband, it is obvious from the many questions which may be raised, that it is incumbent on one who would supply her with necessities on the husband's credit, but without his express authority, to look cautiously into all the facts and circumstances. (b)

When the separation takes place by the consent and agreement of both parties, something of uncertainty arises, from the

* 357 * conflict between the unwillingness of the law to permit and sanction such violation of marriage obligation and

(x) *Manby v. Scott*, 1 Sid. 129; *Brown v. Patton*, 3 Humph. 135; *McCutchen v. McGahay*, 11 Johns. 281; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Williams v. Prince*, 3 Strob. L. 490; *Allen v. Aldrich*, 9 Foster (N. H.), 63; *Thorne v. Kathan*, 51 Vt. 520; *Bevier v. Galloway*, 71 Ill. 517; *Schnuckle v. Bierman*, 89 Ill. 454; *Hartmann v. Tegart*, 12 Kan. 177. — If, however, she offers to return, not having been guilty of adultery, and the husband refuses to receive her, his liability for her future necessities is thereby revived. *McCutchen v. McGahay*, 11 Johns. 281; *Clement v. Mattison*, 3 Rich. L. 93; *Cunningham v. Irwin*, 7 S. & R. 247. — And if such application is made to the husband by some third person on behalf of the wife, and he without questioning such third person's authority, puts his re-

fusal on some other ground, it will be equivalent to a personal application by the wife herself. *McGahay v. Williams*, 12 Johns. 293. So if husband and wife separate by consent, and provision is made by him for her maintenance, if the wife, during such separation, purchase necessities, and the parties subsequently cohabit together, the husband will be liable for them. *Rennick v. Ficklin*, 3 B. Mon. 166; *Rea v. Durkee*, 25 Ill. 503.

(y) Dig. Lib. 23, Tit. 3.

(z) In *Henderson v. Stringer*, 2 Dana, 293, it is said: "If she offers to return, and he, *without sufficient cause*, refuses to receive her, his liability is revived."

(a) *Bates v. Enright*, Sup. Ct. of Me. 21 Law Rep. 53.

(b) See *Blowers v. Sturtevant*, 4 Denio, 46.

¹ If, however, she returns, and he receives her, he does not become liable for her necessary support during the separation. *Oinson v. Heritage*, 45 Ind. 73. — K.

duty, on the one hand, (*bb*) and on the other its disposition to allow such a separation under circumstances which give it a color of reason, and to hold all parties to their contracts made in relation to it, so far as may be done without placing the power of a dissolution of marriage too much in the hands of the married parties. (*bc*) Thus, it is said by Sir *William Scott*, that the obligations of the marriage contract are not to be relaxed at the pleasure of one party, or at the pleasure of both. (*c*) And it is well settled that they cannot by any contract destroy each other's rights. Let the covenant of separation be never so formal or solemn, either party may at any time insist upon a restoration of all the rights which belong to the relation of marriage. (*d*) (*x*) But if after such a deed, and a separation consequent upon it, the husband institutes proceedings to recover the society of his wife, the deed, though no bar, may still be evidence as to the character of the separation, and if this be shown to have arisen from his misconduct, either by the deed itself or otherwise, he cannot succeed. (*e*) Nevertheless, where such separation is made

(*bb*) See a strong case to this effect, *Collins v. Collins*, Phill. (N. C.) Eq. 153.

(*bc*) For recent cases arising under articles of separation, see *Griffin v. Banks*, 37 N. Y. 621; *Hitner's appeal*, 54 Penn. St. 110; *Carley v. Green*, 12 Allen, 104.

(*c*) See *Evans v. Evans*, 1 Hagg. Cons. 118; *Oliver v. Oliver*, id. 364.

(*d*) See *Mortimer v. Mortimer*, 2 Hagg. Cons. 318; *Sullivan v. Sullivan*, 2 Adams Ecl. 303; *Smith v. Smith*, 2 Hagg. Ecl. (supp.) n. (*a*). — Although a deed of separation upon mutual agreement, on account of unhappy differences, contain a covenant not to bring a suit for restitution of conjugal rights, yet it is no bar to such a

suit. *Westmeath v. Westmeath*, 2 Hagg. Ecl. (supp.) 115. — That deeds of separation between husband and wife amount to nothing more than a mere permission to one party to live separate from the other, and confer no release of the marriage contract on either party, and that neither can violate them, see *Warrender v. Warrender*, 2 Cl. & F. 561; *Lord St. John v. Lady St. John*, 11 Ves. 526, 532; *Wilkes v. Wilkes*, 2 Dickens, 791; *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow & C. 519. *Guth v. Guth*, 3 Bro. Ch. 614, seems *contra*, but this case is not of good authority.

(*e*) *Rex v. Mary Mead*, 1 Burr. 542.

(*v*) In England a married woman can contract to live apart from her husband; he can obtain specific performance of such a contract, if he has not materially departed from the terms of the deed of separation, and an injunction may be granted to restrain the wife from suing for restitution of conjugal rights. *Besant v. Wood*, 12 Ch. D. 605; *Kunski v. Kunski*, 68 L. J. P. 18. In America, such an agreement, though merely by parol, is recognized in equity after it was fully executed: *Dutton v. Dutton*, 30 Ind. 452; or when there is other valuable consideration than the separation. *Randall v. Randall*, 37 Mich. 563; *Hutton v. Hutton*, 3 Penn. St. 100. As to its validity when executory, much depends upon the local legislative policy as to the relation of husband and

wife; but, usually, this kind of agreement is, as to the future, treated as against public policy when it does not provide for a trustee for the wife. *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650; *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216; *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1038, 54 L. R. A. 554; *Sherer v. Sherer*, 23 Ind. App. 384, 77 Am. St. Rep. 437. Such a covenant is not a sufficient consideration for the husband's promise to assign insurance policies. *Baum v. Baum*, *supra*. An agreement to promote or facilitate a divorce is also against public policy. *Blauk v. Nohl*, 112 Mo. 159, 19 S. W. 65, 18 L. R. A. 350; *Henderson v. Henderson*, 37 Oregon, 141, 61 Pac. 136, 48 L. R. A. 766.

* 358 by an * instrument to which a third person is a party, and is a trustee for the wife, and the husband agrees with this trustee to give him a sufficient sum for her maintenance, such trustee may maintain an action on the agreement. (*f*) And if the trustee agrees to hold the husband harmless on his liability for his wife, and indemnify him against any further expenditure for her, the husband may maintain an action on such agreement. (*g*) Without the intervention of such third party, the

* 359 * husband and wife cannot contract together, being but one person in the view of the law. (*h*) But such agreement must be absolute and unconditional, and not dependent upon the contingency of a future separation, nor upon the wife's future consent to live separate, for then it is regarded as an inducement to separation, and is therefore wholly void. (*i*)¹ And if the covenant be in general to pay an annuity to the wife, the consideration for it being the separation, and in the nature of a continuing consideration, a subsequent reconciliation and cohabitation discharges the husband from his obligation. (*j*) But the agreement may be expressly to pay to her or for her use such annuity during her life, and then it is not affected by a subsequent cohabitation. (*k*) And it would seem, that if the annuity is

* 360 * expressly to be paid during the continuance of a separation by mutual consent, and the husband forfeits his marital rights by his own misconduct, he can no longer put an

See *Ex parte Sandilands*, 21 L. J. Rep. (N. S.) Q. B. 342, 12 E. L. & E. 463. See also *The Queen v. Jackson*, [1891] 1 Q. B. 671.

(*f*) *Jee v. Thurlow*, 2 B. & C. 547; s. c. 4 Dow. & R. 11; *Wilson v. Mushett*, 3 B. & Ad. 743. See also *Logan v. Birkett*, 1 Myl. & K. 225.

(*g*) See *Summers v. Ball*, 8 M. & W. 596.

(*h*) Co. Lit. 112 a; *Reeve*, Dom. Rel. 89, 90; *Marshall v. Rutton*, 8 T. R. 545; *Carter v. Carter*, 14 Sm. & M. 59. He cannot convey property directly to her. *Martin v. Martin*, 1 Greenl. 394; *Porter v. Wakefield*, 146 Mass. 25; *Jackson v. Parks*, 10 Cush. 550, was an action of assumpsit on two promissory notes, made by the defendant's testator to the plain-

tiff, his wife, during coverture. The consideration of the notes was certain property which the plaintiff held in her own right, which passed to her husband. The court held that the action could not be sustained. In *Sweat v. Hall*, 8 Vt. 187, the same doctrine has been established. See also *Hoker v. Baggs*, 63 Ill. 161; *Butler v. Ives*, 139 Mass. 202; *Patterson v. Patterson*, 45 N. H. 164, 166. [The law on this point is changed by statute in many jurisdictions.]

(*i*) *Westmeath v. Salisbury*, 5 Bligh (N. S.), 393; *Durant v. Titley*, 7 Price, 577; *Hindley v. Westmeath*, 6 B. & C. 200; *Jee v. Thurlow*, 2 B. & C. 547; *Jones v. Waite*, 9 Cl. & F. 101.

(*j*) *Scholey v. Goodman*, 1 C. & P. 36.

(*k*) *Wilson v. Mushett*, 3 B. & Ad. 743.

¹ An indenture in which a husband agrees to pay to a trustee money for the support of his wife, made in contemplation of an immediate separation, which takes place, is not void as against public policy. *Fox v. Davis*, 113 Mass. 255. But a note made by a husband to a trustee for his wife in consideration that she would drop proceedings for a divorce and return and live with him as his wife, is illegal. *Merrill v. Peaslee*, 146 Mass. 460. — W.

end to the separation, nor to his obligation to pay the annuity. (*l*) And if such an agreement to pay an annuity do not expressly except adultery on her part, neither that nor a divorce because of it would discharge his obligation. (*m*) Such is the doctrine of the English courts; and in Massachusetts, it was held where real estate was secured, the income to be paid to the wife during her life, and to her husband during his life, if he survived her, and she was divorced from him for his adultery, and afterwards died, he was still entitled to the income during his life. (*mm*) But it must be remembered that such divorce in England would have formerly been only (unless by act of Parliament) *a mensâ et thoro*; whereas in this country it would be *a vinculo*, and thus might perhaps put an end to such obligation. There is now, however, in England, a court having full power to decree divorces *a vinculo*; and the rules of law hitherto applied in that court are similar to those in force in this country.

If, upon such separation, property has been settled on the wife and children for their support, it would be upheld against subsequent creditors, unless the settlement were shown to be in fraud of them, or otherwise not in good faith. (*n*)

If there be separation by consent, and a specific sum settled upon the wife, which is reasonably sufficient for her necessities, then the husband is not liable for necessities supplied to her. (*o*)

Nor is he so liable even if the party so furnishing * goods * 361 did not know of the provision made for the wife; unless this party had supplied her before, and the separation was recent and not notorious; (*p*) the fact of separation, if he knew it, was

(*l*) *Whoregood v. Whoregood*, 1 Ch. Cas. 250.

(*m*) *Baynon v. Batley*, 8 Bing. 256; *Jee v. Thurlow*, 2 B. & C. 547.

(*mm*) *Babcock v. John Smith*, 22 Pick. 61.

(*n*) *Hobbs v. Hull*, 1 Cox, 445; *Stephens v. Olive*, 2 Bro. Ch. 91; *Nunn v. Wilmor*, 8 T. R. 521.

(*o*) *Angier v. Angier*, Gilb. Eq. 152; *Stephens v. Olive*, 2 Bro. Ch. 90; *Todd v. Stokes*, 1 Salk. 116, 1 Ld. Raym. 444. This allowance must be reasonably sufficient for the wife to the satisfaction of a jury; and the mere acquiescence on the part of the wife in the sum paid will not necessarily exonerate the husband. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Liddlow v. Wilmot*, 2 Stark. 87; *Emmett v. Norton*, 8 C. & P. 506. The sum stipulated by the husband must have been *actually paid*, or the husband is not discharged, and the wife is not driven to her remedy on the

instrument of separation, but may bind her husband on her contracts. *Nurse v. Craig*, 5 B. & P. 148; *Hunt v. De Blaquiere*, 5 Bing. 550.

(*p*) In *Rawlins v. Van Dyke*, 3 Esp. 250, Lord *Eldon* held that in cases of separation between man and wife, if the tradesman's demand is for necessities it is incumbent on the husband, in order to discharge himself, to show that the tradesman had notice of the separation. *Contra*, is *Mizen v. Pick*, 3 M. & W. 481, where *Alderson*, B., said: "I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife living separate from her husband is supplied by him with sufficient funds to support herself, — with everything proper for her maintenance and support, — then she is not his agent to pledge his credit, and he is not liable." It is held in this country that if the tradesman was not accustomed to trust the wife

enough to put him upon inquiry. But the party supplying necessities to a separated wife is not bound to show that no provision is made for her; if the husband would otherwise be bound, and undertakes to relieve himself from his liability by the fact of such provision, the burden of proving it lies on him; (q) and if it be inadequate or not duly paid, he is liable. (r) But he is not liable,

even if the separation were not by deed, and there is no * 362 written agreement between them as * to the allowance if it be in fact paid to her. (s) And he is also under no liability if sufficient necessities be provided for her by another person and none by him. (t)

The rule of law is, that if a wife be separated from her husband, with her consent, he is liable for necessities supplied to her only where in fact she has no other means of obtaining them. But under any circumstances of separation, the husband may be held to answer to articles of the peace against him, if occasioned by his violent conduct towards her, (u) and even held liable to pay the bill of the attorney whom she employs for * 363 that purpose. (v)¹ But he has been held not liable to pay

before separation, neither express notice nor general notoriety of the fact of separation is necessary to discharge the husband. *Cany v. Patton*, 2 Ashm. 140; and see *Baker v. Barney*, 8 Johns. 72; *Mott v. Comstock*, 8 Wend. 544; *Wilson v. Smyth*, 1 B. & Ad. 801.

(q) See *Frost v. Willis*, 13 Vt. 202; *Rumney v. Keyes*, 7 N. H. 571; *Clancy on Husband & Wife*, 28. But in *Mott v. Comstock*, 8 Wend. 544, it was held that if a husband professes to provide for his wife, who lives apart from him, it is incumbent upon a party who has been expressly forbidden to give her credit to show clearly and affirmatively that the husband did not supply her with necessities suitable to her condition, before he can charge him for supplies furnished her; and this seems to be the better law. But see *McClellan v. Adams*, 19 Pick. 333.

(r) *Hodgkinson v. Fletcher*, 4 Camp. 70; *Liddlow v. Wilmot*, 2 Stark. 87; *Emmett v. Norton*, 8 C. & P. 506; *Hunt v. De Blaquiére*, 5 Bing. 550. — It has been held that although the husband pays the wife a sufficient allowance, yet if he expressly promise to pay the debts she has contracted during such separation, he is bound by such promise. *Harrison v. Hall*, 1 Mood. & R. 185; *Hornbuckle v. Horn-*

bury, 2 Stark. 177. These cases seem anomalous; for, if the allowance was duly paid, and was adequate, the husband's promise would be *nudum pactum*.

(s) No deed of separation is actually necessary; it is sufficient if a separation actually took place. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emery v. Neighbour*, 2 Halst. 142; *Lockwood v. Thomas*, 12 Johns. 248; *Kimball v. Keyes*, 11 Wend. 33. But if the separate maintenance be secured by deed, it is held that the deed is void unless executed by a trustee on the part of the wife. *Ewers v. Hutton*, 3 Esp. 255.

(t) It is immaterial from what source the wife's provision comes, provided it be sufficient and permanent. *Liddlow v. Wilmot*, 2 Stark. 86; and see *Dixon v. Hurrell*, 8 C. & P. 717. *Thompson v. Hervey*, 4 Burr. 2177, sometimes cited as deciding that the provision must be derived from the husband in order to discharge him, seems to proceed rather on the ground that the provision was purely voluntary, and during the grantor's pleasure, and therefore that creditors could not be supposed to rely upon it.

(u) *Turner v. Rookes*, 10 A. & E. 47.

(v) *Shepherd v. Mackoul*, 3 Camp. 326. But this was on the ground that in that

¹ So a husband unsuccessfully prosecuting his wife, to compel her to find sureties to keep the peace, is liable for the reasonable fees of her attorneys, as necessities. *Warner v. Heiden*, 28 Wis. 517. — K.

* the bill of an attorney, whom she employs to procure an indictment of him. (*w*)

In this country if such questions arise on a petition by the wife for a divorce, the court, if satisfied of the wife's destitution, and in view of all the circumstances they deem it just and expedient, often requires the husband to provide for the expenses of the proceedings against him.

A liability, very similar to that which falls upon one who is legally a husband, rests also upon him who lives with a woman as his wife, who is not so. If he holds her out to the public as his wife, then he promises the public that he will be as responsible for her as if she were so. (*x*) Hence he is liable, as for his wife, to a tradesman who knew that they were not married. (*y*) The ground of his liability is not that he deceived persons into an erroneous belief that she was his wife, but that after voluntarily treating her as such, and so inducing persons to believe that he would continue to treat her as such, he cannot recede from the liabilities which he thus assumes. But this liability ceases with cohabitation; he is not responsible for necessities supplied to her afterwards, even where they had lived together a long time, and she had left him because of his ill conduct. (*z*)

* Proof of cohabitation seems to be sufficient *prima facie* * 364 evidence in an action against husband and wife for her debt before marriage. (*a*)

particular case the step was actually necessary on the part of the wife. See *Brown v. Ackroyd*, 5 E. & B. 819; also preceding note, and *Shelton v. Pendleton*, 18 Conn. 417. In *Ladd v. Lynn*, 2 M. & W. 265, it was held that a husband was not liable for expenses incurred by the wife in procuring a deed of separation.

(*w*) Because that is not necessary. *Grindell v. Godmond*, 5 A. & E. 755. Nor for the counterpart of the deed of separation, procured by the wife's trustee, unless he expressly promise to pay. *Ladd v. Lynn*, 2 M. & W. 265; *Coffin v. Dunham*, 8 Cush. 404. Nor is a husband liable to an attorney for professional services rendered to the wife in defending against his petition for a divorce for her fault, nor on her petition against him for his. *Wing v. Hurlburt*, 15 Vt. 607; *Dorsey v. Goodenow*, Wright 120. See *supra*, p. * 348, note 3. And see *Shelton v. Pendleton*, cited in the preceding note. Nor is the woman herself liable, unless she expressly promise to pay them, after the divorce. *Wilson v. Burr*, 25 Wend. 386. If there is evidence of an express agree-

ment to pay such bills, the husband may then be liable. *Williams v. Fowler*, 1 McClell. & Y. 269.

(*z*) *Watson v. Trelkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167; *Munro v. De Chemant*, 4 Camp. 215; *Carr v. King*, 12 Mod. 372; *Graham v. Brettell*, 18 Law Times, 185.

(*y*) *Watson v. Trelkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Ryan v. Sams*, 12 Q. B. 460.

(*z*) *Munro v. De Chemant*, 4 Camp. 215. But see *Ryan v. Sams*, 12 Q. B. 460. In *Blades v. Free*, 9 B. & C. 167, where a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad, it was held, that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received.

(*a*) *Tracey v. McArlon*, 7 Dowl. P. C.

In England, it has been decided, that if a marriage has taken place *de facto*, the husband cannot defend against an action brought on promises made by the wife before coverture, by showing that the marriage was illegal, and therefore void, because only the spiritual courts can take cognizance of such questions. (*b*) But in this country, as we have no such courts, the defence could not be objected to on these grounds.

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* SECTION IV.

OF THE DISABILITY OF A WIFE TO ACT AS A SINGLE WOMAN.

This disability is almost entire at common law. The usages of this country, recognized more or less distinctly by the courts, have lessened this somewhat, and the recent legislation of most of the States has modified it very materially; as may be seen in the synopsis at the close of this chapter. (*c*) (*x*)

532. And see *Norwood v. Stevenson*, *Andrews*, 227. But to be liable for the wife's *torts* committed before coverture, a marriage *de facto* is not sufficient; and a man with whom a woman already married contracts matrimony, her first and lawful husband still living, is not responsible for her torts committed before coverture. *Overholt v. Elswell*, 1 *Ashm.* 200. And the same reasoning would seem to apply to her debts contracted before coverture. And a husband is not liable for the debts of his wife *dum sola*, unless the wife herself was liable for them at

the time of her marriage. *Caldwell v. Drake*, 4 *J. J. Marsh.* 247.

(*b*) *Norwood v. Stevenson*, *Andrews*, 227.

(*c*) See *Yale v. Dederer*, 18 *N. Y.* 265; *s. c.* 22 *N. Y.* 450; 68 *N. Y.* 329, for an examination of the question how far and when the note of a married woman binds her separate estate under the existing law of New York. It seems that it does not, unless she distinctly consent that the debt should be created on the credit of that estate, and should bind it.

(*x*) As to contracts, the rights and liabilities of married women are now so completely covered by statute in all the American States (a full synopsis of which statutes will be found at the end of this chapter) as to practically supersede the common law. That law is still material, however, as statutes like that of Michigan (3 *Compiled Laws*, p. 2673, § 8690), by which married women may convey their property, and contract in relation thereto, as if they were unmarried, are construed as enabling them to enter only into such contracts as relate to the benefit and improvement of their separate estate, and as have a direct relation to such property; an incidental benefit or improvement not being sufficient. *Detroit Chamber of Commerce v. Goodman*, 110 *Mich.* 498, 68 *N. W.* 295, 35 *L. R. A.* 96. In such case, or when the statute expressly enables the

wife to contract only in respect to her separate estate, she cannot make any contract if she has not, at the time, any separate estate. *Hirth v. Hirth*, 98 *Va.* 121, 34 *S. E.* 964. As to charging the wife's land for improvements made thereon by her husband, see *Morris v. Fletcher* (67 *Ark.* 105), 77 *Am. St. Rep.* 87, 92 n.; *Cleland v. Clark*, 123 *Mich.* 179, 81 *N. W.* 1086, 81 *Am. St. Rep.* 161, 192 n.

So under the statute of New York, which confers upon a married woman the right to create a separate estate by carrying on a trade or business on her sole account, her contracts, to be valid, must relate to or be for the benefit of her separate estate, or the payment therefor must be expressly charged thereon. *Holcomb v. Harris*, 166 *N. Y.* 257, 261, 59 *N. E.* 820.

In all such cases the common law prevails when it has not been invaded by

Even at common law there were some exceptions. Thus, a wife might purchase land in fee, and the grant would not be void. But it would be voidable by the husband by any act distinctly expressing his dissent; and voidable also by the wife after her husband's death. (*d*) Her conveyance of her real estate was absolutely void at common law. But the usages of this country, from the earliest colonial times, have so modified this rule, that a conveyance by her and her husband, jointly, of her land, is valid; but not by separate deeds. (*dd*)¹ In some of the States precautions are taken by statute to secure her actual consent, by requiring that she should be examined concerning this matter by a magistrate, without her husband being present. (*e*)²

She may relinquish her dower, by executing with her husband his deed of the land; provided that apt words, to indicate her purpose of release, are in the deed; for these are necessary to make the release effectual. (*f*) Generally she cannot release her dower by her own separate deed; but in a very few of the States it is said that she may. (*g*)

(*d*) Co. Litt. 352 a; 2 Bl. Com. 292.

(*dd*) Baxter v. Bodkin, 25 Ind. 172.

(*e*) 2 Kent Com. 152.

(*f*) Catlin v. Ware, 9 Mass. 218; Luffkin v. Curtis, 13 Mass. 223.

(*g*) Ela v. Card, 2 N. H. 175; Gordon v. Haywood, id. 405; Fowler v. Shearer,

7 Mass. 14; Rowe v. Hamilton, 3 Greenl. 63. But see Powell v. Monson Man. Co., 3 Mason, 347, and Hall v. Savage, 4 Mason, 273; Lawrence v. Heister, 3 Har. & J. 371; Manchester v. Hough, 5 Mason, 67; 2 Kent Com. 153.

¹ So a subsequent assent of the husband renders her deed valid, if the wife has not meanwhile repudiated the conveyance, Wing v. Schramm, 79 N. Y. 619; or where a deed is expressed as the wife's, but the husband signs and acknowledges it with her, Thompson v. Lovrein, 82 Penn. St. 432. But if a husband is insane, the wife's deed is void. Leggate v. Clark, 111 Mass. 308. — A wife's mortgage, without husband's joinder, is also void, Weed, &c. Co. v. Emerson, 115 Mass. 554; Herdman v. Pace, 85 Ill. 345; Yager v. Merkle, 26 Minn. 429; as well as her assignment of a mortgage, Moore v. Cornell, 68 Penn. St. 320. — Where a husband and wife are both named "parties of the first part," and then such parties as "grantors," it is a good deed, and binds them both. Thornton v. Exchange Bank, 71 Mo. 221. — K.

² A wife's deed is void, unless the statute formalities are fully complied with, Wentworth v. Clark, 33 Ark. 432; but a substantial compliance with the statute is sufficient, Thayer v. Torrey, 8 Vroom, 339; Hamar v. Medsker, 60 Ind. 413; Laughlin v. Fream, 14 W. Va. 322; Allen v. Lenoir, 53 Miss. 321; Little v. Dodge, 32 Ark. 453. — W.

statutes. Hager v. Nat. German-American Bank, 105 Ga. 116, 31 S. E. 141. Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273. Thus, as the legislation of New York does not touch upon the husband's common-law right to his wife's earnings and services when not received or rendered expressly upon her sole and separate account, he may sue alone to recover for her services rendered

under a contract made by him, and while she lived with him. Holcomb v. Harris, *supra*.

A statute which enables a wife living apart from her non-resident husband to convey property as if sole does not apply to testamentary dispositions. Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554.

The agreement of a wife for a sale of her real estate, * 366 though * made with the assent of the husband, is said to be wholly void at law and in equity. (*h*)¹ Nor will she be held after her husband's death on any of her covenants of warranty, unless so far as they may operate upon her by way of estoppel. (*i*)² (*x*)

In England, a married woman, trading independently of her husband within the city of London, may, by the "custom of London," sue and be sued as a *feme sole*, with reference to such dealings of trade. (*j*) But even there the husband should be made a party to the suit, (*k*) though she will be treated as the

(*h*) *Butler v. Buckingham*, 5 Day, 492; *Watrous v. Chalker*, 7 Conn. 224.

(*i*) *Fowler v. Shearer*, 7 Mass. 21; *Colcord v. Swan*, 7 Mass. 291; *Jackson v. Vanderheyden*, 17 Johns. 167. See as to estoppel, *Hill v. West*, 8 Ohio, 225,

opposing *Jackson v. Vanderheyden*, and agreeing with the Massachusetts cases.

(*j*) *Bac. Abr. Baron & Feme* (M).

(*k*) *Caudell v. Shaw*, 4 T. R. 361; *Beard v. Webb*, 2 B. & P. 93; *Starr v. Taylor*, 4 McCord, 413; *Laughan v. Bewett*, Cro. C. 68.

¹ Nor can she bind herself to buy land. *Robinson v. Robinson*, 11 Bush. 174. — W.

² Nor are her heirs and devisees answerable on her covenants. *Foster v. Wilcox*, 10 R. I. 443. — W.

(*x*) A married woman may be estopped by acts *in pais* in cases involving her equitable title to real estate. *Le Coil v. Armstrong* L. H. Co., 140 Ind. 256; *Hamlen v. Bennett*, 52 N. J. Ch. 70; *Branch v. Ward*, 114 N. C. 148; *Snow v. Hutchins*, 160 Mass. 111, 35 N. E. 315. This is limited, however, to fraudulent conduct. *Wetherbee v. Farrar*, 97 N. C. 106; *Rush v. Dilks*, 43 Hun, 282; *Chaffe v. Watts*, 37 La. Ann. 324; *Gray v. Crockett*, 35 Kansas, 66; *Ingalls v. Ferguson*, 59 Mo. App. 299. In Massachusetts validity is not given to contracts between husband and wife, or those of infants, by means of equitable estoppel. *Nat. Granite Bank v. Tyndale*, 176 Mass. 547, 57 N. E. 1022. In Indiana, if a mortgage on the joint property of husband and wife recites that the loan is for their use jointly, and for improving such property, she is estopped from asserting that the loan was to the husband, and that she is a surety only. *Lavene v. Jarnecke*, 28 Ind. App., 62 N. E. 510. See *Brown v. Pechman*, 53 S. C. 1, 30 S. E. 586; *Moon v. Bruce* (S. C.), 40 S. E. 1030; *Muller's Succession*, 106 La. 89, 30 So. 329.

An infant's settlement of property on her marriage is voidable at her election, as regards her, but not void. *Edwards v. Carter*, [1893] A. C. 360; *Duncan v. Dixon*, 44 Ch. D. 211. A married woman,

after obtaining a decree of judicial separation, is a *feme sole* with respect to property which she acquires, or which devolves upon her after such decree. *Waite v. Morland*, 38 Ch. D. 135. See *Re Emery's Trusts*, 50 L. T. 197; *Fitzgerald v. Chapman*, 1 Ch. D. 563.

In England real estate vested in a wife, married since the Married Women's Property Act, 1882, jointly with other persons upon trust for sale, cannot be conveyed to a purchaser without her husband's concurrence and a separate acknowledgment by her. *In re Harkness & Allsopp's Contract*, [1896] 2 Ch. 358. See 33 Am. L. Reg. n. s. 189.

If a married woman elects to avoid a covenant, her interest in other property under the settlement should be impounded to compensate those who lose by her election. *Hamilton v. Hamilton*, [1892] 1 Ch. 396. See also *Re Queade's Trusts*, 54 L. J. Ch. 786; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124; 31 Ch. D. 275. Coverture does not prevent a married woman from ratifying her covenant made when she was an infant. *In re Hodson's Settlement*, [1894] 2 Ch. 421. As to post-nuptial judicial settlement of the property of an infant wife, see *Brown v. Wadsworth*, 168 N. Y. 225, 61 N. E. 250.

substantial party. Elsewhere in England she can act as a single woman only when the legal existence of her husband may be considered as extinguished, wholly or for a definite period; as in case of outlawry, abjuration of the realm, or transportation for life, or for a limited term. (*l*) In this country, however, in part by statute, as in Pennsylvania, and South Carolina, (*m*) and as an effect of the powers and privileges now given to the wife in many States, and to some extent by the decisions of the courts, the law, as we have already intimated, is much more reasonable,

* and a married woman may act as if unmarried under * 367 many circumstances; as for continued abandonment, (*n*) alienage, and non-residence, or the privity and acquiescence of the husband, although not expressed by deed. (*o*) (*x*)

(*l*) *Marshall v. Rutton*, 8 T. R. 545. And a married woman cannot there be sued on her contracts, although she live apart from her husband in a state of adultery, and there exist a valid divorce *a mensâ et thoro*, and she contract during such separation in the assumed character of a single woman. *Lewis v. Lee*, 3 B. & C. 291, 5 Dow. & R. 98; *Faithorne v. Blaquiere*, 6 M. & Sel. 73; *Turtle v. Worsley*, 3 Dougl. 290. But see *Cox v. Kitchin*, 1 B. & P. 338. Neither is her personal representative liable under such circumstances, although he have abundant assets. *Clayton v. Adams*, 6 T. R. 604. But if the legal assistance of the husband is considered as extinguished, the wife may contract as a *feme sole*. *Lady Belknap's case*, Year Book, 1 Hen. 4, 1 a; *Lean v. Shutz*, 2 W. Bl. 1195; *Marsh v. Hutchinson*, 1 B. & P. 231; *Ex parte Franks*, 7 Bing. 762, 1 M. & Scott, 1; *Carrol v. Blencow*, 4 Esp. 27; *Stretton v. Busnach*, 1 Bing. N. C. 140.

(*m*) In Pennsylvania and South Carolina a wife may become a sole trader, and become liable as such, in imitation of the custom of London. *Starr v. Taylor*, 4 McCord, 413; *Newbiggin v. Pillans*, 2 Bay, 162; *McDowall v. Wood*, 2 Nott & McC. 242; *Burke v. Winkle*, 2 S. & R. 189; *Jacobs v. Featherstone*, 6 W. & S. 346. She must, however, in order to have the privilege of contracting as a *feme sole*, be technically a trader. *McDaniel v. Cornwall*, 1 Hill (S. C.), 428. The privilege does not extend to a woman who is a common carrier. *Ewart v. Nagel*, 1 McMull. 50. Nor to one who was separated from her husband, and

supported herself by her daily labor. *Robards v. Hutson*, 3 McCord, 475. Keeping a shop as a milliner brings her within the privilege. *Surtell v. Brailsford*, 2 Bay, 333. But her privilege to contract as a *feme sole* extends no further than to such contracts as are connected with her trade. *McDowall v. Wood*, 2 Nott & McC. 242. And see *Wallace v. Rippon*, 2 Bay, 112.

(*n*) If the husband is banished, then, as we have seen, by the laws of England and of this country, a wife may contract as a *feme sole*. *Wright v. Wright*, 2 Desaus, 244. And the law is the same whether he is banished for his crimes, or has voluntarily abandoned his wife. *Rhea v. Rhenner*, 1 Pet. 105; *Chapman v. Lemon*, 11 How. Pr. 235. The voluntary absence of the husband, however, must be more than temporary in order to have this effect. *Robinson v. Reynolds*, 1 Aik. 174; *Gregory v. Pierce*, 4 Met. 478; *Commonwealth v. Collins*, 1 Mass. 116; *Chouteau v. Merry*, 3 Mo. 254. If it amount to absolute and complete desertion, then it may be sufficient. *Cases supra*, and likewise *Ayer v. Warren*, 47 Me. 217. Whether the imprisonment of the husband for life, or a term of years, in our State prisons, will have the same effect, is more doubtful. See 21 Am. Jur. 8; 1 Swift, Dig. 36; *Cornwall v. Hoyt*, 7 Conn. 427. If the husband is an alien, and never resided in this country, the wife may sue and be sued as a *feme sole*. *Kay*

(*o*) *Megrath v. Robertson*, 1 Desaus. 445.

(*x*) Power given by statute to the wife to trade as a *feme sole* does not

affect her relations to her husband, or enable the relation of debtor and creditor

It may be added, that the husband is, in general, held for the torts or frauds of the wife, committed during coverture. (*x*) If committed by his order, he is alone liable. If while she is in his company the law presumes his order; but this presumption may be overcome by evidence.¹ Where both are liable, and must be sued jointly, the remedy, by imprisonment or execution, must be sought of the husband alone. (*p*) But if the tort of the wife alone be punishable by imprisonment, this punishment falls on her alone. If the wife be sued jointly with her husband, for her libel (and perhaps for other torts), the damages shall be the same as if she were unmarried. (*q*) If the husband assumes to be the agent of the wife, and in that capacity commits a fraud, it is said that she cannot be made liable, because she has no power to make her husband her agent. (*r*) But this we think may be doubted.

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*SECTION V.

OF THE SEPARATE ESTATE OF A MARRIED WOMAN, AND OF SETTLEMENTS IN HER FAVOR.

If the wife has a separate estate, this is usually reached in equity. (*y*) Thus, if she join with her husband in making a promis-

v. Duchess de Pienne, 3 Camp. 123; *Deerly v. Mazarine*, 1 Salk. 116; *Robinson v. Reynolds*, 1 Aik. 174; *De Gaillon v. L'Aigle*, 1 B. & P. 356, compared with *Farrer v. Granard*, 4 B. & P. 80. But this rule is qualified in *Barden v. Keverberg*, 2 M. & W. 61, in which it is held

that she is responsible only if she represents herself as a *feme sole*, or the plaintiff has knowledge of the facts.

(*p*) 3 Bl. Com. 414.

(*q*) *Austin v. Wilson*, 4 Cush. 273.

(*r*) *Birdseye v. Flint*, 3 Barb. 500.

¹ Her defence of coercion should be set up in the pleadings. *Clark v. Bayer*, 32 Ohio St. 299. See *Handy v. Foley*, 121 Mass. 259; *Ferguson v. Brooks*, 67 Me. 251. A husband is liable in replevin for his wife's unlawful detention of chattels under a claim of title in herself. *Choen v. Porter*, 66 Ind. 194. — K.

to be established between them. *Leahy v. Leahy* (Ky.), 29 S. W. 852, 853; *Snashall v. Met. R. Co.*, 19 D. C. 399. Where the wife can engage in business as a *feme sole*, the husband can be her agent in the business, and she can make him her attorney in fact. *Kirkey v. Lacy*, 7 Houst. (Del.) 213; *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014. As the husband is entitled to the wife's earnings at common law, the burden is upon her to show that property purchased by her during coverture was bought with her own and not her husband's funds. *Walker v. Peck*, 39 W. Va. 325; *Crook v. Tull*, 111 Mo. 283, 20 S. W. 8; *Bynum*

v. Frederick, 81 Ala. 489; *Yesler v. Hochstettler*, 4 Wash. St. 349. Earnings from a business which the husband permits his wife to conduct on her own account are her separate property. *Baer v. Pfaff*, 44 Mo. App. 35. The husband's power to bind his wife's separate estate terminates with her death. *Gibbs v. Bunch*, 63 Miss. 47. The New Hampshire statute allowing a wife to hold her own property free from her husband's control does not apply to property received by her before its enactment. *Allen v. Coburn*, 65 N. H. 37, 38.

(*x*) See *supra*, p. *345, n. (xx).

(*y*) In *Ankeney v. Hannon*, 147 U. S.

sory note, this separate estate is chargeable with it. (s)¹ (x) Perhaps, however, it must be shown that the promise was made with special

(s) *Yale v. Dederer*, 21 Barb. 286; s. c. *Ikelheimer*, 26 Ala. 332; *Collins v. 18 N. Y. 265*; 22 N. Y. 450; 68 N. Y. 329; *Rudolph*, 19 Ala. 616. *Bell v. Kellar*, 18 B. Mon. 381; *Ozley v.*

¹ Contracts by a married woman for necessities or her separate estate's benefit are enforceable against it, *Priest v. Cone*, 51 Vt. 495; as for money borrowed for the avowed purpose of benefiting her estate, and her note is received in reliance upon her statement, although the money was in fact otherwise applied, *McVey v. Cantrell*, 70 N. Y. 295; see *Dale v. Robinson*, 51 Vt. 20; or for services rendered in borrowing money to lift a mortgage from her separate estate, *Patrick v. Littell*, 36 Ohio St. 79; or a bond for part of the purchase-money of her estate, *Garland v. Pamplin*, 32 Gratt. 305; but not for money lent to her on an agreement that it should be applied to the use of her husband or his firm, *Nourse v. Henshaw*, 123 Mass. 96. — She is not liable as surety on a guardian's bond without expressing an intention to bind her separate estate. *Gosman v. Cruger*, 69 N. Y. 87. — K.

118, 123, 13 S. Ct. 206, 37 L. Ed. 105, *Field, J.*, said: "The separate estate of a married woman is, in the absence of legislation on the subject, created by conveyance, devise, or contract. Its creation gives to her the beneficial use of the property which otherwise would not be brought under her control. As to such property she is regarded in equity as a *feme sole*, and it was, therefore, formerly held that her general engagements, though not personally binding upon her, could be enforced against the property. This doctrine, however, has been modified in modern times. It is now held that to charge her separate estate with her engagement, it must be made with an intention on her part to create a charge upon such estate; that is, with reference to the property, either for its improvement or for her benefit upon its credit;" and it is conceded that she must have intended to charge her separate estate with her contract. A wife's assent to the transfer of her separate estate to her husband, and its investment in a certain way, will not be avoided for ignorance of law on her part. *Oshurn v. Throckmorton*, 90 Va. 311, 18 S. E. 285. A husband's deed of realty to his wife conveys only an equitable interest, apart from statute. *Wallace v. Pereles*, 109 Wis. 316, 85 N. W. 371, 53 L. R. A. 644. If the property is not actually settled to her separate use, the husband cannot make his wife deal with it as if it were separate property. *Cahill v. Cahill*, 8 A. C. 420; *Butler v. Butler*, 16 Q. B. D. 374, 378.

(x) A court of equity will not set aside a judgment by default against a married woman upon a note to which she might have pleaded coverture. *Evans v. Calman*, 92 Mich. 427; *Yeatman v. Bellmain*,

74 Tenn. 488. Signing a joint note with her husband is *prima facie* evidence of the wife's intention to charge her separate estate. *Nelson v. McDonald*, 80 Wis. 605; see *Schofield v. Jones*, 85 Ga. 816; *Atkinson v. Weidner*, 83 Mich. 412. A promissory note given by the wife to her husband's copartnership is void as between the original parties, and equity cannot afford relief. *Clark v. Patterson*, 158 Mass. 388, 33 N. E. 589; *Rahway Bank v. Brewster*, 49 N. J. Eq. 231. A bond executed by a wife as surety for her husband's debt binds her separate estate. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

In general, a married woman's contracts can be enforced only against property which formed part of her separate estate at the date of the contract. *Pike v. Fitzgibbon*, 17 Ch. D. 454; 14 id. 837; *King v. Lucas*, 23 Ch. D. 712. See *Flower v. Buller*, 15 Ch. D. 665. The rule that a married woman's contract is valid only as to her separate estate applies both at law and in equity. *Frazee v. Frazee*, 79 Md. 27, 28 Atl. 1105; *Filler v. Tyler*, 91 Va. 458; *Valentine v. Bell*, 66 Vt. 280; *Godfrey v. Megahan*, 38 Neb. 748; *Pickens v. Kniseley*, 36 W. Va. 794; *Shelton v. Hadlock*, 62 Conn. 143; *Mendenhall v. Leivy*, 45 Mo. App. 20; *Prentiss v. Paisley*, 25 Fla. 927; *Reed v. Buys*, 44 Mich. 80. She can properly appoint an agent only as to such estate. *MacFarland v. Heim*, 127 Mo. 327. A confessed judgment is a contract within this rule. See *Turner v. State*, 92 Ala. 53. Such contracts, being void, cannot be made valid by ratification after the husband's decease. *Davis v. Schmidt* (Ind.), 31 N. E. 840; *Nesbitt v. Turner*, 7 Kulp (Penn.), 41. After marriage a wife cannot ratify her

reference to, or was received on the credit of her separate estate. (*t*) Our courts now protect with great care any separate estate of the wife, and any reasonable agreement in her favor. (*u*) Nor will they interfere to vary or discharge it but for strong cause and on certain evidence. (*v*) Nor will the wife herself be permitted to waive such an agreement if it were made after marriage, and obviously intended to benefit her children. (*w*) And if the wife's debts are contracted before marriage, the remedy against her separate estate is suspended during her marriage. (*x*) But if contracted after marriage, they are *primâ facie* chargeable on her separate estate. (*y*) It will be seen in the synopsis at the close of the chapter, that the statutes of many States contain provisions for the security of the wife's separate estate.

Whether a wife, acting with her husband, may dispose of land conveyed to trustees for her separate use, when no power of disposition is given her, is not certain. The better rule seems to be, that she may, if the trust instrument is silent, but not if it contain express prohibitions or restrictions. (*z*) After some
 * 369 * fluctuation it seems that the English courts incline to permit a wife, with the consent of the trustees and the husband, to alienate funds or modify a trust created for her benefit. But it would also seem, that in this country the wife is protected

(*t*) *Conn. v. Conn.*, 1 Md. Ch. 212; *Cherry v. Clements*, 10 Humph. 552; *Burch v. Breckenridge*, 16 B. Mon. 482.

(*u*) See *Stille v. Folger*, 14 Ohio, 649.

(*v*) *Rogers v. Smith*, 4 Barr, 93.

(*w*) *Fenner v. Taylor*, 1 Sim. 169.

(*x*) *Vanderheyden v. Mallory*, 1 Comst. 452. See *Dickson v. Miller*, 11 Sm. & M. 594.

(*y*) *Greenough v. Wigginton*, 2 Greene (Iowa), 435; *Gardner v. Gardner*, 7 Paige, 112; *Conlin v. Cantrell*, 64 N. Y. 217.

(*z*) So held in New York, in *Jaques v. Methodist Episcopal Church*, 17 Johns. 548. In Maryland, in 5 Md. 219; *Tarr v. Williams*, 4 Md. Ch. 68; *Williams v.*

Donaldson, id. 414. In Tennessee, in *Marshall v. Stephens*, 8 Humph. 159; *Litton v. Baldwin*, id. 209. In South Carolina, *Nix v. Bradley*, 6 Rich. Eq. 53; *Adams v. Mackey*, id. 75. In Georgia, *Wylly v. Collins*, 9 Ga. 228. In Mississippi, *Doty v. Mitchell*, 9 Sm. & M. 435. And in Rhode Island, *Metcalf v. Cooke*, 2 R. I. 355. That she cannot make such disposition unless the power be given her, is held in Connecticut, *Imlay v. Huntington*, 20 Conn. 146, 175. In Alabama, *Bradford v. Greenway*, 17 Ala. 797. In North Carolina, *Harris v. Harris*, 7 Ired. Eq. 111, and in Virginia, *Hume v. Hord*, 5 Gratt. 374.

invalid contract made before marriage. *Saulsbury v. Corwin*, 40 Mo. App. 373.

The statement of claim upon her contract must allege that she has separate estate. *Tetley v. Griffith*, 57 L. T. 673; 36 W. R. 96. In South Carolina, in a suit upon a wife's contract, an allegation that the contract relates to her separate estate is unnecessary when the disability of coverture does not appear upon the complaint. *Brice v. Miller*, 35 S. C. 537.

As to the community property of

husband and wife now recognized frequently by statute, see *Muller's Succession*, 106 La. 89, 30 So. 329; *Childs v. Lockett*, 107 La. 270, 31 So. 751; *Fennell v. Drinkhouse*, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361, 365 n.; *Oregon Impr. Co. v. Sagmeister* (Wash.), 19 L. R. A. 233 and note.

As to powers of attorney by married women, see note to *Security Sav. Bank v. Smith* (38 Oregon, 72, 62 Pac. 794), in 84 Am. St. Rep. 756, 761.

against her own acts, and that such a trust cannot be discharged or changed unless by order of court. (a) And if lands so held in trust are sold by the husband under an agreement to purchase with the proceeds other lands to be held under the same trust, the lands so purchased by him are protected from his creditors. (b) But where, by such a trust, the wife may dispose of the fund, *for ever*, but dies without disposal, it goes to her husband. (c) Nor can a second husband interfere with a trust created by a first husband. (d) It has, however, been held, on grounds which seem to us doubtful, that where a wife, having power to dispose of lands under a trust, sells them, and with the proceeds buys other lands, these other lands do not come under the original trust, and become subject to the original power. (e) If she has the power to sell, she may contract to sell. (f)

A married woman may contract with her husband for a settlement for her benefit, in good faith, and for a valuable consideration, and courts of equity will sustain it, and even do what may be necessary to complete such a contract, if interrupted by death or accident. (g). If made in good faith in pursuance of an antenuptial agreement, it seems that this is valid, without other consideration than the marriage, that being a good and sufficient one. (h) But if wholly voluntary, it is *void against existing creditors, although made in good faith, but not against subsequent creditors. (i).¹

To any contract of a third person for the benefit of a wife, there must be a distinct assent of the husband; but this may be proved by implication, as by depositing money to her credit in a bank,

(a) *Leggett v. Perkins*, 2 Comst. 297; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Noyes v. Blakeman*, 3 Seld. 567; *Cruger v. Jones*, 18 Barb. 467. The U. S. Supreme Court has held that a court of equity should protect such a trust for the collateral relatives, if intended for their benefit. *Neves v. Scott*, 9 How. 196.

(b) *Barnett v. Goings*, 8 Blackf. 284.

(c) *Brown v. Brown*, 6 Humph. 127; *Wilkinson v. Wright*, 6 B. Mon. 576.

(d) *Cole v. O'Neill*, 3 Md. Ch. 174; *Robert v. West*, 15 Ga. 122.

(e) *Newlin v. Freeman*, 4 Ired. Eq. 312.

(f) *Van Allen v. Humphrey*, 15 Barb. 555.

(g) *Livingston v. Livingston*, 2 Johns. Ch. 537; *Coates v. Gealach*, 44 Penn. St. 43.

(h) *Reade v. Livingston*, 3 Johns. Ch. 481.

(i) *Borst v. Corey*, 16 Barb. 136; *Albert v. Winn*, 5 Md. 66. See also, in relation to post-nuptial settlements, *Kinnard v. Daniel*, 13 B. Mon. 496; *Thomson v. Dougherty*, 18 S. & R. 448; *Magniac v. Thompson*, 1 Baldw. 344; *Duffy v. Ins. Co.*, 8 W. & S. 413; *Sexton v. Wheaton*, 8 Wheat. 229; *Picquet v. Swan*, 4 Mason, 443.

¹ But a voluntary settlement by a husband upon his wife directly, without impairing the claims of existing creditors, is valid, although reserving a power of revocation, or appointment to other uses, *Jones v. Clifton*, 101 U. S. 225; and a deed of land, which is but a reasonable provision for her, by a husband to his wife, in consideration of love and affection, is valid as against an heir, *Majors v. Everton*, 89 Ill. 56; *Horder v. Horder*, 23 Kan. 391. — K.

and giving the deposit book to her with the knowledge of the husband. (*j*)

In New York, the statute requirements as to making a will, are held not to determine the age at which a married woman, with power to make a will, may exercise that power. (*k*) And the same rule would probably be adopted elsewhere.

Formerly, the rights which the husband acquired over the property of his wife by his marriage, were not only carefully protected, but any disposition of her property by the wife, made before marriage, in derogation of his rights, was held to be void on the ground that it was a fraud upon him. Doubtless there may now be such disposition of property by the wife, in actual fraud of the husband. (*kk*) But, in this country, nothing less than such a fraud, certainly proved, would be permitted by our courts to invalidate the acts of an unmarried woman, in favor of a husband subsequently married. (*l*) (*x*)

Again we must refer to the synopsis of the statutes concerning married women, which follows immediately. The reader will also find the cases cited in this note bearing on this question. (*ll*) The law on this interesting subject is, however, even now, in a transition condition, and changes in it are quite frequent.

(*j*) *Fisk v. Cushman*, 6 Cush. 20.

(*k*) *Strong v. Wilkin*, 1 Barb. Ch. 9.

(*kk*) *Duncan's Appeal*, 43 Penn. St. 67; *Belt v. Ferguson*, 3 Grant, 289.

(*l*) *St. George v. Wake*, 1 Myl. & K. 610; *Bill v. Cureton*, 2 Myl. & K. 503; *Strathmore v. Bowes*, 2 Bro. 345; s. c. 1 Ves. Jun. 22; *Tucker v. Andrews*, 13 Me. 124; *Jordan v. Black, Meigs*, 142; *Ramsay v. Joyce*, 1 McMull. Eq. 236; *Logan v. Simmons*, 3 Ired. Eq. 487.

(*x*) See *Moore v. Harrison*, 26 Ind. App. 408, 59 N. E. 1077; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Goodwin v. Malcom*, 5 Kan. App. 285, 48 Pac. 439; *Stoup v. Stoup*, 140 Ind. 179, 39 N. E. 864; *Dudley v. Dudley (Wis.)*, 8 L. R. A. 814 and note; 2 Kent Com. (14th ed.). 175 n. (*x*); 1 Perry on Trusts (5th ed.), §§ 122, 213 and notes; *Countess of Strathmore v. Bowes* (1 Ves. 22), 12 English Ruling Cas. 757, 765 n.

A wife may so permit her husband to retain and use the title to her realty as to estop her from claiming it against his creditors. *Cowling v. Hill*, 69 Ark. 350, 63 S. W. 800, 86 Am. St. Rep. 200. And a wife may so mingle her funds with her husband's, or enable him to do so as her agent, as to make it his as to his creditors. *Springfield Inst'n for Savings v. Copeland*,

(*ll*) *Huff v. Wright*, 39 Ga. 41; *Richardson v. Stodder*, 100 Mass. 528; *Marsh v. Marsh*, 43 Ala. 677; *Corning v. Lewis*, 54 Barb. 51; *Demott v. McMullen*, 8 Abb. Pr. (N. S.) 335; *Smith v. Allen*, 1 Laus. 101; *Boyles' Estate*, 1 Tuck. 4; *Walker v. Walker*, 9 Wall. 743; *Melley v. Casey*, 99 Mass. 241; *Gulick v. Grover*, 4 Vroom, 463; *Dutton v. Dutton*, 30 Ind. 452.

160 Mass. 380, 35 N. E. 1132. A payment from the wife's separate estate to her husband is presumably a gift. *Hume & Warwick Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56; *Clark v. Patterson*, 158 Mass. 338, 33 N. E. 589; *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 209.

Although a married woman is not liable upon a note signed by her and her husband, and made payable to and indorsed by him, he is liable thereon as maker. *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037. And when she is the last indorser, as she warrants the validity of the note, she is liable thereon, though it was indorsed to her by her husband. *Foster v. Leach*, 160 Mass. 418, 36 N. E. 69. A promissory note from the husband to a third person who indorses it to the wife in the husband's lifetime, is valid. *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121.

* SYNOPSIS

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Of the Statutes in the different States and Territories and the District of Columbia concerning the Rights and Powers of Married Women, and of the Husband in relation to his Wife's Property.

IN ALABAMA, all a wife's property held before, or acquired after marriage is her separate property free from her husband's liabilities, Civil Code (1896), § 2520. Her earnings are her separate property, but she is entitled to no pay for services to her husband or family, § 2521. Damages recovered for injuries to her person or property are her separate property, § 2523. She is liable as if sole for contracts made or torts committed before marriage. Husband is not liable, § 2524. She is liable on contracts made by her after marriage with her husband's consent. He is not liable on such contracts, nor for torts unless he takes part in them, § 2525. She may contract as if sole, except as otherwise provided by law, § 2526. She must sue or be sued alone upon her contracts, or for her torts, § 2527. She cannot convey real estate without her husband's consent, unless her husband is *non compos*, has abandoned her, is a non-resident, or is imprisoned under a sentence of not less than two years, § 2528. Husband and wife may contract with each other, but wife may not become surety for her husband, and their contractual relations are confidential, § 2529.

IN ALASKA, a wife is entitled to her wages, and may prosecute and defend actions as if unmarried, Code of Civil Proc. (1900), § 28. Her property acquired before or after marriage is not subject to her husband's debts, §§ 63, 64. She is liable on her contracts as if unmarried, § 68. Husband and wife may convey her real estate by their joint deed, § 74.

IN ARIZONA, all of a married woman's property owned before marriage and that acquired thereafter by gift, devise, or descent, is her separate property; of which, if of the age of eighteen years, she has the sole control, and may convey without the husband's joinder, as if unmarried. All after-acquired property, except as above, is common property. The separate property of husband or wife is not liable for the other's debts contracted before marriage; and their community property is liable for their community debts. Rev. Stats. (1901), Title 45, c. 3.

IN ARKANSAS, the before or after acquired real or personal property of a married woman is her separate estate, free from her husband's debts, and she may convey or dispose of it by will as if unmarried, Const. Art. 9, § 7. She may contract with reference to her property, do business and perform any services on her sole account, and her earnings are her own, and she alone may sue or be sued with reference thereto, Sandels & Hill's Digest (1894), § 4946. Her husband is not liable on her contracts, or for her costs, §§ 4947, 4949. The husband cannot bind a child to service, dispose of it, or appoint a testamentary guardian therefor, without the mother's consent, if living, § 4950. She may sue and be sued as if unmarried, § 4949, and her property cannot be sold to pay his antenuptial debts, § 4954. She may file a schedule of her personal property in the receiver's office of her county, § 4955. If not so scheduled as provided by law, the burden of proof is upon her to show that it is her separate estate, § 4957. The Act of Mar. 19, 1895,

enabled married women to make executory contracts and to execute letters of attorney for conveying her real estate. The Act of Feb. 1, 1899, relieves the husband from his wife's antenuptial debts, for which he is not bound by written contract.

In CALIFORNIA, husband and wife may contract as if sole (Code, ed. 1885), § 158, but may not by contract alter their legal relation to each other, except that they may agree in writing to an immediate separation and may make provision for support of either or of their children, § 159. They may hold property as joint tenants, tenants by entireties, tenants in common, or as community property, § 161; Act of Mar. 16, 1901 (p. 338), c. 157, § 33. All property of the wife owned before marriage and that acquired afterwards by gift, bequest, devise, or descent is her separate property, and may be conveyed by her without her husband's consent, § 162; so, of the husband, § 163. All other property acquired by either after marriage is community property, but property placed in the wife's name is presumed to be her separate property, § 164; Act of Mar. 16, 1901 (p. 338), c. 157, § 34; Act of Mar. 19, 1889 (p. 328), c. 219; Act of Mar. 3, 1893 (p. 71), c. 62; Act of Mar. 4, 1897 (p. 63), c. 72; of which the husband has management and disposition (other than testamentary), § 172. Inventory of wife's separate property may be recorded and is *prima facie* evidence of her title, §§ 165, 166. The wife's earnings are not liable for her husband's debts, § 168, and when living separate are her separate property, § 169. The separate property of the husband is not liable for the wife's debts, § 170; Act of Mar. 16, 1901 (p. 339), c. 157, § 35. Curtesy and dower are not allowed, § 173. The husband is liable for support furnished his wife, § 175, unless she has left him without cause or has agreed to a separation, § 176. The wife must support her husband if there is no community property and he has no separate property and is unable to support himself. A married woman, either personally or by agent, independently of her husband, may transfer her shares of stock, receive the dividends and grant proxies thereon, as if unmarried, § 325; Act of Mar. 16, 1901 (p. 350), c. 157, § 78. She may hold shares in homestead, and loan and savings corporations, bought with her own earnings and those of her children, or with property bequeathed or given to her by others than her husband, §§ 561, 575. Her conveyance of her real estate and her power of attorney (§ 1094; see now Act of Mar. 9, 1895 (p. 39), c. 35) given for that purpose are now made as if unmarried, § 1094; Act of Mar. 14, 1895 (p. 53), c. 53; Act of Mar. 1891 (p. 137), c. 75, repealing § 1186. She may dispose of her property by will as if unmarried, § 1273. She may sue or be sued as if unmarried, Code of Civil Procedure, § 370, as amended by the Act of Mar. 8, 1901 (p. 126), § 45. If the husband and wife are sued together, she may defend in her own right, and for him also if he neglect so to do, § 371. She may become a sole trader on due notice and petition to the court, §§ 1811, 1812, 1813. She may invest therein of the community or her husband's separate property not exceeding \$500, § 1814. On leave of court she may carry on the business * 372 specified in her own name, and the investments and * profits belong to her, free from the husband's debts, and she has the same rights and liabilities as if unmarried, § 1819. She is also liable, as such trader, for the maintenance of her minor children, and her husband is not liable for her debts unless he so consents in writing, §§ 1820, 1821. [Sec. 1818, as to a sole trader's oath, was amended by the Act of Mar. 8, 1901 (pp. 117, 238), c. 52, § 453.]

In COLORADO, all of a married woman's property at the marriage, with its profits, and all received afterwards by descent, devise, or bequest, or by gift of any person except her husband, including, however, ornaments, money, and apparel from him, is her separate property, free from his debts or disposal, Mills' Annotated Statutes

(1891), § 3007. She may dispose of personal estate as if unmarried, § 3008. She may sue or be sued alone touching her person, property, or reputation, § 3009. She may dispose by will of one half of her property only away from her husband, unless he consents in writing, § 3010. She may trade or labor on her sole account, and her earnings and profits are her own to use or invest; she may sue or be sued touching the same, and the same are liable to execution, § 3012. Marriage contracts are valid, § 3013. The husband is liable for her antenuptial debts only to the extent of property, or its proceeds, derived from her, her death not freeing him from such liability, §§ 3014, 3015. When a woman, in debt and owning land, marries, a joint judgment for the same against husband and wife is to be levied on such land alone, § 3016. The husband's sole deed can convey no part of the wife's land, § 3017. She may give any written instrument to pay money, and if for her estate's benefit, she may be sued thereon, the judgment be a lien on her land, which may be levied on therefor, § 3018. She may sell and convey her property, sue and be sued, and contract in every way on her sole liability, as if unmarried, §§ 3019-3021. She may be a special partner with her husband or another, and may so contract as if unmarried, and in relation to partnership matters may be a witness for or against the husband, § 3332. Her husband must join or be joined in suits, unless relating to her separate estate or between themselves, Code of Civil Procedure of 1877, § 6. If sued together she may defend herself, § 7. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately, Act of Apr. 6, 1891, p. 238.

In CONNECTICUT, a married woman's real estate, the result of her labor, and the proceeds of its sale, if invested in her name or that of her trustee, is her separate property; and she may convey it, as if unmarried, by leave of court, if abandoned for three years by her husband, Gen. Sts. of Conn. of 1888, § 2790. A married woman, so long as a conservator is over her husband, may exercise every right touching her estate as if unmarried, § 2791. All the before and after acquired personal property of a woman, married since June 22, 1849, and before April 20, 1877, and the proceeds of its sale, are held in trust by the husband to enjoy the income subject to her and the minor children's support, to apply such part of the principal as may be necessary for her support, or otherwise with her written consent; on his death the rest to be transferred to her, if living, otherwise to her legatees or representatives. A portion of such trust property, equivalent to any of her antenuptial debts paid by him, is to vest in him absolutely, § 2792. The husband cannot sell her property, unless she, if living, or her representatives or the guardians of the minor children, consent in writing, and all reinvestments must be in his name as trustee, § 2793. If abandoned her property vests in her; and she may, during the abandonment, sue and be sued, and do business as if unmarried, § 2794. She may insure her husband for the benefit of herself and children, up to \$300 premium, § 2799. Payment to her of money lent or deposited by her or for personal services, is as valid as if she were unmarried, § 3000. She may be sued as if unmarried upon any antenuptial cause of action, and upon any postnuptial contract made on her personal credit for the benefit of herself, her family, or her estate, and for any tort, unless coerced by the husband, and her property attached and levied upon, § 984; and in like manner, on a joint contract with the hus- * 373 band * for the benefit of her or the joint estate, § 985. Likewise she may sue, if doing business, upon any right accruing therefrom, § 986. In a civil action by or against her, the husband may be joined, but judgment is to be entered only in favor of or against the one for or against whom a cause of action is found, and costs taxed for or against that one only, § 987. In all marriages contracted after April 20, 1877,

neither husband nor wife acquires any rights in any before or after acquired property of the other except as survivor. She has her earnings, may contract with third persons, and convey her property, real and personal, as if unmarried. Her property is liable for her debts, but not for the husband's, § 2796. All purchases of either husband or wife are presumed, in the absence of notice, to be on his or her private account; but both are liable if for the family support, the joint benefit, her reasonable apparel, or support while abandoned by him. She shall be indemnified by him for what she may have expended for the family support if he has property, § 2797. If married before April 20, 1877, any husband and wife may agree in writing to abandon all existing and mutual rights in each other's property, and when recorded, this act shall apply to such marriage as well, § 2798. By the Act of June 17, 1901 (p. 1369), c. 173, § 9, previous deeds made by a married woman directly to her husband, and *vice versa*, and her sole deeds previously made, are confirmed, as is also her previous attestation to a deed by or to her husband. See also Acts of 1893, p. 391, § 5 (as to previous conveyances by a married woman living apart from a non-resident husband); Acts of 1897, p. 962, § 8.

[In DAKOTA [see now, *infra*, NORTH DAKOTA; SOUTH DAKOTA], a husband must support his wife, but she must support her husband out of her separate estate, when he has none, has not deserted her, and is too infirm to support himself, Compiled Laws of 1887, § 2588. She may contract with her husband or a third person, as if unmarried, subject in transactions with her husband to the rules of trusts, § 2590. She may hold property with her husband, jointly or in common, may convey her property without his consent, and may record an inventory of the same duly acknowledged, § 2593. She is not answerable for his acts, and has no dower. Her earnings and other accumulations and her minor children's earnings, while apart from her husband, are her separate property, which is alone liable for her debts, contracted before or after marriage. There is no curtesy or dower, § 2594. He is liable for necessities, if he neglects her, unless she abandons him, but on an agreement of separation she is liable for her support, unless expressly stipulated, §§ 2594, 2595. A woman has the same legal rights after marriage as before and the same as her husband except the right to vote or hold office, § 2600.]

In DELAWARE, a married woman, her husband joining, may convey her land, but must acknowledge the same apart from her husband, Code of 1874, pp. 478, 501, §§ 1469, 1614. Her real estate, mortgages, stocks, and silver plate owned before and acquired after marriage remain her separate property subject to her antenuptial debts, but not subject to her husband's disposition, or his debts or contracts. She may not convey her separate property, nor dispose of the profits without her husband's consent under seal. The husband is entitled to curtesy, p. 478. She may reinvest, with his consent, a mortgage debt paid to her, or the proceeds of property so sold in other real estate or stocks or mortgages, the same to remain her separate property, p. 478. If the husband fails to support her while living apart from him, she is entitled to her property, if distinguishable from his, free of his debts, and she may sue and be sued and contract about it, and sue for the redress of personal wrongs and torts. If living apart without his default, he is not, but otherwise is, liable for her debts; when they again cohabit, he becomes liable for all her debts contracted during the separation, p. 479, and Laws of 1885, c. 611. A judgment for antenuptial debts may be recovered against her alone, p. 479, § 2. She may receive her wages for labor not for her family, sue therefor in her own name, hold against all, including the husband, and deposit subject to her sole right to withdraw without the husband's consent, § 3. She may sue or be sued touching her separate property, as if unmarried: but he cannot sue alone respecting it, although she may join him in her suits. She may make contracts and sue and

be sued thereon as if unmarried, § 4. She may, if twenty-one years of age, dispose of her property by will; but if intestate it goes to her heirs subject to curtesy. Ante-marriage settlements may be made to define marriage rights and in case of descent. If she dies without issue the husband has a life estate in one-half of her real estate after payment of her debts, § 5 as amended, Acts of 1875, c. 165. She may release to the husband the control of her property and the income for the mutual benefit, and in writing revoke it, pp. 479, 480, Act of 1873. All before and after acquired property other than from her husband is her separate property, and the profits thereof are subject to neither his disposal nor debts, Laws of 1875, p. 289, § 1. A married woman may, as if unmarried, buy real estate and secure the purchase-money by any appropriate instrument with a warrant of attorney, upon which the husband is not liable unless a party thereto, § 3. By the Act of April 11, 1893 (Rev. Code, as amended 1893, p. 601), an abandoned wife may dispose of her own real estate as if unmarried.

In FLORIDA, all the property of a married woman owned before or acquired after marriage is her separate estate, and not liable for the husband's debts, Rev. Stats. (1892), p. 682, § 2070. The rights of husband and wife, derived under the Spanish law, when in force, remain the same, subject to formalities of conveyance, § 2069. Her property is conveyed jointly with the husband, § 2072. Such joinder suffices also, as to her deed, if she is a minor, Acts 1901, p. 96, c. 4954. If her husband is adjudged insane, she may, after a year's continuance of such insanity, let, lease, mortgage, or convey her property, Acts 1893, p. 73, c. 4150. Her estate is alone liable for her antenuptial debts, § 2073. She may sue as to her real estate without joining her husband or next friend, § 2074. Her wages and earnings, in any employment separate from her husband, are her separate property, § 2075.

In GEORGIA, all the property of the wife, at the marriage or after acquired, remains her separate property, liable for her debts only, Code of 1895, vol. II. §§ 2474, 2488, 5790. When separate from her husband, her own and her children's acquisitions vest in her; and if she dies intestate they go to her children, failing which, to her next of kin, § 2476. The husband is liable for suitable necessities, unless she leaves him without provocation, and notice relieves him, except in case of his misconduct, §§ 2477, 2478. When the husband or wife dies without issue, the survivor is the sole heir; but if she dies intestate, leaving children, the children and the husband share alike, §§ 3354, 3355. The wife as to her separate estate may act as if unmarried, but must comply with every restriction of the marriage contract; she cannot bind it by suretyship or by assuming her husband's debts; and any sale of it to her husband's creditor to extinguish his debt is void, § 2488. Her contract of sale of her separate estate * with her husband * 374 or trustee is invalid unless by leave of the Superior Court, § 2490. She may make contracts with persons other than her husband, § 2492; and may enforce contracts made in reference to her own acquisitions, § 2475. Either husband or wife may recover for torts committed against her, §§ 2475, 3816. He is liable for her torts, § 3817. When in possession of her trust estate, or when the trustee does not protect it or provide for her, she may contract debts for these purposes, § 3187. A married woman, when acting under her husband's coercion, is not liable for her crimes not punishable by death or perpetual imprisonment, Code 1895, vol. III. § 38.

In the HAWAIIAN ISLANDS, the real and personal property of a married woman remains her property, free from the control and debts of her husband; and she may acquire property as if sole: Provided that no sale or mortgage of her real estate is valid without her husband's written consent, Civil Laws (1897), § 1884. She may contract as if sole, but not for personal service without the husband's written consent, and she cannot contract with her husband, § 1885. Her work

and labor are presumed to be performed on her separate account, § 1886. She may sue and be sued as if sole, but suits between husband and wife are not authorized, § 1888. The husband is liable for the wife's necessities, but only for such of her torts as are done with his authority or consent, § 1890. Her contracts as to her separate property, business, or labor do not bind the husband, § 1892. She may do business on her separate account by filing a certificate therefor; if not filed, the property so employed is liable to attachment and execution as her husband's property, § 1893.

IN IDAHO, all the property of a wife, owned before or acquired after marriage by gift, bequest, devise, or descent, is her separate property, Civil Code (1901), § 4051. So of the husband, § 2052. All other acquired property is common, § 2053. The husband shall manage the wife's separate property, but no conveyance or lien is effective unless in writing, signed by both, and acknowledged by her apart from him, § 2054. If he mismanages, a trustee may be appointed by and subject to the court to pay over the profits as directed, § 2055. The husband controls the common property, as if it was his separate property, except the homestead, § 2061. The wife's separate estate may be inventoried and the inventory recorded. If this is done it is *prima facie* evidence of her title, §§ 2056, 2057. Her earnings and those of her minor children when she is living apart from her husband are her separate property, § 2058. His separate property is not liable for her debts contracted before marriage, § 2059. Nor her separate property for his debts, § 2060. Neither curtesy nor dower is allowed, § 2506. The wife must support her husband from her separate estate when he has no separate property, there is no community property, and he from infirmity is unable to support himself, § 2063. Contracts for marriage settlements are valid if acknowledged and recorded, §§ 2064-2067. A minor capable of contracting may make a valid marriage settlement, § 2068. On the death of the wife community property unless set apart by judicial decree for her support goes to the husband without administration, § 2549. On the death of the husband, half of the community property goes to the wife, the other half being subject to the husband's testamentary disposition, and if undisposed of, descending to his descendants or kindred in the same way as his separate property, § 2550. A married woman may make a will and dispose of all her separate estate without her husband's consent, § 2504. She may become a sole trader by judgment of the District Court on complying with certain formalities, § 3886. The wife's separate property and all the rents, issues, and profits thereof, and all compensation due or owing for her personal services, are exempt from execution against her husband, Code of Civil Procedure (1901), § 3541. The husband is liable for her debts as a sole trader only when they were contracted upon his written consent, § 3896. When a married woman is a party, her husband must be joined, except —

1. When the action concerns her separate property or the homestead, she may sue alone.

2. When the action is between herself and husband, she may sue or be sued alone.

3. Likewise when she is living apart from her husband, § 3158. If husband and wife are sued together she may defend her own right, and if her husband neglects to defend, she may defend for his right also, § 3159.

IN ILLINOIS, a married woman may sue and be sued alone as if unmarried, Rev. Stats. (1874, Hurd's ed. 1899) c. 68, § 1. If husband and wife are sued jointly, she may defend her right, and if either neglect to defend, the other may defend for such one also, § 2. If either deserts the other, the deserted party may prosecute or defend actions in the name of the deserting party, § 3. The husband

is liable for his wife's torts only "in cases where he would be jointly responsible with her, if the marriage did not exist," § 4. Neither husband nor wife is liable for the debts of the other contracted before marriage. Nor are the wages, earnings, or property of either liable for the debts of the other, § 5. She may contract as if unmarried, but without her husband's consent she may not become a co-partner, unless he has deserted her, is insane, or in the penitentiary, § 6. She may receive, use, and possess her earnings as if unmarried, § 7. Neither may recover from the other for services, § 8. A married woman may own, in her individual right, property obtained by descent, gift, or purchase, and manage, sell, and convey the same as the husband can his property; but if living together, a transfer to him, to be valid against third persons, must be in writing and acknowledged and recorded like chattel mortgages, § 9. When either obtains or retains property of the other, the latter may bring action as if unmarried, § 10. She is equally liable with her husband for family expenses and the children's education, and may be sued therefor singly or jointly, § 15. If when eighteen years old she joins her husband in the conveyance of her real estate, she is bound as if unmarried, c. 30, § 18; and her acknowledgment may be taken as if unmarried, § 19. If she dies intestate without issue, the husband is entitled to one half of the real estate and the whole of the personal estate absolutely; if she leaves issue, to one third of the personal property absolutely; if no issue or kindred, to the whole of her estate, c. 39, § 1. A homestead to the value of \$1,000 is exempt from attachment for debt, and so continues while occupied by the survivor or the children until the youngest is twenty-one years of age, or if the husband or wife deserts the family, in favor of the occupier, c. 52, §§ 1, 2. She may cause the life of her husband to be insured for her own use, or that of her children, if she dies before it accrues; but if the premium is paid in fraud of his creditors, an amount equal to the sum so paid with interest shall inure to their benefit, c. 73, § 199. Her separate property is chargeable with the support of poor descendants or ancestors, c. 107, § 2.

In INDIANA, a married woman may sue alone touching her separate property, and when the suit is between herself and husband, Rev. Stats. of 1881 (Burns' ed. 1901), § 255. The wife of a person who has absented himself from home for five years has the same rights and powers as if unmarried to make contracts, deeds, and acquittances during the absence, § 2388. If she die, testate or intestate, one third of her real estate descends to her husband subject to its proportion of her antenuptial debts, § 2642. A wife's personal property at the marriage or acquired afterwards by descent, devise, or gift, remains her own like her real estate; if the husband dies first, it goes to her, and if she dies first, it is distributed like her real estate, § 2649. If she dies intestate without issue but leaving parents, three fourths of her property go to her husband, and one fourth to the parents or the survivor; but if only \$1,000 in all, the whole goes to the husband. If she leaves no issue nor parents, the whole goes to the husband, §§ 2650, 2651. A married woman may dispose of her property by will, c. 9, § 2727. A married woman's lands and the profits are her separate property as fully as if unmarried, free of her husband's debts, but she cannot convey or encumber them unless he joins in a deed, c. 71, § 6951. A married woman may acquire property by conveyance, gift, devise, or descent, or by purchase with her own money, and control the same and the profits, as if unmarried. She may likewise contract about and dispose of her personal property, but not the real, unless the husband joins: *Provided* that she shall be bound by an estoppel *in pais*, like any other person, § 6962. Her covenants for title and her official bonds bind her as if unmarried, § 6963. But her contracts of suretyship, indorsement, or guaranty are void, § 6964. The husband is liable for

his wife's torts only when he consents thereto, in which case they are jointly liable, §§ 6965, 6966. The husband is not liable for her business debts on her sole account, or if in partnership other than with himself, nor for improvements on her property by her authority, § 6967. She alone is liable for such improvements, made by his order with her consent in writing, § 6968. She has the same exemption of property from seizure and sale for debt as householders, § 6969. The husband is liable, even after her death, for her antenuptial debts to the extent only of personalty received through her or derived from the sale or rent of her land, §§ 6970, 6971. Judgment for such debts may be

* 375 rendered against them jointly, * to be levied on her land only, § 6972. The husband can convey no interest in her land by his separate deed, § 6973. Suits about such land are to be brought by or against them jointly, or if living apart, against her alone, § 6974. She may do business and labor on her separate account, the profits of which, other than for her husband or family, are her separate property, § 6975. She may sue as if unmarried for damages to her person or character, the money recovered to be her separate property, § 6976. If it shall appear to be beneficial to her, a married woman may, by leave of court, convey or encumber her real estate without the husband's joinder, § 6982.

In the INDIAN TERRITORY, the husband having a freehold estate in unpaid rents in right of his wife at her death, has the same remedy as in her lifetime, § 2839. Her property remains her separate estate so long as she chooses; she may devise or convey it, and it is not subject to her husband's debts, § 3021. Her property may be used, collected and invested by her in her own name, is not subject to the husband's control or to any of his debts, except those contracted for the support of herself or her children by her as his agent, §§ 3024, 3033. She may carry on business on her separate account, her earnings are hers, and she may sue or be sued alone as to her property, business or services, § 3025. The husband is not liable on her contracts, § 3026. Her bank deposits may be paid to her, § 3027. She is alone liable for her costs or for the recovery in actions by or against her, or on judgments against her, §§ 3028, 3030. She may schedule her separate property; failure to do so does not cause a forfeiture, but places on her the burden to show that the property is hers, §§ 3022, 3031, 3036. A court of equity may still settle her separate property upon her, § 3038. Her husband must be joined in actions not relating to her separate estate, but she may sue or be sued alone when the action is between her and her husband, § 3156. When sued together, she may defend in her own right, and also in his, if he neglects to defend, § 3157. When deserted, she may prosecute or defend any action he might prosecute or defend, § 3158. If married while a suit is pending against her, the husband may be made a party, § 3159. When both are joined as parties, notice served on the husband is served on the wife, § 3415.

In IOWA, a married woman may convey, encumber, control, or contract about her real estate like other persons, Annotated Code of 1897, § 2919. The conveyance of husband and wife together passes all the estate of either, unless the contrary appears; but, in such a conveyance, he or she is not bound by the other's covenants unless so expressed, §§ 2920, 2921. A married woman may own property acquired by descent, gift, or purchase, and dispose of the same and devise it by will, precisely as the husband, § 3153. The property of neither is liable for the debts of the other, or the subject of contract between them, § 3154. If either gains possession of the other's property before or after marriage, the owner may sue for or about it as if unmarried, § 3155. The husband is liable for her torts only where he would be responsible jointly with her if the marriage did not exist, § 3156. A conveyance, transfer, or lien, executed by husband or wife to or in

favor of the other, is as valid as between other persons, § 3157. If the husband or wife abandons the other, and is absent from the State for a year, or imprisoned, the other, by leave of court, may manage, sell, and encumber her or his property to support the family or pay debts; and all acts so done bind both and the property of both, §§ 3158, 3159. The order of court may be annulled, but not so as to affect acts done, § 3160. The husband or wife may appoint the other an attorney in fact, revocable at pleasure, to dispose of each other's property for their mutual benefit, § 3161. The wife may receive, hold, and sue for personal wages, and may sue and be sued touching her rights and property as if unmarried, § 3162. The husband and wife and their property or incomes are not liable for the other's antenuptial debts, nor for the other's separate debts, § 3163. She may contract and sue and be sued as if unmarried, § 3164. The family expenses and children's education are chargeable upon the property of both or either, and joint or separate suit may be brought, § 3165. Neither husband nor wife can remove the other, nor their children, from the homestead without mutual consent; and if he abandons her, she may have custody of minor children, unless the court directs otherwise, § 3166. The homestead, embracing the house used as a home, consisting of half an acre in a town plat, or forty acres if without, up to \$500 in value, is exempt from judicial sale, except in certain cases, and the surviving husband or wife may continue to occupy, §§ 2972 *et seq.* The homestead may be retained in lieu of a distributive share, § 2985. The Act of Mar. 31, 1902, c. 237 (p. 188) validates conveyances of husband or wife, or contracts to convey, the inchoate right of dower of the other spouse, acting as attorney in fact. Sect. 4606 of the Code, enabling husband and wife to be witnesses for each other in civil and criminal cases, but not against each other except in certain cases, was amended by the Act of April 12, 1898, c. 108 (p. 58) by adding to such exceptions: "or in any civil action brought by a judgment creditor against either husband or wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud and to subject the same to the payment of his judgment."

In KANSAS, all the property of a woman at the marriage, and its profits, and subsequently acquired by descent, devise, and bequest, or by gift other than from her husband, is her separate property, free from his disposal or debts, Gen. Stats. (Dassler's ed. 1899), § 3874. A married woman may dispose of her property and contract about it the same as a married man with his own, § 3875. She may sue and be sued, as if unmarried, § 3876. She may trade or labor on her separate account, and her profits and earnings are her own, and may be used and invested in her own name, § 3877. If married without the State, and the husband moves within, she continues to enjoy prior property rights, § 3878. Marriage contracts or settlements remain valid, § 3879. The wife may be empowered to dispose of or devise, without her husband's concurrence, lands conveyed or devised to her in fee, § 7534. A homestead of one hundred and sixty acres without a town or city, or of one acre within, is exempt from distribution or forced sale, without their joint consent, except for purchase-money, and liens for improvements, § 2442.

In KENTUCKY, the husband has no estate or interest in the before or after acquired property of the wife, whose separate estate is liable for her debts, but not for his, Ky. Stats. (1899, by Carroll), § 2127. * She may acquire property and * 376 may dispose of her personalty as if single; she may contract and sue and be sued; but in her mortgage or contract to convey her realty, her husband must join. Gifts and assignments between them must be recorded like chattel mortgages in order to bind third persons, and such recording does not validate gifts or assignments fraudulent as to creditors or purchasers, § 2128. The husband is liable for her ante or post nuptial debts only as to property received from her, but is liable for her

necessaries purchased after marriage, § 2130. A wife whose husband has abandoned her, or is a prisoner for more than one year, or is permanently insane, may be empowered by a court of equity to sell and convey her realty, § 2131. Upon the death of either, the survivor takes for life one third of the other's real estate and one half of the surplus personalty, § 2132.

In LOUISIANA, a married woman, even if separate in estate from her husband, cannot alienate, grant, mortgage, or acquire, by gratuitous or encumbered title, unless he concurs or gives his written consent, Revised Code (Merrick's ed. 1900), Art. 122. Her separation from him dissolves the community of acquets and gains, making his authorization unnecessary, Art. 123. She may contract by leave of court, if the husband refuses to consent, Art. 125. If twenty-one years of age, she may, by the husband's authority and leave of court, borrow or contract for her separate benefit, and to secure the same give security affecting her separate estate, paraphernal or dotal. In so doing it must appear to the court that the money is to be borrowed or the debt contracted solely for her separate advantage, Arts. 126-128. If of the age of twenty-one years, a married woman may, with the husband's consent after examination apart from him by a notary, renounce in favor of a third person her matrimonial, paraphernal, dotal, and other rights, Art. 129. She may, if a public merchant, without the husband's authority, bind herself respecting her trade, and the husband also, if a community of property exists between them. She is a public merchant, if she carries on a separate trade, but not if she simply retails the merchandise of her husband's commerce, Art. 131. If the husband is interdicted or absent, she may, by leave of court, sue and be sued, or make contracts, Art. 132. Every general authority, though stipulated in the marriage contract, is void, except respecting the administration of her property, Art. 133.

* 377 * The wife may make her last will without his authority, Art. 135. The husband or wife may, either by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger, Arts. 1743, 1746. But all donations during marriage, though termed *inter vivos*, are always revocable, Art. 1749. They may, by marriage contract, determine the rights of property; but cannot change the legal order of descents (this restriction not affecting donations *inter vivos* or such *mortis causa*, or donation by the marriage contract according to the rules for donations), nor derogate from the husband's rights over the person of his wife and children, or as head of the family, nor with respect to children, if he survive the wife, nor from the prohibitory dispensations of the Code, Arts. 2325-2327, 2336. The property of married persons is divided into "separate" and "common;" and the separate property of the wife into "dotal" and "extradotal" (or "paraphernal"). The "dotal" is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment, Arts. 2334, 2335, 2337. The wife has a legal mortgage on her husband's immovables (which he may release by giving a special mortgage to the satisfaction of a family meeting, &c., or in accordance with stipulations in the marriage contract): but it shall not be lawful to stipulate that no mortgage shall exist, Arts. 2376-2380; and a privilege on his immovables for the restitution of her dowry, &c., Arts. 2376-2380, 2390. A partnership, or community, of acquets or gains exists by operation of law in all cases. But the parties may modify or limit it, or agree that it shall not exist; in which case there are provisions, preserving to the wife the administration and enjoyment of her property and the power of alienating it as if paraphernal, with reference to the expenses of the marriage and liability of the husband, Arts. 2332, 2399, 2401, 2424. This community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; of the produce of the reciprocal industry and labor of both husband and

wife; and of the estates which they may acquire during marriage, either by donations made jointly to them both, or by purchase, or in any similar way, even though the purchase be in the name of one and not of both. Debts contracted during marriage enter into this partnership, and must be acquitted out of the common fund; but those contracted before marriage, out of individual effects, Arts. 2402, 2403. The husband is the head and master of the community; administers its effects, disposes of the revenue, and may alienate by an unencumbered title, without the wife's consent. He cannot convey *inter vivos* gratuitously the immovables of the community, nor any portion of the movables, except to establish the children; but he may dispose of the movables. If he disposes of the common estate by fraud to injure the wife, she may sue his heirs for one half, Art. 2404. If decreed separate in property, she must contribute proportionately to the household expenses and the children's education, and must do both alone if he has nothing, Art. 2435. When separate in property, she has the free administration of her estate, and may dispose of movables, but not immovables, without the husband's consent, or, on his refusal, by leave of court, Art. 2436. She may, with the husband's consent, or by leave of court, give her dotal effects to establish their children, or her children by a former marriage, Arts. 2358, 2359. The husband has the administration of the dowry, and the income of it belongs to him, Arts. 2347, 2349, 2350. She cannot sue without the authorization of her husband or of the Court, Code (Garland's 2d ed.), §§ 105, 106. The husband can sue in his own name to preserve the dotal property, or to recover debts due them, § 107. Upon claims against a married woman's separate interest, husband and wife are both to be defendants, unless he is absent, or she is divorced or separated from him, § 118. The wife, suing her husband for a separation, may have an injunction against his disposing of the property held in community, or on which she has a privilege for her dotal rights, § 298, cl. 6.

In MAINE, a married woman may own property acquired by descent, gift, or purchase, and may manage, sell, and convey it, and devise it by will, without the husband's joinder or assent; but real estate directly conveyed to her by her husband she cannot convey without such joinder, unless held as security or in payment of a *bona fide* debt from the husband. Her property paid for out of his property, or conveyed by him to her without consideration, is liable for his prior debts, * Acts of 1889, c. 176. A wife married since April 21, * 378 1844, loses no right by her marriage, nor does a husband acquire any right to her property after that date, nor are his prior rights affected. She may release to her husband the right, revocable in writing, to control the whole or any part of her property, and dispose of the income for their mutual benefit, Rev. Stats. of 1883, c. 61, § 2. She may receive her personal wages other than for her family, sue for in her own name, and hold them against him or third persons, § 3. A husband married since April 26, 1852, is not liable for her antenuptial debts, nor for those contracted thereafter in her own name. Nor for her torts committed after April 26, 1883, in which he takes no part. She is liable in all such cases, may be sued therefor singly or jointly with him, and her property attached and levied on, as if unmarried; but she cannot be arrested, § 4. She may sue and be sued alone, or jointly with the husband, touching her property and personal rights as if unmarried; and the husband may not settle such suits without her written consent, § 5. If she dies intestate, her property goes to her heirs, but by an antenuptial settlement they may arrange marriage rights and bar all rights not so secured, § 6. If he abandons her or is imprisoned, leaving her no maintenance, she may, by leave of court, make contracts, and receive for disposal personal property from the holder and give a valid discharge. Her husband and herself are bound by such contracts, and she

may, during such absence, sue and be sued, and execution be enforced against her, as if unmarried. He may be made a party on his return, §§ 7, 8. If her real estate is taken for a public use, the compensation is to be so invested as to secure her equal benefits, § 9. If she enters or remains in the State without living with her husband, she may contract, dispose of her property, and sue and be sued as if unmarried. When he comes and claims his marital rights, her contracts and suits are affected as if they were then first married, § 10. Her administrator may pay all reasonable expenses of her last sickness, § 11. A husband, living apart from his family, and refusing without reasonable cause to provide for them, may be compelled to contribute to their support. Laws 1885, c. 136, amended by Laws 1897, c. 175. Money deposited by a woman or a minor in a savings bank or trust company is the property of and is to be paid to the depositor's order. Laws 1899, c. 50, § 4, amending Laws 1889, c. 188.

In MARYLAND, a married woman's property, real and personal, at the marriage, or after acquired by purchase, gift, grant, devise, bequest, or inheritance, is free of her husband's debts; but no transfer to a wife from him is valid if in fraud of creditors, § 1 of Public General Laws of 1888, Art. 45, which article was repealed and re-enacted by Laws 1898, c. 457. She holds her property for her separate use, and may devise it as if unmarried, if more than eighteen years of age; and the fact that the husband has conveyed property to his wife is not notice that he has subsisting creditors, §§ 2-4. She may, but need not, have a trustee appointed, § 3. She may engage in business, contract, and sue upon her contracts, or for torts against her, as if unmarried, and the husband is not liable for her torts not sanctioned by him, § 5. Dower and curtesy exist in lands held by equitable title, §§ 6, 7, 12 (amended by Laws of 1900, c. 195). Husband and wife may insure each other's lives, §§ 8-10. Her receipt for deposits by her is valid, but if the deposit is in fraud of creditors the latter may attach, § 11. The husband is not * 379 liable for his wife's * debts, §§ 15-16, except such as he is liable for at common law, when incurred upon his credit, or as his agent, § 20. If she makes a lease, and if the rent is unpaid ninety days, she may be distrained upon for rent or suffer a re-entry, § 17, amended by Laws of 1900, c. 135. In all deeds to her, she may bind herself and assign by covenants, as if unmarried, § 18. The husband may bring a personal action to recover in right of his wife after her death, by declaring his right specifically, § 19. The Act of 1900, c. 633, enables a married woman to contract with her husband or form a copartnership with him, or with any other person, as if she were not married.

In MASSACHUSETTS, all a woman's property at her marriage remains her separate property, and a married woman may receive, receipt for, hold, manage and dispose of property, as if unmarried; but without her husband's written consent she cannot impair his rights to curtesy, Rev. Laws (1902), c. 153, § 1. She may make contracts as if unmarried, but not with her husband, § 2. A husband and wife are not authorized to transfer property to each other, except that he may give her wearing apparel, and articles of personal use and ornament up to \$2,000, if not in fraud of creditors, § 3. Her labor for other than her husband and children, unless expressly agreed otherwise, is presumed to be on her separate account, § 4. She may be an executrix, administratrix, guardian, or trustee, and may bind herself and the estate she represents without his act or assent, § 5. A married woman may make a will as if unmarried, but the husband may waive its provisions as to him, c. 132, § 1; c. 135, § 16. She may sue and be sued as if unmarried, but no suits can be had between husband and wife, c. 153, § 6. She is not liable for her husband's debts, nor her property on an execution against him, unless she fails to record a certificate that she is doing business on separate account, §§ 7, 10. The

husband is not liable for her antenuptial debt, or upon a judgment against her, except when such a certificate is not recorded, § 8. Her contracts touching her property, trade, business, labor, or services do not bind him or his property, except on failure to record such a certificate, but bind her and her property as if unmarried, § 9. When she does or proposes to do business on her separate account, a certificate giving their names, its nature and the place with street and number, must be recorded, failure to do which renders the property employed liable for the husband's debts and the husband liable on all contracts as if made by himself, §§ 10, 11. She may have a trustee appointed to take charge of her property, § 12. If her real estate is taken by eminent domain, the compensation therefor may be invested so as to secure her the same rights as from the property taken, § 13. If she comes into the State without her husband, she may act as if unmarried, § 29. When husband and wife come into the State and reside as such, she retains all her property, and subsequent rights accrue as if the time of their coming was the time of their marriage, § 30. If he deserts her or is in the State-prison, not leaving a maintenance, she may, by leave of the probate court, dispose of her property or of any undisposed personal property coming to him by reason of the marriage, as if unmarried, during such absence or imprisonment, §§ 31, 36. * By the * 380 Act of June 16, 1902, c. 478, her signature, if under age, to her husband's conveyance of his land has the same effect as if she were of full age.

In MICHIGAN, a married woman's property at the marriage and afterwards acquired in any way is her estate free of her husband's debts, and may be contracted about, sold, transferred, mortgaged, conveyed, devised, and bequeathed as if she were unmarried, 3 Compiled Laws (1897), §§ 8683, 8690. Any trustee of hers may convey to her all or a part of the property or the income for her separate use, § 8691. She may sue and be sued touching her sole property, as if unmarried; and where the husband's property cannot be sold or encumbered without her consent, or is exempt from judicial process, she may sue in her own name, § 8692. Her husband is not liable on her property contracts, but she may be sued on her contracts where he is not liable or refuses to perform, § 8693. All contracts made between persons in contemplation of marriage remain in force after marriage, § 8694. If he deserts her, or is in the State-prison, without providing for her, she may, if twenty-one years of age, by leave of court, convey or lease her real estate, or dispose of any undisposed-of personal estate brought to the husband by the marriage, §§ 8659, 8670. She may, by leave of court, when deserted, receive such personal estate as is due the husband in her right, and give a valid discharge, § 8660. All such proceeds she may use as if her own and unmarried, and may be authorized to contract in her own name, and to bring and defend suits as if unmarried, §§ 8661-8669. When her real estate is taken by eminent domain, the compensation may be so invested as to afford the same benefit as the undamaged estate would have, § 8676. If she comes from another State without her husband, she may act in all respects as if unmarried; and when her husband comes, the effect is as if the marriage took place at his arrival, §§ 8678-8680. She may insure his life for her benefit up to \$300 premium, and may make such insurance payable, if she dies before him, to her children or dispose of it by will, §§ 8695, 8696. She may execute a power, if of age, by grant or devise, without the husband's concurrence, unless in terms prohibited, § 8893. If entitled to an estate in fee and empowered to dispose of it during the marriage, she may create any estate, as if unmarried, § 8912. If she dies intestate, one third of her personal estate goes to the husband, and the remainder to her children; but if one child only, or if no children or issue, one half to him; if there are no parents, nor brothers or sisters, or issue, the whole goes to him, § 9322, cl. 7. The husband is not to be imprisoned

upon a judgment for his wife's torts, § 10552. When sued together, she may defend alone, if he will not defend her rights, § 11187.

In MINNESOTA, all a married woman's property, owned before or after marriage, continues her separate property, and she may receive, take, hold, use, and enjoy it and its profits and all avails of her contracts and industry free from her husband's control and debts, as if unmarried, Gen. Stats. (Wenzell's ed. 1894), §§ 5531, 5533. She is bound by her contracts and responsible for her torts, and her property is liable therefor, as if she were unmarried. She may contract, as if unmarried, but not to sell or convey real estate other than by a mortgage to secure purchase money or a lease for three years or less, unless the husband joins, and no curtesy attaches against such a mortgage; but after a valid divorce the husband's joinder is unnecessary, § 5532. The husband and wife may not contract with each other touching

real estate, but may in respect to all other matters, as if they were not
 * 381 * married. But where rights of creditors and *bona fide* purchasers come in question, they are held to have notice of each other's debts and contracts, § 5534. Antenuptial settlements are unaffected, and the husband is not now liable for her torts, § 5536; Acts of 1897, c. 10. She is not liable for his debts, nor is he for hers; for necessities furnished to the wife after marriage, he is liable as at common law; *Provided*, that, when living together, "they are jointly and severally liable for all necessary household articles and supplies furnished to and used by the family." Act of Mar. 2, 1901, c. 22, amending § 5533 and Acts of 1899, c. 325. If she is deserted by him for a year, or she or he is entitled to a divorce, or has been insane for ten years, she may, by decree of court, bar his curtesy and have power to dispose of her lands, as if unmarried, § 5535. A married woman, who deposits in a savings bank, is entitled thereto, and her receipt shall be a discharge as against third persons, §§ 2560, 2561. She may sue and be sued alone, as if unmarried, where the husband would not be a necessary party aside from the marriage relation, § 5159. And in his name when he has deserted her, § 5165. A married woman may dispose of her property by will, as if unmarried, § 4423. The Act of April 13, 1895, c. 209, legalized her deed not signed by the husband, when he afterwards conveys to the same grantee. The Act of Mar. 30, 1895, c. 213, legalized her powers of attorney, if approved in writing by her husband for the conveyance of her real estate within the State. The Act of Mar. 5, 1897, c. 35, legalized conveyances of real estate by husband to wife. The Acts of Mar. 26, 1897, c. 77, and of April 13, 1901, c. 276, legalized conveyances by husband and wife by separate deeds. The Act of April 11, 1901, c. 249, legalized conveyances by husband to wife made between Jan. 1, 1850, and Mar. 5, 1869.

In MISSISSIPPI, a married woman has the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, contract about it, bind herself personally, sue and be sued, with all the rights and liabilities incident thereto, as if unmarried, Revised Code of 1892, c. 61, § 2289. Husband and wife may sue each other, § 2290. Dower and curtesy are abolished, § 2291. She may dispose of her estate by will, as if unmarried, § 4438. If she dies with issue, leaving estate undisposed of, it descends to her husband and descendants in equal parts; if without issue, the husband inherits the whole, § 1545. If he or she fails to make satisfactory provision for the other by will, he or she may renounce the same and become entitled to the same share as if he or she had died intestate, except that, if there is no issue, he or she shall be entitled to only one half of the other's estate, § 4496. If his or her will contains no provision for the other, he or she has the same share as in the case of an unsatisfactory provision, § 4497. Provision by will for one of them is in bar of any share of the other's estate, unless otherwise expressed, § 4498. If the husband is testate, and she has

separate property at his death, equal to her share of his estate, she cannot renounce; but if less, she may have the difference made up to her; or if only one fifth, the whole; and the same rules apply to a husband renouncing his wife's will, § 4499. If the husband appropriates her property or its income, he shall be her debtor for a year; but if she permits him to use the income, or her estate for family support, he is not chargeable, § 2291. They cannot contract with each other for compensation for services rendered, nor can he rent or carry on business with his wife's plantation, houses, cattle, or tools, or with any of her means, but all business so done is on her account by him as agent as to persons without notice, unless written contract to the contrary is executed by them, acknowledged and recorded, § 2293. No transfer of goods or lands between them is valid against third persons unless in writing, acknowledged and recorded as a mortgage or deed of trust is required to be, possession of property not being equivalent to record, § 2294, as amended by the Act of Mar. 12, 1900, c. 90.

In MISSOURI, a married woman, deserted or whom her husband fails to support, may be allowed maintenance from his property. 1 Rev. Stats. (1899), c. 51, § 4327. Or she may, by leave of court, sell and convey her real estate or any undisposed-of personal estate, which he has in her right, or receive any such personal property from the holder, and give a valid discharge therefor, and her earnings and those of her minor children, free of his debts, and use the proceeds of such sales, personal property and earnings, to support herself and family, §§ 4328-4332.

When her real estate is taken by eminent domain, the compensation therefor may be invested so as to secure her the same benefits as such real estate, § 4333. The wife of a man under guardianship may join with the guardian in partitioning, or conveying by leave of court, her real estate, and release dower in so doing, § 4334. She shall be deemed a *feme sole* so far as to enable her to carry on business, contract, sue and be sued, without joinder of her husband. She may invoke all exemption and homestead laws except where her husband has already claimed them for the protection of his property, § 4335. A married woman, living apart from her husband by reason of ill-usage, may, by leave of court, have the sole use and enjoyment of her real estate, §§ 4336-4338. Her real estate, its income and the proceeds of its sale and her husband's interest in that owned by her before marriage or afterwards acquired by gift, grant, devise, or inheritance, are free of his debts and cannot be conveyed by him without her joinder; but the annual products are liable for family necessities, for labor and materials thereon, and for improvements, § 4339. Her real estate and personal property at marriage, or acquired after by gift, bequest, or inheritance, or by purchase with her separate money, or personal wages or compensation for any violation of personal rights, with the profits thereof, remains her separate property, free from his debts, except what he has become possessed of with her express assent in writing, but is subject to her antenuptial debts and for his debts for family necessities, § 4340. The husband's property, except such as he may have acquired from the wife, is exempt from all her antenuptial debts, § 4341. She may convey her real estate by deed or power of attorney executed and acknowledged jointly with her husband, but covenants in deeds bind her no farther than is necessary to convey all her right, title and interest, §§ 901, 902. The wife may sue and be sued without joining her husband, and judgments for or against her have the same effect as if she were unmarried, § 546. The husband may be enjoined, at suit of the wife, from squandering property to which she is entitled, § 3648. A married woman may dispose of her property by will, subject to her husband's right of curtesy, § 4603.

IN MONTANA, a married woman may sue and be sued as if sole. If sued with him she may defend for herself and for him, if he neglects, Code of Civil Proc. (1895), §§ 572, 573. She may dispose of her property by will, but may not without her husband's written consent deprive him of more than two thirds of her real or of her personal estate, Civil Code (1895), § 255. She may convey her real estate and acknowledge the deed as if unmarried, §§ 1606, 1607. Neither husband nor wife has any interest in the other's property; they may contract with each other or with others; they cannot alter their legal relation except as to property, but may agree in writing to separate, §§ 213-215. All her before and after acquired property is free of her husband's debts, except for family necessities, such property to be thus exempt to be recorded, §§ 220, 223, 227. She can convey it without the husband's consent, § 220, and may sue for any injury to her rights, and defend suits brought against her, § 219. All work performed by a married woman for one not her husband shall, unless there is a written agreement to the contrary, be presumed to be performed on her separate account, § 225. She may be executrix, administratrix, guardian, or trustee, and sue and be sued as if sole, §§ 252, 253. A husband is not liable for his wife's antenuptial liabilities, § 226. Neither is answerable for the other's acts, § 218. The surviving husband has no estate as tenant by curtesy, § 257. Her rights to dower or jointure are not prejudiced by his acts done without her assent, or by a judgment or decree against him, § 243. Her contracts as to her separate property, labor, or services do not bind her husband, but do bind her and her separate property, § 254. She may make contracts, § 256. A married woman may do business on her own account, by applying to the district court and publishing notice of her application, and obtaining an order of court, which shall be recorded; she is then responsible for the maintenance of her minor children, but the husband is not liable for her debts contracted as a sole trader and not assented to by him in writing, Code of Civil Proc. (1895), §§ 2290-2297.

IN NEBRASKA, all a married woman's property at the marriage and its profits, and that coming to her by descent, devise, or the gift of other than her husband, or acquired by purchase, remains her separate property, as if unmarried, and free from his debts or disposal, but is liable for necessities furnished her family, if execution against her husband is returned unsatisfied. Compiled Statutes of 1881, (9th ed.). c. 53, § 1. She may bargain, sell, and convey, and contract concerning her property, as fully as a married man, § 2. She may sue and be sued, as if unmarried, § 3. She may do business and service on sole account, and her earnings therefrom are her sole property, and may be used and invested in her own name, § 4. A woman married without, if her husband comes to reside in, this State, enjoys the rights elsewhere acquired, § 5. The husband's property is not liable for her antenuptial debts, § 7. She may dispose of her property by will, as if unmarried, c. 23, § 123. She may likewise manage, control, lease, or convey her real estate by deed or will, c. 73, § 42. She is not bound by the covenants in a joint deed of herself and husband, § 48. A homestead up to \$2,000, and one hundred and sixty acres without, or two lots within, an incorporated city or village, is exempt from judgment liens and execution, c. 36, § 1. If a husband or wife dies intestate leaving only one issue, one half goes to the survivor. So if instead of issue the deceased left father, mother, brother, or sister. If more than one issue, one third goes to the survivor. If no issue or kindred, the whole. Dower and curtesy are abolished. The widow is also entitled to a small allowance from her deceased husband's estate, c. 23, §§ 30, 176. Marriage extinguishes the right of a woman who was unmarried when appointed to act as executrix or administratrix, §§ 170, 188.

In NEVADA, all the property of a married woman at the marriage or after acquired by gift, bequest, devise, or descent, with its profits, is her separate property, which, with the exception of money, must be inventoried, acknowledged, and recorded from time to time as acquired, *Compiled Laws*, by Cutting, 1900, §§ 510-514. The husband's estate so acquired is also his separate property; and all other property acquired by either after marriage is community property, §§ 510, 511. The husband has the control and absolute disposition of the community property, with certain exceptions, § 515. Curtesy and dower are abolished, § 516. She may, without the husband's consent, dispose of her property in any manner, § 518. Her earnings, as to his debts, and if living apart from her husband, those of herself and minor children, are her own absolutely, §§ 522, 523. If he allows her to use her earnings, it is a gift, and with the profits, they belong to her, § 524. Her separate property is liable for her debts, but not for the husband's, §§ 525, 526. They may contract with each other, as if unmarried, like persons occupying a confidential position towards each other, § 528. If the husband neglects to support her, any one who supplies her in good faith may charge the husband, § 531. But not if she abandons him without cause, and does not offer to return, § 532. She must support the husband if not able to support himself, § 533. If living apart from him, she may sue and be sued alone, § 534. Marriage contracts must be acknowledged and recorded, §§ 536-539. She may dispose of her property by deed jointly with her husband, and by will, §§ 2640, 3072. She may, by leave of court, become a sole trader, and may sue and be sued in matters pertaining to the business, while the husband is not liable for her contracts unless made with his written assent. She is then liable for her children's maintenance, §§ 545-549. The statute of descents and distribution is similar to that of Montana, §§ 519, 520, 3054. An estate of homestead, exempt from execution for debts, is allowed to the extent of \$5,000, §§ 550-558.

* In NEW HAMPSHIRE, a married woman holds to her own use, free of her * 382 husband's control, all before or after acquired property, if not the result of a payment or pledge of his property, *Public Stats.* (Chase's ed. 1901), c. 176, § 1. While her husband is insane, or when a cause of divorce exists by his act, the supreme court may, on her petition, make her a reasonable allowance out of his estate, §§ 4, 5. If either of them has been insane for one year, the probate court may authorize the other to sell and convey his or her, or the other's, real estate, §§ 6, 7. If of age, she may join her husband in any conveyance of real estate; and in release of dower, if not of full age. He may, though a minor, join with her in releasing curtesy; "and real estate may be conveyed directly by husband to wife, or wife to husband, in all cases where the same thing might lawfully be done through the intervention of a third person," § 3 (as amended by the Act of 1899, c. 16). As to third persons, she has the same rights, may make contracts, but not with her husband, and sue and be sued, as if unmarried, but no undertaking on her husband's behalf is binding except her release of dower and homestead in a mortgage, § 2. He is not liable for her antenuptial debts, § 13. She may, if of full age, dispose of her property by will, c. 186, § 1. An antenuptial settlement in his or her favor bars his or her claims upon the other's estate, §§ 15, 16. Devises or bequests by one of them to the other are in lieu of rights in the other's estate, unless otherwise expressed, § 17. Chapter 195, defining the rights of each in the other's estate after the latter's death, was amended by the Act of Mar. 22, 1901, c. 113.

In NEW JERSEY, the property of any woman married since July 4, 1852, at the marriage continues her separate property, as if unmarried, 2 *Gen. Stats.* (1895), p. 2012, § 1. All the property and profits of any woman "now married" is her

separate property, as if unmarried, except the liability for the husband's debts contracted before July 4, 1852, § 2. All the property and profits acquired by a married woman after July 4, 1852, in any way, is her sole property, as if unmarried, § 3. The Act of Mar. 24, 1899, c. 196, validates conveyances made prior to July 4, 1852, by married women since deceased, without a trustee. Her future earnings and their investments are to be her sole property as if unmarried, § 4. She may contract and enforce the same, as if unmarried, except as accommodation indorser, guarantor, or surety, or to answer for the debt or default of a third person; except that if she thereby obtains property for her own use, or for the benefit of her separate estate, she shall be liable as if unmarried, § 26, as amended by the Act of June 13, 1895, c. 430. She is bound by the covenants in her deed of land, § 7. She may, without the concurrence of her husband, receive and receipt for property as if unmarried, § 8. She may, if of the age of twenty-one years, dispose of her property by will, as if unmarried, without impairing the husband's interest in her real property, § 9. She, and not the husband, is with her property liable, and may be sued, as if unmarried, for her ante and post nuptial debts, § 10. She may sue alone, touching her separate property, as if unmarried, § 11. She cannot convey her real estate without her husband, except when specially provided, nor impair his curtesy, nor can they contract with or sue each other, §§ 14, 33. Her property is not subject to his disposal or debts, § 15. She may make deposits in a savings bank free of the husband's control, Vol. III, p. 3014, § 24, p. 3018, § 103. If living separate from her husband, she may, without his consent, bar her dower, § 18; or, by leave of court, may convey or mortgage her real estate within the State, § 22. If a minor, she cannot convey land, Vol. I, p. 854, § 9. If she has lived separate for seven years, the chancellor may authorize her to convey, mortgage, lease or devise any interest or estate she has in real property, §§ 35, 36, Act of Mar. 24, 1896, c. 83. Any conveyance in pursuance of a power of attorney executed by a married woman with the husband, and describing the land, is as effectual as if she were unmarried, Vol. I, p. 855, §§ 11, 12. The Act of Mar. 22, 1901, c. 183, authorizes married women to convey a life estate without joining the husband. The Act of April 1, 1902, c. 74, authorizes them to release dower, or an estate devised for life or years in lieu of dower without joining the husband.

In New Mexico, by the Compiled Laws of 1897, neither is liable for the other's debts, except for necessities furnished the husband or family. Husband and wife may be agents for and contract with one another, but each is chargeable with notice of the contracts and debts of the other, § 1511. Persons of either sex, not otherwise prohibited by law, may make a will, § 1947. By the Act of Mar. 20, 1901, c. 62 (repealing § 21 of Acts of 1899, c. 80, and §§ 1431-32, 2030, 2031, 3943-44, 3950, 3951-52, 3959, 3962-63-68, 3970, 1509, 1510-12-13, 3933 of Compiled Laws of 1897), husband and wife's property are their separate estate, and not liable for the other's contracts, debts, or torts, §§ 1, 4. Neither is liable for the other's contracts except for necessities, § 3. They are not liable for the torts of their minor children, Acts 1901, c. 83. Husband and wife have the same property rights, the same power to convey or contract, or to sue or be sued, and all powers and rights as if single, § 5. But neither of them can convey or encumber realty without both joining in the contract, &c., § 6. Either may convey by will an undivided half of the estate acquired during marriage, §§ 7, 8. In case of intestacy, the survivor administers the other's estate, § 1963. And the surviving husband has the same rights as a surviving wife, § 1994. She may become a special partner with him or with others, may contract with him and be a witness for or against him as to the business, § 2676. The Act of Mar. 1897, c. 73, § 8, enabled married women to sue and be sued as if unmarried. By the Act of Mar.

16, 1899, c. 80, § 21, the wife's signature or consent is not requisite to the husband's conveyance or encumbrance of his real estate.

In NEW YORK, the property of a married woman at the marriage and its income remains her separate property, free from the control or disposal of her husband, as if she were unmarried; she may contract as to her property with any person including her husband, carry on business, and enjoy her property as if single, 3 Heydecker's Gen. Laws and Rev. Stats. (2d ed. 1901), p. 3954, §§ 20, 21. A trustee of her property, on her written request and by leave of court, may convey to her all or a part of such property or its income for her sole use and benefit, § 29. Marriage contracts are valid, § 23. Her contracts do not bind her husband, but he is liable for her debts to the extent of the property he acquired from her by antenuptial contract or otherwise, §§ 24, 25. She may insure his life for her sole use up to \$500 premium, and may, if without issue, dispose of such insurance by will, § 22. Husband and wife may convey directly to each other, or make partition, § 26. She may sue and defend as if single, and the husband should not be joined in a suit affecting her separate estate, Code of Civil Procedure, § 450.

In NORTH CAROLINA, a married woman is alone liable for her antenuptial contracts or torts, Code of 1883, §§ 1822, 1823. The husband must be joined in a suit against her, when not a free trader, but judgment will not issue against him for her antenuptial debts or postnuptial contracts, § 1824. But he may be liable for costs for his misconduct in such a suit, or discharged from the defence, § 1825. She cannot contract to bind her property without the husband's written consent, except for necessary personal expenses, for family support, or for discharging antenuptial debts, unless she is a free trader, § 1826. She may by an antenuptial contract, or by the husband's written consent, acknowledged and recorded, become such a trader, and contract as if unmarried, §§ 1827-1829. She may, after due notice, cease to be a trader, and return to her disability, except as to incurred liability or subsequent fraud, § 1830. If living with his wife, a husband is jointly liable for her torts, § 1833. She must be joined by her husband in a conveyance of her real estate, except in a lease for more than three years, § 1834. She may contract with her husband, but may not, without leave of court, thereby charge her real or personal estate for longer than three years, §§ 1835, 1836. Her separate income, if saved, is her separate property; but if he receives it without objection, he is liable to account for it but a year, § 1837. She may dispose of her property by will as if unmarried, but not to impair curtesy, § 1839. The wife's real estate cannot be sold or leased without her consent, and the husband's interest therein is exempt from execution, § 1840. If she dies intestate, in whole or in part, he holds her personal estate, subject to her debts. If he then dies before administering, it passes into his estate, still so subject, § 1479; but the right to share in each other's estate is lost upon dissolution of marriage, or by separation and living in adultery, §§ 1480, 1482, 1845. She may insure his life and dispose of her interest therein by will, § 1841. In executing an instrument for registry, she must acknowledge after a separate examination by the proper officer, § 1246, (5, 6). The husband may acknowledge before or after the wife, Acts of Mar. 5, 1895, c. 136, and of Feb. 23, 1899, c. 235, § 9. She need not prosecute or defend suits by a guardian or next friend; the husband is to be joined with her, except in actions concerning her separate estate, or in suits between themselves. Clark's Code of Civil Procedure, § 178. Judgments and executions against her are collected from her separate estate, §§ 424 (4), 443. Sects. 148 and 163 of the Code, as to her disabilities, were amended by the Act of Feb. 13, 1899, c. 78, which provided that the time computed as constituting adverse possession shall not include any adverse possession against a married woman

prior to the Act. On her corporate stock he may vote as if unmarried, Act of Mar. 8, 1901, c. 474.

In **NORTH DAKOTA**, the husband must support his wife, but she must support her husband out of her separate estate, when he has none, has not deserted her, and is too infirm to support himself, Civil Code of 1895, § 2765. She may contract with her husband or a third person, as if unmarried; they can contract in writing for an immediate separation, but cannot alter their marital relations, §§ 2767, 2768; Act. of Mar. 7, 1899, c. 100. She may hold property with her husband, jointly or in common, may convey her property without his consent, and may record an inventory of the same duly acknowledged, § 2593. She is not answerable for his acts, and has no dower. Her earnings and accumulations and those of her minor children while apart from her husband, are her separate property, which is alone liable for her debts, contracted before or after marriage. There is no curtesy or dower, § 2770. He is liable for necessities, if he neglects her, unless she abandons him, but on an agreement of separation she is liable for her support, unless expressly stipulated, §§ 2771, 2772. A woman has the same legal rights and is subject to the same liabilities after marriage as before, and sues and is sued in her own name, § 2767; Act of Mar. 7, 1899, c. 100. Divorce restores the parties to the state of unmarried persons, Act of Mar. 7, 1901, c. 70.

In **OHIO**, the husband must support his wife and minor children, but if unable his wife must assist him as far as she is able, Rev. Stats. (Bates's 2d ed. 1898), § 3110. Neither has any interest in the other's property except as afterwards provided, but neither can be excluded from the other's dwelling, § 3111. They may contract with each other or any other person as if unmarried, subject between themselves to the general rules controlling persons occupying confidential relations with each other, § 3112; and see note after § 3117. A married person may take, hold, and dispose of real and personal property as if unmarried, § 3114. Neither is answerable for the acts of the other, § 3115. If the husband neglects to support his wife, he is liable to any one who in good faith supplies her with necessities, § 3116. But not if she abandons him without cause, § 3117. In disposing of her real estate, a married woman executes and acknowledges a deed in the same manner as other persons, § 4107. A married woman shall sue and be sued as if unmarried, § 4996. Judgment may be enforced against her and her property as if unmarried; but she is entitled to the benefit of all exemptions to heads of families, § 5319. She may insure her husband's life for her benefit; and insurance on the life of any person may be transferred to her and inure to her separate use, and in case she dies before due, to her children, or if no children, on her death revert to the party insured or his transferee. She may sell or assign such insurance with the concurrence of the party insured, § 3629. If husband or wife dies intestate, without children or their legal representatives or kindred, all her property belongs to the survivor, § 4158. Curtesy (but not dower) is abolished, § 4194 (1, 2). A married woman may make a will, § 5914.

In **OKLAHOMA**, the husband must support himself and his wife, but if unable from infirmity to do so, the wife must support him from her separate estate, Stats. 1893, Par. 2966. Either may contract with the other or with third persons as to property, Par. 2968. Neither is liable for the acts or upon the contracts of the other, and dower and curtesy are abolished, Pars. 2972, 6262. She may convey and acknowledge as if single, Pars. 1629, 2971, 6116. A married woman may dispose of all her separate estate by will without her husband's consent, Par. 6166. A married woman may sue and be sued as if unmarried, Par. 2973. By the Acts of 1895, c. 41, § 29, amending § 5207 of the statutes, either may be a witness for the other.

but not against the other in criminal cases, except as to a crime committed against the other.

IN OREGON, a married woman's property and pecuniary rights are not subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent as he may his property, Hill's Annotated Laws of 1892, §§ 2992, 2993; Acts of 1893, p. 170. She is responsible for civil injuries committed by her, § 2996. She may contract, and her contracts are enforceable by or against her as if unmarried, § 2997. She may sue alone, § 2998. She may record with the county clerk a list of her personal property, which will be evidence of her title. Property not so recorded shall be deemed *prima facie* the property of the husband, §§ 2999-3001. She may make a will subject to her husband's right of curtesy, § 3068. She may prosecute and defend alone actions in regard to her property or personal rights; otherwise her husband must be joined, §§ 30, 31. Acknowledgments of married women to conveyances of real property are taken as if they were unmarried, p. 1985 (Act of Feb. 21, 1891).

IN PENNSYLVANIA, a married woman is under no disability as to the acquisition, ownership, use, control, or disposition of property, or the making of contracts of any kind; but she cannot mortgage or convey her real estate unless her husband join; she is liable for her own debts, and for her torts execution is first had against her property, Brightly's Purdon's Digest (1894), p. 1298, §§ 22-24. She may enter into and render herself liable upon contracts as to her property or for necessities, but she cannot become accommodation indorser, guarantor, or surety for another, §§ 24, 42. Her earnings are her separate property, § 39. She may sue and be sued civilly as if single, § 52. A married woman may make a will as if unmarried, § 25. By the Acts of 1895, c. 35, husband and wife, if both have a cause of action for an injury done to her, have redress in only one suit. The Act of 1897, c. 63, provided for record of releases and other written instruments executed by married women without joinder of their husbands. As to the sale or lease, upon ground rent, of real estate owned by them, see the Act of 1897, c. 121. A wife living separate from her husband under a recorded written agreement between them releasing his interest in her real estate, may convey or incumber such real estate, or her after-acquired real estate, as if single, Acts of 1897, c. 171. Her acknowledgments are taken as if single, and now have the same effect as if taken apart from her husband, Acts of 1901, c. 35.

IN RHODE ISLAND, a married woman's property before marriage, or becoming hers thereafter, or acquired by her own industry, and its income, remains her separate property, free of her husband's debts, General Laws of 1896, c. 194, § 1. Her receipts and discharges bind her, including those on mortgages, § 2. She may manage and convey her separate property, even directly to her husband, §§ 3, 5. And she may now make any contract as if unmarried, Acts of 1896, c. 335. She may dispose of her property by will, c. 194, § 8. She may engage in trade, but not as a partner with her husband; and he is not liable for her debts or acts in so doing, § 10. Either may be agent for the other, § 12. They are not liable for each other's torts, § 14. She sues and is sued alone, § 16.

IN SOUTH CAROLINA, a married woman's property, at the marriage, or accrued to her thereafter in any way, is her separate property free of her husband's debts, Civil Code (1902), § 2665. Her earnings and income are her separate estate, § 2666. She may bequeath, devise, or convey it as if unmarried; if intestate, her property descends as provided for the husband; and her written instruments are executed as if she were unmarried, § 2667. She can purchase, take conveyances, and contract with reference to her property, as if unmarried, and her husband is not liable for her debts except when contracted for her necessary

support, § 2668. Tenancy by curtesy is abolished, § 2670. The wife may renounce dower, § 2383. By the Code of Civil Procedure (1902), §§ 135, 296, cl. 4, the husband is to be joined with the wife when she is a party to a suit; she need not prosecute or defend by a guardian or next friend, and may sue or be sued alone as to her separate property, her husband not being liable in such suits; or in suits between husband and wife.

In SOUTH DAKOTA, a husband must support his wife, but she must support her husband out of her separate estate, when he has none, has not deserted her, and is too infirm to support himself, Civil Code (1901), § 3499. She may contract with her husband or a third person, as if unmarried, subject in transactions with her husband to the rules of trusts, § 3501. She may hold property with her husband, jointly or in common, may convey her property without his consent, and may record, as *prima facie* evidence of her title, an inventory of the same duly acknowledged, § 3504. She is not answerable for his acts, and has no dower. Her earnings and other accumulations and her minor children's earnings, while apart from her husband, are her separate property, which is alone liable for her debts, contracted before or after marriage. There is no curtesy or dower, § 3505. He is liable for necessities, if he neglects her, unless she abandons him, but on an agreement of separation she is liable for her support, unless expressly stipulated, §§ 3506, 3507. If husband or wife, abandoning the other, is absent from the State for one year without providing maintenance, or is sentenced to imprisonment for one year or more, the circuit court may authorize the abandoned party to sell, manage, or encumber the property of said husband or wife for family support and the payment of prior debts, upon notice to the other party; and contracts so made bind both, §§ 3508-3510; Act of Mar. 5, 1901, c. 137. A woman has the same legal rights after marriage as before and the same as her husband except the right to vote or hold office, § 3511. By the Act of Mar. 12, 1901, c. 105, husband or wife cannot testify against the other without the latter's consent.

In TENNESSEE, life insurance, effected by a married woman upon her husband's life, inures to her benefit and that of her children free of his debts, Code of 1896 (by Shannon), § 4232. The proceeds of her property cannot be paid to any person except by her consent on privy examination, or by their joint deed or power of attorney, § 4236. She may dispose of her separate estate by will, § 3901. The husband's interest in her real estate cannot be sold during her life upon execution against him, §§ 4234, 4235. Her personal property is exempt from his debts, § 4237. He is not liable for her antenuptial debts, § 4238. The rents and profits of her estate are subject to his debts or contracts only by her written consent, not interfering with his tenancy by the curtesy, § 4239. If deserted by him, or leaving him for ill-treatment, after-acquired property by her is free of his debts or disposal during the separation, § 4240. In such case, if of the age of twenty-one years, she may dispose of her interest in real estate by will, deed, or otherwise, as if unmarried. (x) She may dispose of her real estate in any manner without his consent or concurrence after privy examination thereto before the proper official. Unless in case of a settled estate upon her, the power is withheld. Her property is liable for debts for necessities for herself and children, as if she were unmarried. Her property must be scheduled and registered, §§ 4241-4246. By the Act of April 20, 1897, c. 82, married women engaging in mercantile or manufacturing business in their own names, or by an agent, or as a partner, are liable for debts incurred therein as if single.

(x) See *Baker v. Kilgore*, 145 U. S. 487, 12 S. Ct. 943, 36 L. Ed. 786; *Martin v. Fort*, 83 Fed. 19.

In TEXAS, all a married woman's property before marriage and acquired after by gift, devise, or descent, and the increase of lands thus acquired, is her separate property, but is under the husband's sole management, Rev. Stats. of 1895, § 2967. All her other after-acquired property is common, and may be disposed of by the husband alone, Art. 2968. At the dissolution of the marriage all their effects are regarded as common, unless proved otherwise, Art. 2969. She may contract debts for family necessities and for the benefit of her separate property, for which they may be jointly sued, Arts. 1201, 2970; and execution may then be ordered to be levied on her separate or the common property at the discretion of the plaintiff, Art. 2971. If the husband fails to support her, or to educate the children, from the proceeds of her property, she may, by decree of court, have so much as may be deemed necessary, Art. 2972. Their community property is liable for their debts contracted during marriage, except when otherwise provided, § 2973. If the husband fails to sue alone or jointly with her for her property, she may, by leave of court, sue for it alone, Art. 1200. She may dispose of her property by will, Art. 5333. A homestead of two hundred acres without, or lots up to \$5,000 within, a town or city, are exempt from a forced sale, Art. 2396.

In UTAH, a married woman's property at the marriage and afterwards acquired by purchase, grant, gift, devise, or descent, is her separate property, and may be managed and disposed of as if unmarried, Rev. Stats. of 1898, § 1198. She only is liable on her contracts, § 1199. Husband and wife may convey to each other, § 1200. Her wages are her property, and she may prosecute and defend suits as if single, §§ 1201, 1203. They are not liable for each other's antenuptial debts, or for post-nuptial debts, except as otherwise provided, § 1202. He is not liable for her torts, § 1204. Either may be agent for the other, § 1205. They may be sued jointly or separately for family expenses, § 1206. They must join in executing a mortgage of exempt personal property, § 167. She may sue and be sued, § 2529. She may dispose of all her estate by will, § 2649.

In VERMONT, a married woman may contract, except with her husband, and sue and be sued in all matters connected therewith, as if unmarried, and execution issue against her separate estate, Statutes (1894), § 2644. She cannot become surety for her husband except by way of mortgage, § 2646. Personalty is held to her sole use, free from the husband's debts, and neither can claim against the other for personal services, § 2647. He is only liable for such of her torts as were committed by his authority, and only for her debts incurred before a marriage contracted anterior to Jan. 1, 1885, § 2648. If deserted or unprovided for, she may contract for and be entitled to the earnings of herself and minor children; and may, by leave of court, if living apart from him, dispose of property, contract, and to receive money due or property, §§ 2649, 2650. Sect. 2542 was amended by the Act of Nov. 17, 1900, c. 39, which entitles him, on her death, to one third of her real estate in fee. Sect. 2675 was amended by the Acts of Nov. 24, 1896, c. 49, and of Nov. 16, 1898, c. 55, enabling the court of chancery, in its discretion, to empower a married woman on her petition, to convey her real estate by separate deed, and to confirm her separate conveyance, upon the petition of any person in interest.

In VIRGINIA, all the property, including rights of action, possessed by a woman at the time of her marriage, or acquired afterwards in any manner, is her separate estate; her husband is entitled to curtesy, but this does not entitle him to the possession, or the rents and profits during the coverture, and her property is not subject to his debts. Act of Mar. 7, 1900, c. 1139, repealing §§ 2284-2290, 2292, 2295, and amending §§ 2291, 2293, 2294, 2296 of the Code of 1887. By this Act the wife may contract, sue and be sued as if unmarried; the husband is not liable

on her contracts or for her torts committed before or after marriage. It amends § 2291 so as to enable the circuit court to manage the estate of an infant wife through a receiver; also § 2296, by declaring a husband's interest in his wife's estate, forfeited if he abandons her and this continues until her death. The Supplement to the Code (1898), § 3346 *a*, makes them competent witnesses for or against each other in certain civil and criminal cases; and amends § 2295, declaring that the wife's contracts shall be deemed intended as made with reference to her separate estate, by enabling a court of equity to enforce her contracts against her separate estate, by subjecting the corpus of either the real or personal estate. By § 2502, as here amended, the conveyances of husband and wife are to be admitted to record as to each of them under §§ 2500, 2501. By § 2288 *a*, an adult wife can sue without a next friend. By the Act of Feb. 3, 1900, c. 266, her contingent right of dower in real estate in which her husband has no interest, is her separate estate. Sect. 2298 of the Code was amended by the Act of Mar. 5, 1900, c. 585.

In WASHINGTON, a married woman may acquire, hold, and dispose of property, and sue and be sued, as if unmarried, Ballinger's Statutes and Codes (1897), § 4502. She has no more of disability in civil matters than the husband, and may equally in her own name appeal to the courts, § 4503. She has equal right to earnings and estate of children, § 4509. Her property at the marriage, and after acquired by gift, devise, or inheritance, and its income and profits, are free of her husband's debts and contracts, and she may manage, lease, sell, convey, encumber, and dispose of it by will precisely as her husband can, § 4489. If he gets control of it, she may sue for it as if unmarried, § 4505. She may receive and sue for her personal earnings, and may sue and be sued for protection of her rights, as if unmarried, § 4493. Neither she, nor the rent or income of her property, is liable for his antenuptial debts, nor for his separate debts, § 4507. She may contract and enforce contracts, and be held by them, as if unmarried, § 4504. Her property is jointly or separately liable for family expenses and children's education, § 4508. Property acquired by her other than by gift, devise, or inheritance, is community property, which, if personalty, the husband manages and disposes of, but not more than one half by will, § 4490. He cannot dispose of community realty unless she joins, § 4491. On her death, one half of the community property goes to him, the other half being subject to her disposal by will. If without issue, the whole goes to him, § 4621. If separate from him, her earnings and accumulations, and those of minor children with her, are her separate property, § 4494. Dower and curtesy are superseded by §§ 4495, 4620, 4622. Husband and wife may join in a suit for injury to either; if sued, she may defend in her right, and in his also, if he does not defend, Code of Civil Procedure (1896), § 4105.

In WEST VIRGINIA, a married woman's property at the marriage, and its profits, is her sole property, as if unmarried, free from her husband's control and debts, Code of 1891, c. 66, §§ 1, 2, as amended by the Acts of 1893, c. 43. She may take property by inheritance or by gift, grant, devise, or bequest from other than her husband, and hold, convey, and devise it and its profits as if unmarried, free from his debts and disposal; but, unless living apart, he must join in her deed of conveyance, or power of attorney therefor, § 3, as amended by the Acts of 1895, c. 9. Her trustee on her written request may, by leave of court, convey any or all of her property to her. She may insure her husband's life up to \$150 premium free of his debts. She may hold, enjoy, and dispose of a patent free of her husband's debts, and as if unmarried. She may receive and receipt for her deposits in a bank, §§ 4-8, as amended by the Acts of 1893, c. 3, §§ 4-8. She may vote as a stockholder, and may be sued jointly with him for her antenuptial debt, but the judgment will bind her property alone. The husband is liable for her antenuptial debts only to the

extent of her separate property acquired by him, Acts of 1893, c. 3, §§ 9-11. Her earnings are her separate property ; her separate personal property is liable for any of her debts, Act of 1893, § 12. She may be sued alone concerning her separate property, when between her husband and herself, and when living apart from him, and she need not prosecute or defend by guardian or next friend. Ibid. § 13. If living separate and apart from her husband, she may do business in her own name, and the property used, the profits and earnings realized, will be her separate property, free from the debts and control of her husband. Ibid. § 14. She may sue and be sued, as if she were a *feme sole* ; judgments against her are a lien against the corpus of her separate real estate, and execution thereon may be collected from her separate personal property as if she were a *feme sole*. Ibid. § 15.

In WISCONSIN, a married woman's property at the marriage, including realty held jointly with her husband, is her separate property, with its profits, free of his debts and disposal, Sanborn and Berryman's Statutes of 1898, §§ 2340, 2341. She may receive property by inheritance, gift, grant, devise, or bequest, and hold, convey, and devise it and its profits as if unmarried, free from his debts and disposal ; and each may convey and transfer property to the other or in the other's favor, § 2342. Her personal earnings, except those from her husband, are her own, free of his debts and control, § 2343. If deserted or unprovided for, she may do business in her own name, and collect the profits and her and her minor children's earnings, and apply them to the family support and the children's education, free from his debts or control, § 2344. She may sue and be sued touching her property or personal earnings, and judgment may be enforced against her property, as if she were sole ; she and her husband may sue separately for an injury to her person or character, § 2345. She is liable, as if unmarried, for antenuptial debts contracted after April 3, 1872, and her husband is not liable, § 2346. She may insure her husband or another person for her benefit up to \$150 premium, § 2347. She may be admitted as an attorney at law, and act as assignee or receiver, except as to her husband's estate or interests, § 2347 *a*. She may, if of age, convey her real estate, as if unmarried, by joint or separate deed ; and her acknowledgment is taken in the same form as if she were sole, § 2221. She may, if eighteen years of age, dispose of all her real and personal estate by will, §§ 2277, 2281. Her deposits in a savings bank and the profits are her own solely, payable to her, and her receipt therefor is a discharge, c. 94, § 2020.

In WYOMING, a married woman's property at the marriage, and afterwards acquired in any way other than from her husband, is her separate property, and may be enjoyed by her as if unmarried, free from the debts and control of her husband, Revised Statutes of 1899, § 2972. She may contract about, grant, sell, and convey her property of any kind as if unmarried, § 2973. She may sue and be sued touching her property, person, and reputation as if unmarried, § 2974. She may make a will as if unmarried, § 2975. She may do business and perform services, and the earnings and profits are her own, and may be used by her, and she may sue and be in regard to such business as if unmarried, § 2976. Under a marriage contract after Dec. 4, 1869, her husband is not liable for her antenuptial debts unless he assumes them in writing, § 2977. Judgments on liabilities existing against a woman when she marries, and who has or acquires lands, are to be levied on such lands only, § 2978. Execution upon judgments rendered against husband and wife for her torts is to be first levied on her lands, if any, § 2979. The husband's separate deed conveys no interest in her lands, § 2980. Dower and curtesy are abolished, § 4858.

In the DISTRICT OF COLUMBIA, a married woman's property at the marriage, or acquired during marriage by gift, grant, devise, or descent, from her by her own

labor, by judgment or decree, or in any other manner, is her own as absolutely as if she were unmarried, free from her husband's debts, Code of 1902, c. 33, § 1151. The husband may convey property directly to his wife, § 1152. No trustee is necessary for the wife, but she may have one appointed, § 1153. Adult married women may dispose of their separate property by deed, mortgage, lease, will, gift, or otherwise, as if unmarried, § 1154. They may trade, contract, sue and be sued as if unmarried, and the husband is not liable upon his wife's contracts or for her torts committed out of his presence without his participation or consent; but she cannot contract as surety, guarantor, or for accommodation, § 1155. Her contracts are deemed made with reference to her separate estate, § 1156. The property of infant wives is to be under guardianship, § 1157. Dower and curtesy exist, §§ 1158, 1159. The husband is not liable for the wife's antenuptial debts, but is liable, as at common law, for her debts incurred upon his credit, or as his agent, or for family necessities. §§ 1166, 1177. She may make covenants running with the land, § 1170.

* CHAPTER XIX.

* 383

PERSONS OF INSUFFICIENT MIND TO CONTRACT.

SECT. I. — *Non Compotes Mentis.*

THEY who have no mind, “cannot agree in mind” with another; and, as this is the essence of a contract, they cannot enter into a contract. But there is more difficulty when we consider the case of those who are of unsound mind, partially and temporarily; and inquire how the question may be affected by the cause of this unsoundness.

Mere mental weakness, or inferiority of intellect, will not incapacitate a person from making a valid contract; nor is it easy to define the state of mind which will have this effect. There must be such a condition of insanity or idiocy, as, from its character or intensity, disables him from understanding the nature and effect of his acts, and therefore disqualifies him from transacting business and managing his property. (*aa*)¹(*x*) And an

(*aa*) *Dennett v. Dennett*, 44 N. H. 531; 231; *Hovey v. Hovey*, 55 Me. 256; *Coleman v. Bond*, 7 Allen, 1; *Hovey v. Chase*, 52 Me. 304; *Somers v. Pumphrey*, 24 Ind. man *v. Frazer*, 3 Bush, 300.

¹ For this reason a monomaniac's deed cannot be set aside when his monomania had no reference to the transaction of which the conveyance was the result and does not affect his business judgment. *Burgess v. Pollock*, 53 Iowa, 273. Even though the deed was voluntary. *Kidder v. Stevens*, 60 Cal. 414. — W.

(*x*) The test of mental capacity in the maker of a contract or deed, whose intelligence is more or less obscured by disease, or by intoxication, is his capacity at the time to understand the nature and effect of the act in which he is engaged, and to protect his own interests; and the rule is held to be stricter as to contracts than as to testamentary capacity; for which latter it is not absolutely necessary that there exist ability to transact the ordinary keen business of life. *Baldwyn v. Smith*, (1900) 1 Ch. 588; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Young v. Otto*, 57 Minn. 307, 59 N. W. 199; *Fretwell v. Fretwell* (Ky.), 62 S. W. 1017; *Lassiter v. Lassiter* (Ky.), 63 S. W. 477. See *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299; *Smith v. Smith*, 157 Mass. 389, 32 N. E. 348; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413; *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510; *People v. Hubert*, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72, 80 n. Upon an exchange of real estate, it is even held that a higher degree of capacity is required than for a deed or a will. *Turner v. Houtt*, 53 N. J. Eq. 526, 33 Atl. 28.

It is libellous to falsely charge a person with insanity without probable cause, especially when special damage is thereby caused to him. *Comfort v. Young*, 100 Iowa, 627, 69 N. W. 1032; see 30 Am. L. Reg. N. s. 389.

adult person although of unsound mind can become liable on an implied contract for necessities.¹

It was once held that no man could discharge himself from his liability under a contract by proof that when he made it he was not of sound mind; on the ground that no man should be permitted to stultify himself. (a) This is not now the law, either in England or this country. If one enters into a contract while deprived of reason, and afterwards recovers his reason, he may repudiate that contract. (b)² It is said that an insane person

(a) Litt. §§ 405, 406, *Beverley's Case*, 4 Rep. 126; *Stroud v. Marshall*, Cro. E. 398; *Cross v. Andrews*, id. 622. But this was contrary to the most ancient authorities. See 2 Bl. Com. 291. — In *Waring v. Waring*, 12 Jur. 947 (1848), the nature and the degrees of insanity are very fully considered.

(b) In *Gore v. Gibson*, 13 M. & W. 623, *Parke, B.*, said: "Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this is known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication, and total drunken-

ness is now held to be a defence. See *Matthews v. Baxter*, L. R. 8 Ex. 132; *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whidden*, 2 N. H. 435; *Seaver v. Phelps*, 11 Pick. 304; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Van Wyck v. Brasher*, 81 N. Y. 260; *McCreight v. Aiken*, 1 Rice, 56; *Yates v. Boen*, 2 Stra. 1104; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Rice v. Peet*, 15 Johns. 503; *Owing's Case*, 1 Bland, 377; *Horner v. Marshall*, 5 Muni. 466; *Fitzgerald v. Reed*, 9 Sm. & M. 94. An administrator may avoid a contract by showing the insanity of the testator at the time of making it. *Lazell v. Pinnick*, 1 Tyler, 247. And it is no answer that the same party when contracting was not apprised of the other's insanity, and did not suspect it, and did not overreach such insane

¹ *Howard v. Digby*, 4 D. M. & G. 798; *Wentworth v. Tubb*, 1 Y. & C. Ch. 171; 6 Jur. 980; 2 Y. & C. Ch. 537; *Williams v. Wentworth*, 5 Beav. 325; *In re Rhodes*, 44 Ch. D. 94; *Ex parte Northington*, Ala. S. C. 400; *Sawyer v. Lufkin*, 56 Me. 308; *Cape Elizabeth v. Lombard*, 72 Me. 492; *Hallett v. Oakes*, 1 Cush. 296; *Kendall v. May*, 10 Allen, 59; *In re Renz*, 79 Mich. 216; *Reando v. Misplay*, 90 Mo. 251; *Van Horn v. Hann*, 39 N. J. L. 207; *LaRue v. Gilkyson*, 4 Penn. St. 375; *Blaisdell v. Holmes*, 48 Vt. 492. So a lunatic is liable for money borrowed to pay his debts. *Lancaster Co. Bank v. Moore*, 78 Pa. 407; or of which he has had the benefit. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541. See *Young v. Stevens*, 48 N. H. 133.

The case of *In re Weaver*, 21 Ch. D. 615, cast some doubt on the liability of a lunatic for necessities, especially if the person dealing with the lunatic knew of the lunacy, but this case was expressly disapproved in *In re Rhodes*, 44 Ch. D. 94, where *Cotton, L. J.*, said: "It is asked, can there be an implied contract by a person who cannot himself contract in express terms. The answer is, that what the law implies on the part of such a person is an obligation which has been improperly termed a contract to repay money spent in supplying necessities. I think the expression 'implied contract' is erroneous and very unfortunate."

But such an obligation will not be imposed upon the lunatic if necessities were furnished him on the credit of another, or without intention of charging the lunatic. *In re Rhodes*, *supra*; *Mass. Gen. Hospital v. Fairbanks*, 129 Mass. 78.

A lunatic is under a quasi contractual obligation to pay for necessities furnished his wife, similar to his obligation to pay for necessities furnished himself. *Read v. Legard*, 6 Ex. 636; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *Shaw v. Thompson*, 16 Pick. 198; *Stuckey v. Mathes*, 24 Hun, 461. See also *Drew v. Nunn*, 4 Q. B. D. 661. — W.

² The burden of proving the restoration to reason is upon him who seeks to enforce

* may be arrested at common law, in a civil action. (c) * 384
We have much doubt of this as a rule, at least in this country.

The deed of an insane person is not void, but it is voidable. (x)
His heirs may avoid as to the grantee or subsequent purchasers, although the deed was not obtained by fraud, nor for an inadequate consideration. (cc)¹

He may repudiate a contract made by him when insane, although his temporary insanity was produced by his own act, as by intoxication. (d) But he must not make use of his intoxication as a

person, or practise any fraud and unfairness upon him. *Seaver v. Phelps*, 11 Pick. 304. And the *dictum* of Lord *Tenterden*, in *Brown v. Joddrell*, 1 Mood. & M. 105, to the contrary, is inconsistent with modern decisions. The modern rule seems to be somewhat qualified in *Morris v. Clay*, 8 Jones, L. 216.

(c) *Person v. Warren*, 14 Barb. 488; *Bush v. Pettiboue*, 4 Const. 300.

(cc) *Hovey v. Hobson*, 53 Me. 451.

(d) An intoxicated man "has no agreeing mind." *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126. See *Cook v. Clayworth*, 18 Ves. 15; *Cole v. Robbins*, Bull. N. P. 172; *Barrett v. Buxton*, 2 Aik. 167; *Burroughs v. Rich-*

mond, 1 Green (N. J.), 233; *Foot v. Tewksbury*, 2 Vt. 97; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Reinicker v. Smith*, 2 Har. & J. 421; *Curtis v. Hall*, 1 Southard, 361; *Rutherford v. Ruff*, 4 Desaus. 364; *Seymour v. Delaney*, 3 Cowen, 445; *Duncan v. McCullough*, 4 S. & R. 484; *Taylor v. Patrick*, 1 Bibb, 168; *Prentice v. Achorn*, 2 Paige, 30; *Harrison v. Lemon*, 3 Blackf. 51; *Drummond v. Hopper*, 4 Harring. (Del.) 327; *Van Wyck v. Brasher*, 81 N. Y. 260. And the legal representatives of a party contracting while intoxicated have the same right as the party himself to avoid such contract, although the drunkenness was not procured by the sober party,

a contract against the one alleging insanity. *Gangwere's Est.*, 14 Penn. St. 417; *Elston v. Jasper*, 45 Tex. 409. See *Turner v. Rusk*, 53 Md. 65. — An insane person's contract made during a lucid interval is binding, *McCormick v. Littler*, 85 Ill. 62; as well as a contract ratified during a lucid interval, although entered into when insane, *Blakeley v. Blakeley*, 6 Stewart, 502, and reporter's note. — K.

¹ Great weakness of mind, also, together with a grossly inadequate consideration, will afford ground for the setting aside a conveyance upon seasonable application. *Allore v. Jewell*, 94 U. S. 506. See *Taylor v. Atwood*, 47 Conn. 498. — K.

(x) The contracts of lunatics who are not under guardianship, and have not been adjudged insane, are usually held voidable only; but where the incapacity is so radical that there could be no meeting of minds, and the alleged lunatic was not a rational and free agent, they have been held void even as to *bona fide* purchasers, and then they cannot afterwards be ratified. *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804; *Kraus v. Stein*, 173 Penn. St. 221, 33 Atl. 1031; *Hay v. Miller*, 48 Neb. 156, 66 N. W. 1115; *Hale v. Stery*, 7 Col. App. 165, 42 Pac. 598; *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385; *Aetna L. Ins. Co. v. Sellers*, 154 Ind. 370, N. W. 77 Am. St. Rep. 481; *Flach v. Gottschalk Co.*, 88 Md. 368, Atl. 908, 71 Am. St. Rep. 418; *Daugherty v. Powe* (Ala.), 30 So. 524; *Wilkinson v. Wilkinson*, 129 Ala. 279, 30 So. 578;

French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910; *Wolf v. Edwards*, 106 Ala. 477, 31 So. 58; *Moulton v. Camroux* (4 Exch. 17), 6 English Ruling Cas. 71, 75 n.; *Beverley's Case* (4 Co. Rep. 123 b), 16 id. 702, 735, 739 n.; *Edwards v. Davenport*, 20 Fed. 756; *German Sav. Society v. Lahmutter*, 67 Fed. 399; *Plaster v. Rigney*, 97 Fed. 12, 38 C. C. A. 25. The other party to a lunatic's agreement to purchase land cannot avoid it, if beneficial to the latter, because of his incompetency. *McWilliams v. Doran*, 103 Mich. 588, 61 N. W. 881; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178. An offer to return property sold to an insane person is not a condition precedent to his right to avoid the sale. *Bates v. Hyman* (Miss.), 28 So. 567; see *Parker v. Marco*, 76 Fed. 510.

means of cheating others. If he made himself drunk * 385 * with the intention of avoiding a contract entered into by him while in that state, it may well be doubted whether he would be permitted to carry this fraud into effect. And if he bought goods while drunk, but keeps them when sober, his drunkenness is no answer to an action for the purchase-money. (e) (x) A distinction has been taken between express contracts and those implied by law, as for money paid, goods sold, etc. And it is said that these last contracts, especially where the things furnished were necessities, cannot be defeated by showing the drunkenness of the defendant. (f)

If the condition of lunacy be established by proper evidence under proper process, the representatives and guardians of the lunatic may avoid a contract entered into by him at a time when he is thus found to have been a lunatic, although he seemed to have his senses, and the party dealing with him did not know (y)

Wigglesworth v. Steers, 1 Hen. & M. 70. It seems to be held in equity that intoxication does not avoid a contract, unless the intoxication was produced by the other party or unless fraud had been practised upon him. *Cory v. Cory*, 1 Ves. Sen. 19; *Johnson v. Medicott*, 3 P. Wm. 130, n.; *Stockley v. Stockley*, 1 Ves. & B. 23; *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, Sexton, 346; *Wright v. Fisher*, 65 Mich. 275. Dealing with persons *non compos* raises a presumption of fraud; but it may be rebutted; and if the evidence of good faith and of benefit to the unsound person is clear, equity will not interfere. *Jones v. Perkins*, 5 B. Mon. 225. — As to frauds on drunkards, see *Gregory v. Frazer*, 3 Camp. 454; *Brandon v. Old*, 3 C. & P. 440. We think the principle, that a person intoxicated has no agreeing mind, the true one. [It was held that a contract of a drunken man may

be ratified when he becomes sober, in *Matthews v. Baxter*, L. R. 8 Ex. 132; *Carpen-ter v. Rodgers*, 61 Mich. 384.]

(e) See *Alderson, B.*, in *Gore v. Gibson*, 13 M. & W. 623. From *Sentence v. Poole*, 3 C. & P. 1, it might be inferred that an indorsement, made in a state of complete intoxication, could not be enforced against the drunkard by a *bond fide* holder without knowledge of the circumstances. (y) By such a rule the act was a nullity; but it is difficult to see how one could indorse a bill or note in such a way that its appearance would excite no suspicion, and yet be so drunk as to know nothing of what he was doing; and unless the indorser were utterly incapacitated, it should seem that a third party, taking the note innocently and for value, ought to hold it against him.

(f) *Gore v. Gibson*, 13 M. & W. 623. See *ante*, p. * 383, n. 2.

(x) *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478; *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385; *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440 and note; *Haneklau v. Felchlin*, 57 Mo. App. 602; *Bush v. Breinig*, 113 Penn. St. 310. Insane persons, though not held criminally responsible, are held liable for such of their torts as do not involve a malicious intent. *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153 and note; *Mutual F. Ins. Co. v. Showalter*, 3 Penn. Sup. Ct. 452; *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902; *McIntyre v. Sholty*, 24 Ill. App. 605,

121 Ill. 660; *Northwestern Ben. Society v. Dudley*, 27 Ind. App. 327, 61 N. E. 207; 15 Harv. L. Rev. 487. As to providing for his family, contributing to his church, and the like, a court of equity may continue and carry out a lunatic's presumed intent as shown by his acts and declarations when sane. *Ex parte Whitbread*, 2 Meriv. 102; *Potter v. Berry*, 53 N. J. Eq. 151, 51 Am. St. Rep. 626, 34 L. R. A. 296 and note.

(y) See *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161 and note.

him to be of unsound mind. (*g*) But this rule has one important qualification, quite analogous to that which prevails in the case of an infant, and resting undoubtedly on a similar regard for the interests of the lunatic. This is, that his contract cannot be avoided, if made *bona fide* on the part of the other party, and for the procurement of necessities, (*h*) (*x*) which, * as in the * 386 case of infants, would not be restricted to absolute necessities, but would include such things as are useful to him, and proper for his means and station. And it has been recently held, that a *bona fide* contract made with a lunatic, who was apparently sane, cannot be rescinded by him or his representatives, unless the parties can be placed *in statu quo*. (*i*)¹ (*y*)

(*g*) *McCrillis v. Bartlett*, 8 N. H. 569. *Earl of Portsmouth*, 5 B. & C. 170, 2 C. & See *Smith v. Spooner*, 3 Pick. 229; *Manson v. Felton*, 13 Pick. 206. P. 178.

(*h*) *Richardson v. Strong*, 13 Ired. L. (1848); s. c. 2 Exch. 487; in error, 4 106; *Gore v. Gibson*, 13 M. & W. 623; Exch. 17. See also *Niell v. Morley*, 9 *Niell v. Morley*, 9 Ves. 478; *McCrillis v. Bartlett*, 8 N. H. 569. See *Baxter v. The E. 254; Fitzhugh v. Wilcox*, 12 Barb. 235; *Dane v. Kirkwall*, 8 C. & P. 679.

¹ There has been considerable difference of opinion as to the legal effect of a lunatic's deeds and contracts made when apparently sane. The weight of recent American authority is in accordance with the English decision of *Molton v. Camroux* above cited. Thus it is held that the deed of a lunatic given for fair consideration is not void and is voidable only on return of the consideration. *Scanlan v. Cobb*, 85 Ill. 296; *Burnham v. Kidwell*, 113 Ill. 425; *Boyer v. Berryman*, 123 Ind. 451; *Warfield v. Warfield*, 76 Ia. 633; *Gribben v. Maxwell*, 34 Kan. 8; *Rusk v. Fenton*, 14 Bush, 490; *Evans v. Horan*, 52 Md. 602; *Fitzgerald v. Reed*, 17 Miss. 94; *Riggan v. Green*, 80 N. C. 136. That a bond and mortgage given by a lunatic for money lent him in good faith by one having no knowledge of his insanity may be enforced. *Copenrath v. Kienby*, 83 Ind. 18; *Mutual Life Ins. Company v. Hunt*, 79 N. Y. 541; *Kneeder's Appeal*, 92 Pa. 428. And see *Black's Estate*, 132 Pa. 134. Or a note given for value. *McCormick v. Littler*, 85 Ill. 62; *Shoulters v. Allen*, 51 Mich. 529; *Lancaster Nat. Bank v. Moore*, 78 Pa. 407. And generally if a contract has been made in good faith for full consideration without knowledge or ground for knowledge of the insanity and has been executed, it will be binding. *Brodrib v. Brodrib*, 56 Cal. 563, 567; *Young v. Stevens*, 48 N. H. 133; *Matthiessen, & Co. v. McMahon's Adm.*, 38 N. J. L. 536; *Sims v. McLure*, 8 Rich. Eq. 286. The limits of a lunatic's liability are shown by decisions holding that information such as would lead a prudent person to suspect the incapacity will avoid the contract, *Matthiessen, & Co. v. McMahon's Adm.*, 38 N. J. L. 536, and prevent a recovery for money lent or services rendered. *Lincoln v. Buckmaster*, 32 Vt. 652; *Ricketts v. Joliff*, 62 Miss. 440. But see *Leavitt v. Files*, 38 Kan. 26. That if the contract though executed is not a fair one or a conveyance not for full value, it may be avoided, *Riggs v. American Tract Society*, 84 N. Y. 330. So if no consideration is received. *Van Patton v. Beals*, 46 Iowa, 62. Or if the consideration is neither necessary nor beneficial to the lunatic. *Physio-Medical College v. Wilkinson*, 108 Ind. 314. Where the lunatic has not received, but the party endeavoring to hold or charge him has parted with full value, there is disagreement even among the courts which profess to follow *Molton v. Camroux*. It is held, on the one hand, that a mortgage given by a wife for money advanced to her husband may be set aside by her heirs, *Northwestern Ins. Co. v. Blankenship*, 94 Ind. 535; that

(*x*) *Black's Appeal*, 132 Penn. St. 134; *Page v. Krekey*, 137 N. Y. 307; *William- Borum v. Bell* (Ala.), 31 So. 454; *Hosler son v. Lawrence*, 23 N. Y. S. 594. *v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, (*y*) *Ibid.*; *Gilgallon v. Bishop*, 61 56 Am. St. Rep. 720, 35 L. R. A. 161; N. Y. S. 467.

The statutes of the different States provide that idiots, lunatics, drunkards, and all persons of unsound mind, may be put under guardianship. And the finding by a competent court of the fact of lunacy, and the appointment of a guardian, are held to be conclusive proof of such lunacy, and all subsequent contracts are

void. (*j*) In England, an inquisition is only presumptive

* 387 * evidence as to other parties. (*k*) (*x*). But it has been held, that even where the statute expressly declares all the con-

(*j*) *Northwestern Ins. Co. v. Blankenship*, 94 Ind. 535; *Rannells v. Gerner*, 80 Mo. 474; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169. *Contra* in Pennsylvania, *In re Gangwere's Estate*, 14 Penn. St. 417. See *Leonard v. Leonard*, 14 Pick. 280; *McDonald v. Morton*, 1 Mass. 543; *White v. Palmer*, 4 Mass. 147; *McCreight v. Aiken*, 1 Rice,

56; *Hart v. Deamer*, 6 Wend. 497; *Grant v. Thompson*, 4 Conn. 203; *McCurry v. Hooper*, 12 Ala. 823.

(*k*) *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126. And the same rule was recognized in *Hart v. Deamer*, 6 Wend. 497. See also *Hopson v. Boyd*, 6 B. Mon. 296.

lack of consideration for the promissory note of a lunatic may be shown against a purchaser for value without notice, *Moore v. Hershey*, 90 Pa. 196; *Wirebach's Exec. v. First Nat. Bank*, 97 Pa. 543; and that a lunatic who has made a voluntary conveyance of his property may set the conveyance aside though the grantee subsequently mortgaged the property to an innocent third person. *Hull v. Louth*, 109 Ind. 315. On the other hand, it has been held that one who purchases land from the grantee of a lunatic in good faith, for value and without notice, obtains a valid title, though the original transaction with the lunatic was not a fair one. *Drake v. Crowell*, 40 N. J. L. 58. And see *Valentine v. Hunt*, 115 N. Y. 496. And the English Court of Appeals has recently held that insanity is no defence even to a surety, unless it is also shown that the plaintiff was aware of the insanity. *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

In a few jurisdictions the deeds and contracts of lunatics are held absolutely void or voidable as against any one and under any circumstances. Thus in *Brigham v. Fayerweather*, 144 Mass. 48, the devisee of one who after the execution of her will became imbecile was allowed to set aside a mortgage made by her while imbecile. The court said: "Such deed may be disaffirmed without returning the consideration money or placing the other party *in statu quo*. *Chandler v. Simmons*, 97 Mass. 508, 514, 515. Nor is it material that in taking the deed the grantee acted in good faith, and without knowledge of the grantor's insanity, because he who deals with an insane person, as with an infant, does so at his peril." See also *Valpey v. Rea*, 130 Mass. 384; *Dexter v. Hall*, 15 Wall. 9; *Hovey v. Hobson*, 53 Me. 451; *Rogers v. Blackwell*, 49 Mich. 192; *Halley v. Troester*, 72 Mo. 73; *Farley v. Parker*, 6 Ore. 105; *Crawford v. Scovell*, 94 Penn. St. 48. — W.

(*c*) *Harvey v. Regem*, [1901] A. C. 601. The alleged lunatic is entitled to a jury trial on such an inquisition. *In re Bryant*, 3 Mackey (D. C.), 489; *State v. Billings* (55 Minn. 467), 43 Am. St. Rep. 525, 538 n. Such inquisition is in this country held to be notice to all the world like a judgment. *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 71 Am. St. Rep. 418. A person who is placed under guardianship as *non compos* is *prima facie* incapable of making a will during its continuance. *In re Fenton's Will*, 97 Iowa, 192, 66 N. W. 99.

In England, when a committee has been appointed abroad of the estate of a

lunatic residing within the jurisdiction of the appointing court, but domiciled in England, it is a matter of discretion with the English court whether the estate in England will be paid over to such committee, and it may direct such payment without proof that all the money or property is needed for the lunatic's maintenance. *New York Trust Co. v. Keyser*, [1901] 1 Ch. 666.

If a lunatic's realty is sold by his committee under an irregular order of court, a *bona fide* purchaser at the sale has an equitable lien on the land for the purchase money. *Reals v. Weston*, 59 N. Y. S. 807.

tracts of a lunatic under guardianship void, or disables him from entering into contracts, it is not the purpose nor effect of such provisions to annul his contract for necessities, if made in good faith by the other party, and under circumstances which justify the contract. (*l*) If a lunatic be sued, or a claim is made upon him, perhaps any person, though not expressly authorized, may in his case, as in that of an infant, make, in good faith, a legal tender for him, which shall inure for his benefit. (*x*)

Courts of law, as well as equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence. Against the consequence of mere imprudence, folly, or that deficiency of intellect which makes mistake easy, but does not amount to unsound or disordered intellect, even equity gives no relief, unless the other party has made use of this want of intelligence to do a certainly wrongful act. (*m*) It may be said that a lower degree of intellect suffices ordinarily to make a will than is required to make a valid contract. (*n*)

In this country, where provision is made by statute that persons of unsound mind may be put under guardianship, this may be done upon a representation and request, either of the authorities of the town in which he resides, or of his friends or relatives; and after proper inquiry into the facts, and into the evidence and character of the insanity. The guardian so appointed gives bonds for the due management and care of the estate and person of the insane. He then is put into possession of the estate of his ward, and has the general disposition * and control of it. * 388 For their powers and duties, see the preceding chapters on Guardians and on Trustees.

Similar provisions are often made with respect to persons mentioned in the next section.

(*l*) *McCrillis v. Bartlett*, 8 N. H. 569.

(*m*) *Osmond v. Fitzroy*, 3 P. Wms. 129, 1 Fonbl. Eq. (5th ed.) 66; *Lewis*

v. Pead, 1 Ves. Jr. 19. See *Marmon v. Marmon*, 47 Iowa, 121.

(*n*) *Converse v. Converse*, 21 Vt. 168.

(*x*) As plaintiff, in England and New York, the lunatic may be joined with his committee; in some States, the matter is regulated by statute; in others, an insane person may sue in his own name to avoid a conveyance made by him, and, if he has a guardian, the latter must sue in the

lunatic's name. *Lombard v. Morse*, 155 Mass. 136, 138, 29 N. E. 205. As defendant, the lunatic may appear by attorney, and is only in equity required to have a guardian *ad litem*. *Ibid.*; *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2.

SECTION II.

SPENDTHRIFTS.

In regard to these persons, the appointment of a guardian, and the depriving them of all power over their own property, is generally put on the ground of a danger that they may become chargeable to the town or other body corporate who will be bound to support them if they become paupers. The application must come, therefore, from the authorities of such town; and set forth that the party, by drinking, gaming, or other debauchery, is so spending and wasting his means as to be in danger of becoming chargeable. Here also there is to be a judicial inquiry into the facts, after due notice to the alleged spendthrift; and upon a finding of the facts in accordance with the petition, a guardian is appointed as before, and after such appointment all contracts of the spendthrift, except for necessities, are void. (*x*) Where a provision is made for recording such complaint and petition in a public registry, no valid contract, except for necessities, can be made by the spendthrift, after such record, provided a guardian be subsequently appointed on the petition. (*o*)¹ And it has been held that the acknowledgment or new promise of a spendthrift under guardianship is not sufficient to take a former promise out of the Statute of Limitations. (*p*)

(*o*) It was *held* in *Smith v. Spooner*, 3 Pick. 229, that the Mass. St. of 1818, c. 60, avoiding a spendthrift's "gift, bargain, sale, or transfer of any real or personal estate," made after the complaint to the judge of probate, and the order of notice thereon filed in the registry of deeds, does not apply to promissory notes. But

this case is explained by *Shaw*, C. J., in *Mason v. Felton*, 13 Pick. 208, as depending upon the construction of that statute of 1818.

(*p*) *Mason v. Felton*, 13 Pick. 206; *Sherman v. Atkins*, 4 Pick. 283; and see *Pittam v. Foster*, 1 B. & C. 248; *Ward v. Hunter*, 6 Taunt. 210.

¹ A spendthrift is liable for goods purchased before the appointment of a guardian, though not delivered till after his appointment. *Myer v. Tighe*, 151 Mass. 354. — *W.*

(*x*) See *Pendexter v. Cole*, 66 N. H. 556, 20 Atl. 331; *Young v. Young*, 87 Me. 44, 32 Atl. 782; *Pratt v. Court of Probate*, 22 R. I. 596, 48 Atl. 943. As to spendthrift trusts, and like provisions by wills and deeds of trust for the reckless and improvident, whereby the donor's property is placed in trust for the beneficiary's benefit to the exclusion of the latter's alienees and creditors, see *Potter v. Couch*, 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed.

721; *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169; *Brown v. Macgill*, 87 Md. 161, 39 Atl. 613; *Dunglison's Estate*, 201 Penn. St. 592, 51 Atl. 356; *Young v. Easley*, 94 Va. 193, 26 S. E. 401; *Garland v. Garland* (87 Va. 758), 24 Am. St. Rep. 682, 686 n.; *Gray's Restraints on Alienation* (2d ed.), § 177 *et seq.*; 2 *Perry on Trusts* (5th ed.), § 827*a*, n. (*a*); 28 Am. L. Rev. 230.

* SECTION III.

* 389

SEAMEN.

The reckless and improvident habits of seamen, and their inability to protect themselves against the various parties with whom they deal, have induced courts both of law and equity to extend to them a certain kind of disability for their protection; that is, certain contracts with seamen, taking away their rights, or laying them under wrongful obligations, are annulled. A number of statutes have been enacted both in England and in this country in relation to the shipping articles, as they are termed, or the contracts by which seamen engage their services for a voyage. The Act by which this subject is principally governed at this time is that of 1813, c. 2.¹ And it has been very distinctly decided, that any stipulations in shipping articles * which derogate from the general rights and privi- * 390 leges of seamen, will be held void in admiralty, and to a certain extent at common law, unless it shall be made apparent by proof on the part of the owner, that the nature and effect of such stipulations were explained to and understood by the seaman, and an additional compensation allowed him, fully adequate to all that he lost by the stipulation. (q) In the case of the *Juliana*, referred * to by Judge *Story* in *Harden v. Gordon*, * 391

(q) *Brown v. Lull*, 2 Sumner, 443; *Harden v. Gordon*, 2 Mason, 541; 3 Kent Com. 193; *The Juliana*, 2 Dodson, 504. In *Brown v. Lull*, *supra*, *Story*, J., said: "Whenever any stipulation is found in the shipping articles which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition, or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seaman; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby. See *The Juliana* (2 Dodson, 504); *Harden v. Gordon* (2 Mason, 541, 556); 3 Kent Com. § 40, p. 193. I know not that this doctrine has ever been broken in upon in courts of admiralty or in courts of equity. The latter courts are

accustomed to apply it to classes of cases far more extensive in their reach and operation; to cases of young heirs selling their expectancies; to cases of reversioners and remaindermen dealing with their estates; and to cases of wards dealing with their guardians; and above all, cases of seamen dealing with their prize-money, and other interests. If courts of law have felt bound to a more limited jurisdiction, see *Appleby v. Dodd* (8 East, 300), and *Jesse v. Roy* (1 C. M. & R. 316, 329, 339), it is because they are restrained from applying these considerations, by the more strict rules of the common law." In *The Betsy & Rhoda*, 3 N. Y. Leg. Obs. 215, it was held that a negotiable note taken by a seaman for wages, will not extinguish his claim for wages, nor his lien on the ship, unless he be informed of this effect, and have additional security given him by way of compensation.

¹ See U. S. Rev. Stat. § 4509 *et seq.*

the true doctrine on this subject is set forth by Lord *Stowell* with great clearness and force. The general principle in all these decisions is, that where a man has made a promise to one who has taken a wrongful advantage of his circumstances or his necessities, he shall not be bound by such promise. And the same principle has been enforced against seamen; as where in the course of a voyage they compelled the master to make a new contract with them for higher wages, by threats of desertion. (r) And contracts made with pilots or salvors, under circumstances of necessity, for exorbitant or unjust compensation, have been set aside on the same principle. But, in general, contracts respecting the wages of seamen will be construed liberally in their favor, in all cases where there may be room for such construction. As where by the usual clause no seaman was entitled to his wages, or any part thereof, *until the arrival* of the ship at the port of discharge, the words italicized are not construed as a condition precedent to the earning of wages, but only as determining the time and place of payment. (s) (x)

(r) *Bartlett v. Wyman*, 14 Johns. 261.

(s) *Swift v. Clark*, 15 Mass. 173; *Johnson v. Sims*, 1 Pet. Ad. 215; *Flanders' Marit. Law*, § 404; *The Schooner Emulous & Cargo*, 1 Sumner, 207; *The A. D. Patchin*, 1 Blatch. C. C. 414. And in *The George Home*, 1 Hagg. Adm. 370, on an engagement to go "*from London to Batavia, the East India seas or elsewhere*, and until the final arrival at any port or ports in Europe." It was held, that upon the arrival of the ship at Cowes for orders (as *previously* agreed between the *owners* and *masters*), the seamen were not bound to proceed on a

further voyage to Rotterdam. But in *Webb v. Duckingfield*, 13 Johns. 391, the desertion was held to forfeit wages. — So, mutinous and rebellious conduct of the mariner, if persisted in, forfeits their right to wages. *Relf v. Ship Maria*, 1 Pet. Ad. 186. — So does desertion; and the U. S. statute, declaring unauthorized absence of a seaman from his ship for forty-eight hours to be desertion, applies to all cases where the seaman does not return within such time, although he may have been prevented by the sailing of the ship. *Coffin v. Jenkins*, 3 Story, 108.

(x) In the absence of fraud, seamen are held to be capable of contracting, although the law is liberal in construing contracts in their favor. 13 Atl. Gen. Op. (U. S.), 557. Courts of admiralty do not give effect to seamen's receipts for wages, whether sealed or parol, unless there was an actual payment. *The Eclipse*, 53 Fed. 273. Seamen who leave their vessel because of failure to heat their quarters in

cold weather, as required by 29 St. at Large, p. 687, § 2, must show complaint made to the captain in order to entitle them to their wages for their unexpired time; but, as to their wages already earned, the court will not decree a forfeiture except upon substantial legal grounds, which must be alleged in the respondent's pleading. *The A. M. Baxter*, 93 Fed. 479.

* SECTION IV.

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PERSONS UNDER DURESS.

A contract made by a party under compulsion is void;¹ because *consent* is of the essence of a contract, and where there is compulsion there is no consent, for this must be voluntary. (*t*) Such a contract is void for another reason. It is founded on wrong. The violence was itself an injury to the party suffering it; the party using the violence had no right to do so, and cannot establish a right on his own wrong-doing.

It is not, however, all compulsion which has this effect; it must amount to *durities*, or duress. But this duress may be either actual violence, or threat. (*u*) And actual violence, if not so slight as to be quite unimportant, is sufficient to annul a contract made under its influence. Imprisonment in a common jail or elsewhere is duress of this kind; but to have this effect it must either be unlawful in itself, or, if lawful, then it must be accompanied with such circumstances of unnecessary pain, privation, or danger, that the party is induced by them to make the contract. (*v*) (*x*)

(*t*) 1 Roll. Abr. 688.

(*u*) 1 Bl. Com. 131.

(*v*) *Watkins v. Baird*, 6 Mass. 511; *Richardson v. Duncan*, 3 N. H. 508; *Stouffer v. Latshaw*, 2 Watts, 167; *Nelson v. Suddarth*, 1 Hen. & M. 350. — An arrest, though for a just cause, and under lawful authority, yet if it be for an unlawful purpose, is duress of imprisonment. *Severance v. Kimball*, 8 N. H. 386; see *Richardson v. Duncan*, 3 N. H. 508. An agreement by a prisoner to pay a just debt made while under *legal* imprisonment, cannot be avoided on the ground of duress. *Shepherd v. Watrous*, 3 Caines, 166; *Crowell v. Gleason*, 1 Fairf. 225; *Meek v. Atkinson*, 1 Bailey, 84. — But a bond given for the maintenance of a bastard child, as required by some statute, is void for duress, if the warrant and other proceedings before the magistrate are not according to the statute. *Fisher v. Shat-*

tuck, 17 Pick. 252. — So a bond executed through fear of *unlawful* imprisonment may be avoided on account of duress. *Whitefield v. Longfellow*, 13 Me. 146. — But *contra*, as to a mortgage given as security for payment of a sum to the county, as the condition of a pardon. *Rood v. Winslow*, 2 Dougl. (Mich.) 68. A threat by a judgment creditor to levy his execution is not such duress as to make void an agreement to pay the sum due. *Wilcox v. Howland*, 23 Pick. 167; *Walter v. Cralle*, 8 B. Mon. 11. — Nor a threat of lawful imprisonment. *Eddy v. Herrin*, 17 Me. 338; *Alexander v. Pierce*, 10 N. H. 497. — And a note given to obtain the release of property from an *illegal* levy of an execution, is not void. *Bingham v. Sessions*, 6 Sm. & M. 13. See *Bowker v. Lowell*, 49 Me. 429; *Hackett v. King*, 6 Allen, 58.

¹ In *Fairbanks v. Snow*, 145 Mass. 153, *Holmes, J.*, said, citing *Barry v. Equitable Life Ass. Soc.*, 59 N. Y. 587, 591: "Duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats the contract is only voidable." And see *Bank of Grand Rapids v. Butler*, 48 Mich. 192; *Clark v. Pease*, 41 N. H. 414. — W.

(*x*) Duress of a person is that condition act, which renders him incompetent to of his mind, caused by another's wrongful contract of his own free will. *Galusha v.*

* 393 * Duress by threats does not exist wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong; as of death, or great bodily injury, or unlawful imprisonment.¹

¹ If one knowing he has not a just claim against another arrests him or attaches his goods, a payment by the latter to release himself or his goods is a payment under duress and may be recovered. *Rollins v. Lashus*, 74 Me. 218; *Chandler v. Sanger*, 114 Mass. 364. But a threat to enforce at law a right claimed in good faith will not constitute duress, even though the right claimed did not exist. *Wilson, & Co. v. Curry*, 126 Ind. 161; *State v. Harney*, 57 Miss. 863; *Heysham v. Dettre*, 89 Pa. 506; *De La Cuesta v. Insurance Co.*, 136 Pa. 62, 658; *Whittaker v. Southwest Va. Imp., & Co.*, 34 W. Va. 217. Though business necessities make it necessary to yield. *Silliman v. United States*, 101 U. S. 465; *Hackley v. Headley*, 45 Mich. 568; *Custin v. Viroqua*, 67 Wis. 314. But a compromise oppressive and unfair in its nature and known to be

Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; *Batavian Bank v. North* (Wis.), 90 N. W. 1016. Violent threats of imprisonment, or of force, may, it is held, have this effect, although threats of civil proceedings against property, or of a forced sale, are usually held not sufficient. *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525; *DeMartin v. Phelan*, 115 Cal. 538, 47 Pac. 356; *Phillips v. Henry*, 160 Penn. St. 24, 28 Atl. 477; *Gregor v. Hyde*, 62 Fed. 107; *The Ernest M. Munn*, 61 Fed. 694; *Mascolo v. Montesanto*, 61 Conn. 50; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587; *Cable v. Foley*, 45 Minn. 421, 47 N. W. 1135; *Fuller v. Roberts*, 35 Fla. 110, 17 So. 359; *McClair v. Wilson*, 18 Col. 82, 31 Pac. 502. So mere threats of a criminal prosecution, not accompanied by threats of immediate imprisonment, are insufficient. *Francis v. Hurd*, 113 Mich. 250, 71 N. W. 582; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718. Yet there is great weight of authority that money paid involuntarily and unjustly under duress, even though the threats are only those of an attachment of property, may be recovered back. *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217; *Betts v. Reading*, 93 Mich. 77, 52 N. W. 940; *Loneragan v. Buford*, 148 U. S. 581, 13 S. Ct. 684, 37 L. Ed. 569; *Doyle v. Trinity Church*, 133 N. Y. 372, 31 N. E. 221; *Weber v. Kirkendall*, 39 Neb. 193, 57 N. W. 1026. See *In re Meyer*, 106 Fed. 828; *Bennett v. Luby*, 112 Wis. 118, 88 N. W. 37; *Van Dyke v. Wood*, 70 N. Y. S. 324, 60 App. Div. 208; *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103; *Van Dyke v. Wood*, 70 N. Y. S. 324; *Atkinson v. Allen*, 71 Fed. 58, 17 C. C. A. 570; *Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116; *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12.

The mere refusal to pay a debt or to perform a contract is not such duress as

makes voidable a contract procured by means of such refusal. *Joannin v. Ogilvie*, 49 Minn. 564, 568, 52 N. W. 217. Mere pressure to pay a valid tax, which is a lien upon property, is not duress, nor, in general, is any amount of urging or persuasion. *Phelan v. San Francisco*, 120 Cal. 1, 52 Pac. 38; *Batavian Bank v. North* (Wis.), 90 N. W. 1016. But payment of an illegal tax in order to prevent a distress, upon which the party has no day in court or opportunity to defend, is not voluntary. *Joannin v. Ogilvie*, *supra*; *Newburyport Water Co. v. Newburyport*, 103 Fed. 584, 595; *Tripler v. New York*, 125 N. Y. 617, 26 N. E. 721; *Wood v. New York*, 49 N. Y. S. 622. And so of a payment under protest, after a malicious arrest upon a process valid in form, or to obtain chattels detained otherwise than by judicial process, when the need of possessing the property is so urgent that even replevin would be an inadequate remedy. *Fargusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *Chandler v. Sanger*, 114 Mass. 364; *The Orchis*, 15 P. D. 38.

A wife's agreement is voidable for duress, if forced upon her by threats of criminal prosecution against her husband. *McClatchie v. Haslam*, 63 L. T. 376; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 59 N. W. 564, 33 Am. L. Reg. n. s. 885 and note; *Merchant v. Cook*, 21 D. C. 145; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193; *Hargreaves v. Koreek*, 44 Neb. 660, 62 N. W. 1086; *Hargreaves v. Menken*, 45 Neb. 668, 63 N. W. 951; *Mack v. Prang*, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848, 45 L. R. A. 407; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

Duress, even of imprisonment, of the principal signer of a note is not available to his surety who knew of the duress and signed voluntarily. *Graham v. Marks*, 98 Ga. 67, 21 S. E. 986; *Bowman v. Hiller*, 130 Mass. 153.

It is a rule of law, which is applied to many cases, that where the threat is of an injury for which full and entirely adequate compensation may be expected from the law, such duress will not, *of itself, avoid a contract, for the threatened person * 394 ought to have sufficient resolution to resist the threat and rely upon the law, as where the threat is of an injury to property or of a slight injury to the person. (*w*) But no verdict could com-

(*w*) *Atlee v. Backhouse*, 3 M. & W. 642; *Sumner v. Ferryman*, 11 Mod. 201; *Astley v. Reynolds*, Stra. 715. It is on this ground, perhaps, that in England duress of one's *property* is not sufficient to avoid a contract. *Atlee v. Backhouse*, 3 M. & W. 650; *Skeate v. Beale*, 11 A. & E. 983. But see *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 id. 211, where the court said: "Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void. . . . So, in like manner, duress of goods will avoid a contract, where an unjust and unreasonable advantage is

taken of a man's necessities, by getting his goods into his possession, and there is no other *speedy means left* of getting them *back again* but by giving a *note or a bond*, or where a man's necessities may be so great as not to admit of the ordinary process of law, to afford him relief, as was determined in this court after solemn agreement, in the case of *Sasportas v. Jennings*, 1 Bay, 470; also in the case of *Astley v. Reynolds*, Stra. 915." See also *Nelson v. Suddarth*, 1 Hen. & M. 350; *Foshay v. Ferguson*, 5 Hill (N. Y.), 158. Although in England a contract may not be avoided for duress of goods,

so may be avoided. *Headley v. Hackley*, 50 Mich. 43. Unlawful detention of property will avoid a contract made to secure its return, *Oliphant v. Markham*, 79 Tex. 543; or give a right to recover money paid to obtain such property. *Green v. Duckett*, 11 Q. B. D. 275; *Motz v. Mitchell*, 91 Pa. 114. Refusal to clear a vessel until the master signed an agreement constitutes duress. *McPherson v. Cox*, 86 N. Y. 472. So excessive freight charges extorted by the only common carrier accessible may be recovered. *Transportation Co. v. Sweetzer*, 25 W. Va. 434. An instrument executed by a woman under threats to send a husband or son to prison unless she did so may be avoided. *McClathie v. Haslam*, 63 L. T. 376; *First Nat. Bank v. Bryan*, 62 Iowa, 42; *Meech v. Lee*, 82 Mich. 274; *Lomerson v. Johnston*, 44 N. J. Eq. 93; *Schoener v. Lissauer*, 107 N. Y. 111; *Adams v. Irving Bank*, 116 N. Y. 606; *McCormick, &c. Co. v. Hamilton*, 73 Wis. 486. See *Keckley v. Union Bank*, 79 Va. 458. And a note signed by a father under similar circumstances was held voidable for duress in *Bryant v. Peck & Whipple Co.*, 154 Mass. 460. But an instrument executed by a wife voluntarily and freely is binding, though executed to prevent prosecution of her husband. *Barrett v. Weber*, 125 N. Y. 18. A note executed in order to secure the maker's release from imprisonment under lawful process was held good in *Clark v. Turnbull*, 47 N. J. L. 265, though in fact no cause of action existed. A note given to compromise a well-founded bastardy prosecution may be enforced. *Heaps v. Dunham*, 95 Ill. 583. And in Maine it is held that mere threats of a criminal prosecution by one who believes himself wronged do not constitute duress. *Higgins v. Brown*, 78 Me. 473; *Hilborn v. Bucknam*, 78 Me. 482. And unless threatened prosecution or imprisonment for an actual offence is made under circumstances of unnecessary hardship or with an improper end in view, it will not constitute duress. *Sanford v. Sornborger*, 26 Neb. 295. In New Jersey the distinction is still maintained between duress at common law and such undue influence as will cause a court of equity to set aside a contract or conveyance. *Sooy ads. The State*, 38 N. J. L. 324. It was accordingly held that there was no defence at law to notes signed by a married woman under threats of her husband that he would poison himself unless she did, the payee being cognizant of such threats and the plaintiff being an indorsee from the payer after maturity. The court say that any undue influence was a matter of purely equitable cognizance. *Wright v. Remington*, 41 N. J. L. 98; *Remington v. Wright*, 43 N. J. L. 451. An angry command of a husband to "dry up that crying and go write your name" was held insufficient to establish a defence of duress to a mortgage signed by the wife. *Gabbey v. Forgens*, 38 Kan. 62. Probably duress by a third person without privity of the obligee would be no defence to an obligation. *Fairbanks v. Snow*, 145 Mass. 153. — W.

pensate adequately for loss of limb, or for great personal violence, * and no man shall be held bound to incur such a danger. These distinctions, however, would not now probably have a controlling power in this country; but where the threat, whether of mischief to the person or the property, or to the good name, was of sufficient importance to destroy the threatened party's freedom, the law would not enforce any contract which he might be induced by such means to make.¹ And where there has been no actual contract, but money has been extorted by duress, under circumstances which give to the transaction the character of a payment by compulsion, it may be recovered back. (x)

A contract made under duress is not, however, strictly speaking, void, but only voidable; because it may be ratified and affirmed by the party upon whom the duress was practised. (y) (xx)

yet money paid under such duress may be recovered back. See *Oates v. Hudson*, 5 E. L. & E. 469 : s. c. 6 Exch. 346.

(x) *Chase v. Dwinall*, 7 Greenl. 134; *Oates v. Hudson*, 5 E. L. & E. 469, s. c. 6 Exch. 346. The mere fact that the taxes were paid to collectors, who had warrants for the collection, affords no satisfactory proof of payment by duress. *Smith v. Readfield*, 27 Me. 145. See, as to payments under legal duress, *Fleetwood v. New York*, 2 Sandf. 475; *Harmony v. Bingham*, 1 Duer, 229; *Mayor v. Lefferman*, 4 Gill, 425.

(y) *Shep. Touch.* 62, 288; *Fairbanks v.*

Snow, 145 Mass. 153; *Sanford v. Sornborger*, 26 Neb. 295; *Oregon Pacific R. R. Co. v. Forrest*, 123 N. Y. 88. The privilege of avoiding a contract for duress is personal, and none can take advantage of it but the party himself. *Huscombe v. Standing*, Cro. J. 187; *Baylie v. Clare*, 2 Brownl. 276; *McClintick v. Cummins*, 3 McLean, 158. This privilege may extend to sureties. It was so held in *Fisher v. Shattuck*, 17 Pick. 252. *Contra*, *Huscombe v. Standing*, Cro. J. 187. See also *McClintick v. Cummins*, 3 McLean, 158. In this case it is said that the father and son may each avoid his obligation by

¹ In *Parmentier v. Pater*, 13 Oreg. 121, 130, it is said: "Any threats even of slight injury will invalidate the contract. Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them to be robbed by the unscrupulous, because they are so unfortunately constituted." In *Jordan v. Elliott*, (Pa. 1882) 12 W. N. C. 56, 15 Cent. L. J. 232, *Gordon, J.*, says, in alluding to the old rule that to constitute duress threats must be of such a character as would induce a well-grounded fear in the mind of a courageous man, "The fantastic heroics of Jordan would not have been sufficient to induce a courageous man to do that which he was not disposed; hence if this rule is to be applied to the case in hand, the defence is insufficient. But fortunately for the weak and timid, courts are no longer governed by this harsh and inequitable doctrine;" citing the text. And in *Scott v. Sebright*, 12 P. D. 21, 24, *Butt, J.*, said: "It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary resolution and courage to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear, — whether reasonably entertained or not, — either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger." — W.

(xx) The fact that, under the Massachusetts doctrine, when a grantor by deed avoids it for duress or fraud, the title immediately reverts in him without more,

duress of the other ; and so a husband by duress of his wife. See also *Bac. Abr. Duress* (B.); *Harris v. Carmody*, 131 Mass. 51. See *Baxendale v. Eastern Counties R. R. Co.*, 27 L. J. C. 137 ; *Baxendale v. Great Western R. R. Co.*, 32 L. J. C. 225, 33 ib. 197 ; *Tamvaco v. Simpson*, 3 L. J. C. 268 ; *Fraser v. Pendleberry*, 31 L. J. C. 1 ; *Atkinson v. Denby*,

30 L. J. Exch. 361 ; *Piddington v. South-Eastern R. R. Co.*, 27 L. J. C. 295 ; *Garton v. Bristol & Exeter R. R. Co.*, 28 L. J. Exch. 169. In these last cases the plaintiffs recovered excessive charges which they had paid to railroad companies who had refused to carry goods, or to deliver goods carried, unless these payments were made.

as in the case of chattels, he has a remedy at law by writ of entry when the defendant is in possession, does not preclude him from bringing there, as elsewhere, a bill in equity to have the deed declared void and to obtain a reconveyance. *Billings v. Mann*, 156 Mass. 203, 30 N. E. 1136.

When a person is not obliged to perform a contract, because it was made during infancy (*Tobey v. Wood*, 123 Mass. 88), or by reason of the statute of limitations (*Custy v. Donlan*, 159 Mass. 245, 34 N. E. 360 ; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361), or of a discharge in insol-

vency (*Kenney v. Brown*, 139 Mass. 345), or because of forgery, or lack of authority, as to a signature (*Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923), or for want of demand or notice of dishonor to an indorser of a bill or note (*Parks v. Smith*, 155 Mass. 26, 28 N. E. 1044), the proof must be clear and distinct in order to establish a ratification, new promise, adoption, or admission of liability. *Glidden v. Chamberlin*, 167 Mass. 486, 497, 46 N. E. 103 ; *Reed v. Lancaster*, 152 Mass. 500, 25 N. E. 974.

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* CHAPTER XX.

ALIENS.

AN alien, by the definition of the common law, is a person born out of the jurisdiction and allegiance of this country, excepting only the children of public ministers abroad, whose wives are American women. But the statute of 29th January, 1795, declared that "the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States." The statute of the 14th April, 1802, is more obscure on this subject, and is regarded by high authority (*a*) as leaving this question in some doubt. We do not believe that the courts of this country would apply to this question those principles of the common law of England which oppose the provision of the statute of 1795. This cannot, however, be regarded as certain, until it is settled by competent adjudication or statutory provision.

It is said that a foreign born child of a citizen of the United States is subject to a double allegiance; but on reaching maturity he has the right to elect one and repudiate the other, and such election is conclusive upon him. (*aa*) And it has been held that a child of aliens born in this country, is *primâ facie* a citizen thereof, although his mother was here only for the purpose of being confined. (*ab*)

At common law an alien cannot acquire title to real property by descent, nor by grant, nor by operation of law. Nor can he give good title by grant; nor can he transmit good title * 397 * to his heir. (*b*) If an alien take land by purchase, he may hold it until office found, and may bring an action for the recovery of possession; (*c*) but if he die, the land passes at

(*a*) See 2 Kent Com. 52.

(*aa*) Ludlam v. Ludlam, 26 N. Y. 356.

(*ab*) Munro v. Merchant, 28 N. Y. 9.

(*b*) Calvin's Case, 7 Rep. 25 a; Col-
lingwood v. Pace, 1 Vent. 417; Jackson
v. Lunn, 3 Johns. Cas. 109; Levy v. Mc-
cartee, 6 Pet. 102; Jackson v. Green, 7
Wend. 333; Jackson v. Fitzsimmons, 10

Wend. 1; Cross v. De Valle, 1 Wallace,
5; King v. Ware, 53 Iowa, 97.

(*c*) Waugh v. Riley, 8 Met. 295. —
Bradstreet v. Supervisors of Oneida
County, 13 Wend. 548, decided that such
an action might now be maintained. — In
Texas an alien cannot hold property ex-
cept in particular cases. Merle v. An-

once to the State, without any inquest of office. (*d*) His title cannot be called in question in a collateral proceeding between individuals; (*dd*) for an alien may take and hold by deed or devise as against all but the sovereign; (*de*) and the rule that an alien may take land by purchase is valid in equity as well as law. (*df*) But the severity of these rules has been very much mitigated in this country, somewhat by adjudication, but more by the various statutes of the States, in many of which, and in the constitutions of some, there are provisions modifying the principles of the common law relative to aliens. (*e*)¹

In respect to personal property, and the various contracts in relation to it, and the obligations which these contracts impose upon him, and the remedies to which he may resort for breach of them, the alien stands very much upon the same footing as the citizen. (*x*) An alien resident within a State was entitled to the benefit of the insolvent laws. (*f*) The bankrupt law recently in force by section 19th permitted any person to become a bankrupt "residing within the jurisdiction of the United States, and owing debts provable under this Act." And he [might] be made a bankrupt under the provisions respecting involuntary bankruptcy.

The statute concerning trade-marks admits aliens to its advantages. And before the statute, in some interesting cases respecting trade-marks, it was determined that he was entitled to the

drews, 4 Tex. 200. It was held in *Ramires v. Kent*, 2 Cal. 558, that an alien could not be deprived of land or of any rights incident to its ownership, by proof of alienage in any proceeding but in an inquest of office. See *Ferguson v. Neville*, 61 Cal. 356; *Halstead v. Commissioners*, 56 Ind. 363; *Marx v. McGlynn*, 88 N. Y. 357.

(*d*) *Co. Lit.* 2 b; *Willion v. Berkley*, *Plowd.* 229 b, 230 a; *Fox v. Southack*, 12 Mass. 143; *Fairfax v. Hunter*, 7

Cranch, 619; *Orr v. Hodgson*, 4 Wheat. 453. See also *Wilbur v. Tobey*, 16 Pick. 179; *Foss v. Crisp*, 20 id. 124; *People v. Conklin*, 2 Hill (N. Y.), 67; *Banks v. Walker*, 3 Barb. Ch. 438.

(*dd*) *Harley v. State*, 40 Ala. 689.

(*de*) *Osterman v. Baldwin*, 6 Wallace, 116.

(*df*) *Cross v. DeValle*, 1 Clifford, 282.

(*e*) See 2 Kent Com. lect. xxv.

(*f*) *Judd v. Lawrence*, 1 Cush. 531.

¹ A sale of lands in Texas, before her separation from Mexico, by a citizen to a non-resident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his non-residence and alienage, or upon the denouncement of a private citizen. *Phillips v. Moore*, 100 U. S. 208. See also *Hauenstein v. Lynham*, 100 U. S. 483. — K.

(*x*) Rights, but not duties, may be conferred upon non-resident aliens by statute; and, by weight of authority, a general grant of a right of action for wrongfully causing death confers such right upon them. See *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E.

386. An alien, otherwise competent for naturalization, will not be deprived of that right because ignorant respecting the laws and constitution of the United States. *Ex parte Johnson* (Miss.), 31 So. 208.

* 398 same protection as our citizens. (*g*) The right *to confiscate the debts and property of alien enemies is declared to exist in Congress, by the highest judicial authority; (*h*) but the exercise of this right, it may well be hoped, will never be attempted. (*i*) But even alien enemies residing in this country may sue and be sued as in time of peace, on the ground that their residence is lawful until they are ordered away by competent authority, and this residence gives them a right to protection. (*j*) (*x*) During this residence, the alien is equally bound with the citizen to obey all the laws of the country, which do not apply specifically and exclusively to citizens.¹

(*g*) *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, id. 603; 3 Story, 458; 11 Paige, 292; 2 Woodb. & M. 1. *Story*, J., 3 Story, 434. — *Barry's Case*, 2 How. 65; 5 id. 103. An alien was allowed, as to regaining the custody of his child from his wife and her connections, the same remedies and principles as are granted to the citizens.

(*h*) *Brown v. United States*, 8 Cranch,

110; *The Adventure*, id. 228, 229; *Ware v. Hylton*, 3 Dallas, 199.

(*i*) A very powerful argument against the right itself was made by Alexander Hamilton, in his letters signed Camillus, published in 1795.

(*j*) *Wells v. Williams*, 1 Ld. Raym. 282; *Daubigny v. Davallon*, 2 Anst. 462; *Clarke v. Morey*, 10 Johns. 69; *Russell v. Skipwith*, 6 Binn. 241.

¹ An alien woman who marries a citizen thereby becomes a citizen, and may take lands by purchase or descent. *Luhrs v. Eimer*, 80 N. Y. 171. So if her husband becomes a citizen after the marriage she thereby becomes a citizen, though she is not living with him, and has never come within the United States. *Headman v. Rose*, 63 Ga. 458. — W.

(*x*) The power to exclude or expel aliens is vested in the political departments of the general government, to be regulated by treaty or act of Congress, and executed by the executive according to such regulations, except so far as the judicial department is expressly authorized to intervene; and, in general, this is also

true of the privilege of transit. *Fok Yung Yo v. United States*, 185 U. S. 296, 302, 22 S. Ct. 686, 46 L. Ed. . . . State legislatures cannot restrict the right of aliens, like the Chinese, to enter or leave the country. *Ex parte Ah Cue*, 101 Cal. 197, 35 Pac. 556.

* CHAPTER XXI.

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OF OUTLAWS, PERSONS ATTAINTED, AND PERSONS EXCOMMUNICATED.

THE process of OUTLAWRY was common in England under the Saxon kings. By it a person was placed wholly out of the protection of the law, so that he was incapable of bringing any action for redress of injury; and it also worked a forfeiture of all goods and chattels to the king. Until some time after the Conquest it was confined to cases of felony; but then it was extended by statute to all actions for trespass *vi et armis*. By later statutes it has been extended to other civil actions. An outlaw might be arrested by the writ of *capias utlagatum*, and committed until the outlawry was reversed. But this reversal was granted on any plausible ground, if the party came into court himself or by attorney; the process being used in modern times merely to compel appearance. (a) In some of our older States process of outlawry was permitted and regulated by statute; but it never had much practical existence in this country, and is now wholly disused. (b)

ATTAINDER, by the common law, was the inseparable consequence of every sentence of death. Attainder for treason worked a forfeiture of all estates to the king, and such "corruption of blood" that he could neither inherit, nor could any one inherit from him; he was utterly deprived of all rights, and wholly incapacitated from acting under the protection of the law, either for himself or for another. In the words of Blackstone, "the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than to see him executed;" and "by an anticipation of his punishment he * is already * 423 dead in law." (c) During the conflicts in England between different claimants of the throne, and between the sovereign and the people, this tremendous engine of oppression was unsparingly used, and sometimes under circumstances which gave to it the character of extremest cruelty. It may well be believed that such a process would not find favor among us, either when we were colonies, or after we had become States; and it has no existence here.

(a) 3 Bl. Com. 284.

(c) 4 Bl. Com. 380.

(b) See 7 Dane, Abr. 313.

EXCOMMUNICATION expels a person from the Church of England, and as the civil law comes in aid of the ecclesiastical power of that country, it has been of great moment there; and as it worked a disability almost entire, it was an instrument of great power in the hands of the ecclesiastical authorities. But in this sense excommunication can have no existence in this country, as we have no national church, recognized and armed by the civil law. Churches, with us, as voluntary associations organized for religious purposes, are recognized and protected by the law. They determine as to their own membership, and provide for this by forms and by-laws, which, if they contradict no principles or provisions of law, and interfere with no personal rights, would doubtless be regarded by the courts. (d) (x) But the rights or contracts of a person severed from such society, by an act of "excommunication," would be governed by the general principles of the law of property, or of the law of contracts.

(d) *Farnsworth v. Storrs*, 5 Cush. 412.

(x) Questions as to the discipline or doctrines of a particular church or denomination are determined by its ecclesiastical authorities, and the civil courts will not interfere with their action upon the application of a member whose civil rights are not infringed upon; but when a religious corporation engages in secular business, such as the building of churches, and the like, it becomes subject to the rules of law governing other corporations, especially as to the equitable doctrines of ratification, acquiescence and estoppel with respect to the known action of its trustees or officers. *Norwegian Evang. L. B. Cong. v. U. S. Fidelity Co.*, 81 Minn. 32, 80 N. W. 487; *Moore v. First Ruthven M. E. Church*, 113 Wis. , 90 N. W. 492; *Att. Gen. v. Pearson* (3 Meriv. 353), 5 English Ruling Cas. 689, 700, 702 n.; *Connitt v. Reformed Protestant Dutch Church*, 54 N. Y. 551; *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136; *Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13; *Harrison v. Hoyle*, 24 Ohio St. 254.

CONSIDERATION AND ASSENT.

CHAPTER I.

CONSIDERATION.

SECT. I. — *The Necessity of a Consideration.*

A PROMISE for which there is no consideration cannot be enforced at law. This has been a principle of the common law from the earliest times. (a)¹ It is said to have been borrowed from the Roman law. The phrase "*nudum pactum*" — commonly used to indicate a promise without consideration — certainly was taken from that law; but it does not mean with us precisely what the Roman jurists understood by it. By the civil law gratuitous promises could be enforced only where they were made with due formality, and in prescribed language and manner; then such agreement was a "*pactum verbis prescriptis vestitum*," and where such promise was not so made it was called a "*nudum pactum*," (b) that is, *nudum* because not *vestitum*. But an agreement thus formally ratified, or "*vestitum*," was enforced without reference to its consideration; whereas a "*nudum pactum*," or promise not formally ratified, was left to the good faith of the promisor, the law refusing to aid in its enforcement, unless the promises could prove a distinct consideration. The principle of this is, obviously, that if a contract be not founded * upon a consideration, it shall not be enforced, unless * 428 ratified in such a way as may show that it was deliberate,

(a) 17 Ed. IV. ch. 4, pl. 4; 3 Hen. VI. c. 36, pl. 33; Bro. Abr. *Action sur le Case*, 40. — See on the subject of Consideration articles by "E. L. P." in the March, May, and July numbers of the American Law Register for 1854, in which

the cases on the whole topic are ably collected.

(b) Vin. Com. de Inst. lib. 3, tit. 14, p. 659 (ed. 1755); Id. lib. 3, De Verborum Obligationibus. tit. 16, p. 677; Cod. lib. 7, tit. 52 (6th ed.), Gothofred.

¹ For the history of the doctrine of consideration see Holmes, Common Law, 247; Ames, History of Assumpsit, 2 Harv. L. Rev. 1, 53; Hare, Cont. 117; Pollock, Cont. 168; Salmond, History of Contract, 3 Law Quar. Rev. 166. — W.

intentional, and distinctly understood by both parties. The rule was intended to protect parties from mistake, inadvertence, or fraud. A similar rule or practice, grounded on a similar purpose, prevails on the continent of Europe; where contracts which are properly ratified and confirmed, before a public notary or similar magistrate, are valid without inquiry into their consideration; while a private contract can be enforced only on proof of a consideration. And, indeed, it can only be the same principle which makes reasonable an ancient and well-established distinction in the common law, by virtue whereof a contract *under seal* is in general valid without reference to the consideration; not by way of exception to the rule that no promise can be enforced which was not made for a consideration, but because, as it is said, the seal implies a consideration. The only real meaning of this must be, that the act of sealing is a deliberate and solemn act, implying that caution and fulness of assent which the rule of the civil law

was intended to secure. (c) Whether this inference from * 429 the use of a seal can now be made with sufficient * force to sustain the very great difference made by the law between sealed instruments and those which have no seal, might be doubted. The distinction rests now, perhaps, more on the difficulty of disturbing a rule established by long use and of very extended operation. (d) And in some of the States by usage, and in others by statutory provisions, the want or failure of consideration may be a good defence to an action on a sealed contract. (dd)¹ (x)

(c) That this is the real distinction between contracts under seal and contracts not under seal, see *Plowden, arguendo*, in *Sharrington v. Stratton*, Plowd. 308. "Words," says he, "pass from man to man lightly and inconsiderately; but where the agreement is by deed there is more time for deliberation; for when a man passes a thing by deed, first, there is the determination of the mind to do it; and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution; so that there is great deliberation used in the making of deeds, for which reason they are received as a *littera* final to the party, and are adjudged to bind the parties without examining upon what cause

or consideration they were made. As if I, by deed, promise to give you £20, here you shall have an action of debt upon this deed, and the consideration for my promise is not examinable; it is sufficient to say it was the will of the party who made the deed." See 2 Smith, Lead. Cas. 456. See also *Morley v. Boothby*, 3 Bing. 111; *Fallowes v. Taylor*, 7 T. R. 477; *Shubrick v. Salmond*, 3 Burr. 1639; *Fonbl. Eq. vol. i. p. 344, n. (a)*.

(d) In *Ortucan v. Dickson*, 13 Cal. 33, it is said that the difference between sealed and unsealed instruments is now a mere unmeaning and arbitrary distinction, made by technical law, and not sustained by reason.

(dd) See *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 id. 11; *Swift v. Hawkins*, 1 Dallas, 17; *Solomon v. Kimmel*, 5 Binn. 232; *Chase v. Boughton*, 11

¹ If the parties intended that there should be a consideration for a promise under seal, failure of consideration would doubtless be a good defence everywhere. Mere

(x) Under the Colorado Gen. Sts. 1883, § 3121, by which a scroll affixed to a writ-

ing by way of seal has the same effect as a seal, a writing which recites "sealed with

By the general rule only a creditor of the grantor can avail himself of the fact that a deed was without consideration, (*de*) because as between the parties to a deed there is no need of a consideration. (*df*)

By the civil law, and the modern continental law, the consideration is the *cause* of the contract. This principle is quoted and apparently adopted by *Plowden*; and it has been recently acknowledged by high judicial authority, and the *cause* distinctly discriminated from the *motive*. (*e*)

Doubts have been expressed whether a contract reduced to writing was not in this respect the same as one under seal. (*f*) But this question is now abundantly settled; and both in this country and in England a consideration must be proved, where the contract is in writing but not under seal, as much as if the contract were oral only. (*g*) The exception to this rule in the case of mercantile negotiable paper is considered elsewhere.

Wend. 106; *Leonard v. Bates*, 1 Blackf. 173; *Coyle v. Fowler*, 3 J. J. Marsh. 473; *Pebbles v. Stephens*, 1 Bibb, 500; *Walker v. Walker*, 13 Ired. L. 335; *Matlock v. Gibson*, 8 Rich. L. 437; *Martin v. Barton Iron Works*, 35 Ga. 320.

(*de*) *Hatch v. Bates*, 54 Me. 136.

(*df*) *Laberee v. Carleton*, 53 Me. 211.

(*e*) *Thomas v. Thomas*, 2 Q. B. 851, where *Patterson, J.*, said: "That which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration." See also *Lilly v. Hays*, 5 A. & E. 548; *Smith, Cont.* p. 88, n.—In *Mouton v. Noble*, 1 La. An. 192, *Eustis, C. J.*, said: "Civilians use the word *cause* in relation to obligations in the same sense as the word *consideration* is used in the jurisprudence of England and the United States."

(*f*) *Rann v. Hughes*, 3 T. R. 350, n. (*a*), 7 Bro. P. C. 550; *Pillans v. Van Mierop*, 3 Burr. 1670.

(*g*) *Cook v. Bradley*, 7 Conn. 57; *Dodge v. Burdell*, 13 Conn. 170; *Bean v. Burbank*, 16 Me. 458; *Beverleys v. Holmes*, 4 Munf. 95; *Brown v. Adams*, 1 Stew. (Ala.) 51; *Burnet v. Bisco*, 4 Johns. 235; *People v. Shall*, 9 Cowen, 778; *Roper v. Stone, Cooke*, 499; *Clark v. Small*, 6 Yerg. 418; *Perrine v. Cheeseman*, 6 Halst. 174.—The consideration, however, need not be expressed in the writing. It may be proved *aliunde*. *Tingley v. Cutler*, 7 Conn. 291; *Arms v. Ashley*, 4 Pick. 71; *Cummings v. Dennett*, 26 Me. 397; *Mouton v. Noble*, 1 La. An. 192; *Thompson v. Blanchard*, Comst. 335; *Patchin v. Swift*, 21 Vt. 292. The admission of a consideration in the writing, is of course *prima facie* evidence of its existence. *Whitney v. Stearns*, 16 Me. 394.

want of consideration, however, where the parties intended that there should be no consideration, was no defence to a sealed instrument at common law, and is generally held no defence now in the absent statute. *Consolidated, &c. R. R. Co. v. O'Neill*, 25 Ill. App. 313; *Krell v. Codman*, 154 Mass. 454; *McMillan v. Ames*, 33 Minn. 257; *Aller v. Aller*, 40 N. J. L. 446; *Burkholder v. Plank*, 69 Pa. 225.—W.

our seals," and has at its end the printed word "seal," surrounded by a scroll, is a sealed instrument. *Carlie v. People*, 27 Colo. 116, 59 Pac. 48.

By the New York Code of Civil Procedure, § 840, a seal is only *prima facie* proof of a consideration. See *Williams v. Whittell*, 74 N. Y. S. 820. In California, where the common-law distinction between sealed and unsealed instruments is

abolished as to words of agency therein, it may be shown by parol that a sealed, as well as a simple, contract was made on behalf of another as principal. *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650. A party to a simple contract may always show by parol that the other party was only an agent. *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547.

It has been held, that where the consideration is expressed in a written contract no other can be proved, (*h*) *430 * unless there are words which indicate other considerations; (*i*) because this would be an alteration of the contract by evidence *aliunde*. The same rule is said to be applied in equity, unless relief is sought against the instrument on the ground of fraud or mistake; (*j*) but many decisions of weight allow the maker of a written promise, or of a deed, to prove other and additional considerations besides those expressed in the contract. (*k*) Where the consideration is not expressed it may be proved. (*l*) And where the contract declares that it was made for a valuable consideration, this is *prima facie* evidence of such consideration. (*m*) (*x*)

SECTION II.

KINDS OF CONSIDERATION.

The civil law division of all considerations into four species, very clearly stated by Blackstone, is logically exact and exhaustive; (*n*) but it has never been so far introduced into the com-

(*h*) *Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Veacock v. McCall*, Gilpin, 329; *Emery v. Chase*, 5 Greenl. 232; *Howes v. Barker*, 3 Johns. 506; *Cutter v. Reynolds*, 8 B. Mon. 596; *Mitchell v. Williamson*, 6 Md. 210.

(*i*) *Maigley v. Hauer*, 7 Johns. 341.

(*j*) *Clarkson v. Hanway*, 2 P. Wms. 203; *Peacock v. Monk*, 1 Ves. Sen. 127; *Filmer v. Gott*, 7 Bro. P. C. 70.

(*k*) *Emmons v. Littlefield*, 13 Me. 233; *Tyler v. Carlton*, 7 Greenl. 175; *Wallis v. Wallis*, 4 Mass. 135, *Parsons*, C. J.; *Quarles v. Quarles*, id. 680; *Wilkinson v. Scott*, 17 id. 249; *Hannan v. Hannan*, 123 Mass. 441; *Farnsworth v. Boardman*, 131 Mass. 115; *Hebbard v. Haughian*, 70 N. Y. 54; *Pray v. Rhodes*, 42 Minn. 93.

(*l*) *Orms v. Ashley*, 4 Pick. 71; *Tingley v. Cutler*, 7 Conn. 291.

(*m*) *Whitney v. Stearns*, 16 Me. 394.

See *Sloan v. Gibson*, 4 Mo. 33. *Contra*, *Glen Cove Mut. Ins. Co. v. Harrold*, 20 Barb. 298.

(*n*) "These valuable considerations are divided by the civilians into four species: 1. *Do, ut des*: as when I give money or goods, on a contract, that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond or promise of repayment; and all sales of goods in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *Facio ut facias*, as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides. Or it may be to forbear on one side in consideration of something done on the other, as,

(*x*) The omitted portions of an incomplete written contract may be proved by parol; but so much of it as is in writing must be proved thereby, except that the expressed consideration may be explained or contested. *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617;

Cummings v. Moore (Tex. Civ. App.), 65 S. W. 1113; *infra*, p. *467, n. (*x*).

As to the statute of frauds, the statutes of certain states, as, *e.g.*, Alabama, Nevada, and Oregon, require the consideration of an agreement to be expressed therein. See *Siemers v. Siemers* (65 Minn. 104), 60 Am. St. Rep. 430, 432 n.

mon * law as to be of much practical utility in determin- *431
ing questions of law.

The fundamental distinction in the common law is between those cases where the consideration is a benefit to him who makes the promise, and those in which it is an injury to him who receives the promise. For it is a perfectly well-settled rule, that if a benefit accrues to him who makes the promise, or if any loss or disadvantage accrues to him to whom it is made, and accrues at the request or on the motion of the promisor, although without benefit to the promisor, in either case the consideration is sufficient to sustain *assumpsit*. (o) ¹ (x)

Considerations at common law may be *good*, or *valuable*. The definition of Blackstone is this: "A good consideration is such

that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is, *Facio, ut des*, when a man agrees to perform anything for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages, or an agreed sum of money, here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The

fourth species is, *Do, ut facias*; which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work; which is nothing else but the last species inverted; for *servus facit ut herus det, and herus dat, ut servus faciat*." 2 Bl. Com. 444.

(o) Com. Dig. *Action upon the Case upon Assumpsit* (B) 1; *Pillans v. Van Mierop*, 3 Burr. 1670; *Nerot v. Wallace*, 3 T. R. 24; *Bunn v. Guy*, 4 East, 194; *Willats v. Kennedy*, 8 Bing. 5; *Miller v. Drake*, 1 Caines, 45; *Powell v. Brown*, 3 Johns. 100; *Forster v. Fuller*, 6 Mass. 58; *Townsley v. Sumrall*, 2 Pet. 182; *Hildreth v. Pinkerton Academy*, 9 Foster (N. H.), 227; *Haines v. Haines*, 6 Md. 435.

¹ Thus where a broker, relying upon a promise of his principal to indemnify him against loss, resists a call for a "margin," in accordance with the rules of the "Board of Stock Brokers," of which he is a member, and is in consequence suspended, the injury so caused is a good consideration for the promise, *White v. Baxter*, 71 N. Y. 254; or a mortgagee waives his security in consideration of an agreement to put the mortgaged property up at auction and divide the proceeds in a certain way, *Bradshaw v. McLoughlin*, 39 Mich. 480. See also *Conover v. Stillwell*, 5 Vroom, 56; *Gordon v. Dalby*, 30 Iowa, 223. — K.

(x) As to *detriment* as a consideration, see *Ex parte Ford*, 16 Q. B. D. 305; *Rucker v. Bolles*, 80 Fed. 504, 49 U. S. App. 358; *Elmer v. Loper*, 66 N. J. L. 50, 48 Atl. 550; *Stuht v. Sweesv*, 48 Neb. 767, 67 N. W. 748; *Riegel v. Ormsby*, 111 Iowa, 10, 82 N. W. 432; *Merchant v. O'Rourke*, 111 Iowa, 351, 82 N. W. 759; *Shadwell v. Shadwell* (9 C. B. n. s. 159), 6 English Ruling Cas. 9, 18, 22, notes; *Anson on Contracts* (9th ed.) 102.

"Professor Langdell has pointed out

the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. . . . The incident of a detriment by the promisee involves of necessity a change of position on his part; there must be some act or some forbearance by him. . . . Consideration is any act or forbearance or promise, by one person given in exchange for the promise of another." Prof. Ames in 12 Harvard L. Rev. 515; 13 id. 29.

as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is therefore founded in motives of justice." (p) (x) A valuable consideration is usually in

(p) 2 Bl. Com. 297.

(x) A promise "founded upon a good, but not upon a valuable, consideration is considered merely voluntary, and, while binding between the parties, is void as to creditors." *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588, citing *Chitty on Contracts*, 28. But Mr. Leake (on *Contracts*, 615) says that only a valuable consideration will support a promise. See *Rann v. Hughes* (4 Bro. P. C. 27, 7 T. R. 350 n.), 6 English Ruling Cas. 1, 4, 7 notes; *Bassett v. Nosworthy* (Rep. temp. Finch, 102), 21 id. 702, 717, 727 notes. "For a moral obligation to be sufficient to sustain a promise or conveyance, it must be one which has once been a valuable consideration, but which on account of some rule of law was not binding upon or enforceable against the party, *e. g.* from infancy or like cause, or which had ceased to be binding from some supervenient cause, as the act of limitations, the intervention of bankruptcy, and the like. But a past consideration, other than of the class referred to, which imposed no legal obligation at the time it arose, will support no promise whatever." *Davis v. Anderson*, *supra*, citing *Eastwood v. Kenyon*, 11 Ad. & El. 446; *Earle v. Oliver*, 2 Exch. 71. See *Sutch's Estate*, 201 Penn. St. 305, 50 Atl. 943; *Ferguson v. Harris* (39 S. C. 323), 39 Am. St. Rep. 731, 735 n.; *Austin v. Davis*, 128 Ind. 472; *Ezall v. King*, 93 Ala. 470; *Bentley v. Lamb*, 112 Penn. St. 480; *Holloway v. Rudy* (Ky.), 60 S. W. 650; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588; *Trimble v. Rudy* (Ky.), 53 L. R. A. 353, 361 and note. The Georgia Code (of 1895, § 3658) declares a strong moral consideration valid. A promise made after a discharge in insolvency to pay a debt is held to be supported by the moral obligation to pay one's debts. *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13; *In re Ekins*, 6 Fed. 170.

A resulting trust cannot be founded, when no money is paid, upon a moral consideration, such as love and affection for one's children or relatives. *Landon v. Hutton*, 50 N. J. Eq. 500; 25 Atl. 953;

Beeman v. Beeman, 88 Hun. 14; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Noe v. Roll*, 134 Ind. 115, 33 N. E. 905; *Higbee v. Higbee*, 123 Mo. 287, 27 S. W. 619; *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853; *Williamson v. Yager* (91 Ky.), 34 Am. St. Rep. 184, 191 n. But the acceptance of money intended for another, with notice of its ultimate destination, creates an implied promise and duty upon the recipient's part to devote it to the purposes intended by the bailor. *McKee v. Lamon*, 159 U. S. 317, 322, 16 S. Ct. 11, 40 L. Ed. 165. An equitable estoppel cannot be founded upon a consideration moving to the estopped party. *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695.

The following are also a valid consideration for a promise: the privilege of naming a child: *Wolford v. Powers*, 85 Ind. 294, 307; *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87; *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511; *Babcock v. Chase*, 92 Hun. 264, 266; cancellation of an earlier note: *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497; the surrender of a paper, though of no pecuniary value: *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; a change, as to the manner or time of payment, from what is stipulated in the contract, whereby a new benefit is so conferred upon the creditor, or a burden placed on the debtor, as to be a new consideration validating the creditor's agreement: *Saunders v. Whitcomb*, 177 Mass. 457, 463, 59 N. E. 192; a promise to make a journey, or to attend a school or college, or to give up using tobacco: *Carlill v. Carbolic Smoke Ball Co.* [1893], 1 Q. B. 256; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 21 Am. St. Rep. 693, 12 L. R. A. 463; *Babcock v. Chase*, 92 Hun. 264; *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164; *Devecmon v. Shaw*, 69 Md. 199, 14 Atl. 464; *Hoshor v. Kautz*, 19 Wash. 258, 53 Pac. 51; *Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. 297. So a conditional promise, though not fulfilled, may be an adequate consideration. *Gutlon v. Marcus*, 165 Mass. 335, 43 N. E. 125.

some way pecuniary, or convertible into money; marriage, which it is now settled is a valuable consideration, (q)¹ is the principal exception to this.

An equitable consideration is sufficient as between the parties, although it be not valuable; but only a valuable consideration * is valid as against a third party, as a subsequent * 432 purchaser, (r) whose debt existed when the contract was made, — an attaching creditor, or the like. It is at least true that an equitable consideration is sufficient in all conveyances by deed, and in transfers not by deed, but accompanied by immediate possession. (s) But where there is a promise, performable of course in future, and the consideration is only moral, there it might have been said formerly that the law was not positively settled. But the late cases settle the question definitively. Mr. Baron *Parke* has said, “a mere moral consideration is *nothing*.” (t)²

(q) *Whelan v. Whelan*, 3 Cowen, 537; *Sterry v. Arden*, 1 Johns. Ch. 261; *Barr v. Hill*, Addison, 276; *Hustin v. Cantril*, 11 Leigh, 136; *Magniac v. Thompson*, 7 Pet. 348; *Smith v. Allen*, 5 Allen, 454.

(r) *Lord Tenterden*, C. J., in *Gully v. Bishop of Exeter*, 10 B. & C. 606; *Chitty* on Cont. 28.

(s) *Noble v. Smith*, 2 Johns. 52; *Grangiac v. Arden*, 10 Johns. 293; *Pitts v. Mangun*, 2 Bailey, 588; *Pearson v.*

Pearson, 7 Johns. 26; *Frishie v. McCarty*, 1 Stew. & P. 56; *Fowler v. Stuart*, 1 McCord, 504; *Ewing v. Ewing*, 2 Leigh, 337; *Carpenter v. Dodge*, 20 Vt. 595. In *Smith v. Smith*, 7 C. & P. 401, it was held that a gift from a father to a son of a watch, chain, and seals, was valid upon delivery, and the father could not afterwards revoke the gift.

(t) *Jennings v. Brown*, 9 M. & W. 501.

¹ A woman being regarded as a purchaser for value of all property accruing to her by virtue of the marriage or an antenuptial agreement. *Derry v. Derry*, 74 Ind. 560. Thus a promise to marry, subsequently performed, is a valid consideration for a promissory note, *Wright v. Wright*, 54 N. Y. 437; or for a conveyance of lands to the wife, however fraudulent, if she had no knowledge of the fraud, *Prewit v. Wilson*, 103 U. S. 22; and equally for a promise of the wife to allow her intended husband the use of her land, on which he proceeds to make improvements, *Stratton v. Stratton*, 58 N. H. 473. — K.

² The doctrine that a moral obligation is sufficient consideration to support a promise seems first to have been given much currency by Lord *Mansfield*, who in this connection as well as in his decision in *Pillans v. Van Mierop*, 3 Burr. 1664, that a promise in writing was binding without consideration, showed a desire to restrict the importance of consideration in the law of contracts. Lord *Mansfield* laid down that “where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration,” *Hawkes v. Saunders*, Cowp. 289; and accordingly held that an executor having assets was liable to an action on a promise to pay a legacy, *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, *supra*; and that a discharged bankrupt was liable to an action on a promise to pay a debt barred by his certificate. *Trueman v. Fenton*, Cowp. 544. These decisions were followed by others, at a somewhat later day, to the effect that a promise to repay the principal of a loan was binding, though the money was lent originally on usurious terms and hence was not recoverable, *Barnes v. Hedley*, 2 Taunt. 184; and that a promise made by a widow to repay a loan made to another at her request during her coverture and for which she had given a bond, might be enforced against her executors, though the bond, having been given during coverture, was void; *Lee v. Muggeridge*, 5 Taunt. 36. Later decisions showed an unwillingness to apply the doctrine of moral consideration to new cases. *Binnington v. Wallis*, 4 B. & Ald. 650; *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8. A. & E. 467; *Monkman v. Shepherd-*

* 433 Neither the rule which so distinctly postpones *moral considerations to those which are pecuniary, nor that which seems to embrace marriage within the same cate-

* 434 gory as * money, appears at first sight very creditable to the common law. There is, however, one reason which doubtless had much influence in establishing this rule; and that is the extreme difficulty of deciding between considerations bearing a moral aspect, which were and which were not sufficient to sustain an action at law. And the rule may now be stated as follows: a moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of

son, 11 A. & E. 411. And finally in *Eastwood v. Kenyon*, 11 A. & E. 438, moral consideration was expressly held insufficient to support a promise the earlier cases disapproved, and the learned reporter's note to *Wennall v. Adney*, 3 B. & P. 249, where the early cases are collected, referred to as stating the true principle, namely, that "an express promise . . . can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

At the present time it may be doubted whether even this statement of the law does not concede too much. It is certainly clear that a debt incurred during infancy will support a promise to pay it made after maturity, so a promise to pay a debt barred by the Statute of Limitations or by a discharge in bankruptcy. And so a promise to pay a bill or note though the holder has not exercised due diligence. These cases and no others are always put as illustrations of the rule quoted above. Probably it would be better to regard them as pure exceptions to an otherwise invariable rule that to constitute a good consideration there must be a detriment suffered by the promisee or a benefit received by the promisor in exchange for the promise; or to treat them as waivers of a defence, not as giving rise to an original cause of action.

In this country the doctrine that a moral obligation would support a promise seems never to have been generally accepted. A leading case is *Mills v. Wyman*, 3 Pick. 207, in which it was held that a promise by the defendant to pay for necessities previously furnished his adult son during sickness would not sustain an action. Of similar effect are *Loomis v. Newhall*, 15 Pick. 159; *Nine v. Starr*, 8 Ore. 49. A promise by a son to pay an indebtedness of an indigent parent is equally ineffectual. *Cook v. Bradley*, 7 Conn. 57; *Parker v. Carter*, 4 Munf. 273. A promise to repay money lost in an illegal way on behalf of the defendant was held to be without consideration in *Bates v. Watson*, 1 Sneed, 376.

So in *Frear v. Hardenbergh*, 5 Johns. 272, a promise to pay for labor of the plaintiff on land recovered from him by the defendant in a suit at law was held void for want of consideration. This case was cited with approval in *Society v. Wheeler*, 2 Gallis. 143. And in *Smith v. Ware*, 13 Johns. 257, it was held that where a lot of land was sold and described in the deed as supposed to contain ninety-three acres but was found to lack five or six acres of that area, a promise by the grantor to make up the deficiency was without consideration. A somewhat similar decision is *Hawley v. Farrar*, 1 Vt. 420. And see *West v. Cavins*, 74 Ind. 265; *Allen v. Bryson*, 67 Iowa, 591; *Freeman v. Robinson*, 38 N. J. L. 383; *Smith v. Tripp*, 14 R. I. 112.

Nevertheless, though the doctrine of moral consideration is generally discredited, it has received occasional judicial recognition, especially in Pennsylvania, in a few cases, — some of which might well have been rested on other grounds. *McElven v. Sloan*, 56 Ga. 208; *Edwards v. Nelson*, 51 Mich. 121; *Hemphill v. McClimans*, 24 Penn. St. 367; *Landis v. Royer*, 59 id. 95; *Stebbins v. Crawford*, 92 id. 289; *Holden v. Banes*, 140 id. 63. — W.

law. Thus a promise to pay a debt contracted during infancy, or barred by the Statute of Limitations or bankruptcy, is good, without other consideration than the previous legal obligation. (u)¹ It must, however, be distinct and specific; (uu) and it has been

(u) *Earnest v. Parke*, 4 Rawle, 452; *Rogers v. Stephens*, 2 T. R. 713; *Hawkes v. Saunders*, Cowp. 290; *Cook v. Bradley*, 7 Conn. 57; *Prewett v. Caruthers*, 12 Sm. & M. 491; *Walbridge v. Harroon*, 18 Vt. 448; *Patten v. Ellingwood*, 32 Me. 163; *Franklin v. Beatty*, 27 Miss. 347; *Otis v. Gazlin*, 31 Me. 567; *Scouton v. Eislord*, 7 Johns. 36; *Fleming v. Hayne*, 1 Stark. 370; *Freeman v. Fenton*, 1 Cowp. 544; *Twiss v. Massey*, 1 Atk. 67; *Ex parte Burton*, id. 255; *Birch v. Sharland*, 1 T. R. 715; *Besford v. Saunders*, 2 H. Bl. 116; *Brix v. Braham*, 8 J. B. Moore, 261, 1 Bing. 281; *Erwin v. Saunders*, 1 Cowen, 219; *Shippey v. Henderson*, 14 Johns. 178; *Maxim v. Morse*, 8 Mass. 127; *Way v. Sperry*, 6 Cush. 238; *Best v. Barber*, 3 Doug. 188; *Trumbull v. Tilton*, 1 Foster (N. H.), 128; *Edwards v. Nelson*, 51 Mich. 121; *Stebbins v. Crawford*, 92 Pa. 289. The promise should be made after the decree in bankruptcy discharging the debt — a promise made after the petition in bankruptcy was filed merely, but before the decree, is not sufficient. *Stebbins v. Sherman*, 1 Sandf. 510. In England, however, by statute 6 Geo. IV. c. 16, a promise by a bankrupt must be *in writing*, and signed by the bankrupt, or by some person

thereto by him lawfully authorized. — A promise by a debtor to pay a debt which has been voluntarily released by the creditor is not binding, for want of consideration. *Warren v. Whitney*, 24 Me. 561; *Snevely v. Read*, 9 Watts, 396; *Montgomery v. Lampton*, 3 Met. (Ky.) 519, where the distinction is broadly taken between a discharge by force of positive law and a voluntary discharge. And this although the release was given without consideration, and merely to enable the debtor to testify in a suit against the creditor, in which he could not have otherwise testified because of a legal interest. To the same effect are *Hockett v. Jones*, 70 Ind. 227; *Ingersoll v. Martin*, 58 Md. 67; *Valentine v. Foster*, 1 Met. 520; *Hale v. Rice*, 124 Mass. 292; *Willing v. Peters*, 12 S. & R. 177, *contra*, [which may be considered overruled.]

(uu) It must be an absolute and unconditional promise to pay the debt. *Brown v. Collier*, 8 Humph. 510. The words, "I have always said, and still say, that she shall have her pay," spoken to an agent of the creditor, may be construed by the jury as an express promise to pay. *Pratt v. Russell*, 7 Cush. 462. — Mere statements to third persons that he had

¹ Likewise, it is almost universally held that a promise by the drawer or indorser of a bill or note to pay the holder, although the latter has not used due diligence, and has thereby discharged the drawer and indorsers, is binding. *Rabey v. Gilbert*, 6 H. & N. 536; *Cordery v. Colvin*, 14 C. B. N. s. 374; *Woods v. Dean*, 3 B. & S. 101; *Yeager v. Farwell*, 13 Wall. 6; *Hazard v. White*, 26 Ark. 155; *Hayes v. Werner*, 45 Conn. 246; *Smith v. Curlee*, 59 Ill. 221; *Wing v. Beach*, 31 Ill. App. 78, 85; *Higgins v. Robbins*, 4 Dana, 100; *Hart v. Long*, 1 Rob. (La.) 83; *Thomas v. Mayo*, 56 Me. 40; *Turnbull v. Maddux*, 68 Md. 579; *Hobbs v. Strain*, 149 Mass. 212; *Parsons v. Dickinson*, 23 Mich. 56; *Robbins v. Pinckard*, 13 Miss. 275; *Salisbury v. Renick*, 44 Mo. 554; *Rogers v. Hacket*, 21 N. H. 100; *Leary v. Miller*, 61 N. Y. 488; *Shaw v. McNeill*, 95 N. C. 535; *Smith v. Lowisdale*, 6 Oreg. 78; *Oxnard v. Varnum*, 111 Pa. 193; *Stone v. Smith*, 30 Tex. 138; *Bundy v. Bizzell*, 51 Vt. 128; *Knapp v. Runals*, 37 Wis. 135.

The law in Ireland seems to be otherwise. *Donnelly v. Howie*, *Hayes & Jones*, 436; s. c. 2 Ames Cas. Bills & Notes, 501.

But a promise made in ignorance of the fact that the holder has been guilty of laches, is not binding. *Borradaile v. Lowe*, 4 Taunt. 93; *Thornton v. Wynn*, 12 Wheat. 183; *Walker v. Rogers*, 40 Ill. 279; *Freeman v. O'Brien*, 38 Iowa, 406; *Bank of Tennessee v. Smith*, 9 B. Mon. 609; *James v. Wade*, 21 La. An. 548; *Byram v. Hunter*, 36 Me. 217; *Lewis v. Brehme*, 33 Md. 412; *Kelley v. Brown*, 5 Gray, 108; *Lake v. Artisans' Bank*, 3 Keyes, 278; *Lilly v. Petteway*, 73 N. C. 358.

Ignorance of the legal effect of laches, however, will not prevent a drawer or indorser from being bound by his promise. *Bilbie v. Lumley*, 2 East, 469; *Givens v. Merchants' Nat. Bank*, 85 Ill. 442; *Davis v. Gowen*, 17 Me. 387; *Matthews v. Allen*, 16 Gray, 594; *Third Nat. Bank v. Ainsworth*, 105 Mass. 503; *Edwards v. Tandy*, 36 N. H. 540. See, however, *contra*, *Williams v. Union Bank*, 9 Heisk. 441. — W.

held that the payment of interest, or even payment of part of the principal and its indorsement on the note by the debtor himself, is not sufficient to warrant a jury in finding a new promise to pay the whole debt. (*uv*) Where such promise is made, it does not seem necessary to declare upon it as the foundation of a suit, but an action may be brought upon the old promise; the new promise does away the obstruction otherwise interposed by the bankruptcy and discharge. (*uw*) But if the promise is conditional, then the party seeking to enforce it must show that the condition is satisfied; as, if the debtor promised to pay when he was able, the creditor must prove his ability. (*ux*) In such case, and perhaps in all, the new promise is the ground of action; the old promise is only the consideration for the new one, (*uy*) as many cases hold that the new promise does not revive the negotiability of a bill or note, but binds the insolvent only to the person to whom the contract was made. (*uz*) The contrary has however been held. (*ua*)

The morality of the promise, however certain, or however urgent the duty, does not of itself suffice for a consideration. (*x*) In fact, the present rule amounts merely to a permission to a party * 435 to waive certain rules of law * protecting him from a plaintiff claiming a just and legal debt. (*v*)

Perhaps an illustration of the rule, that a moral obligation does not form a valid consideration for a promise, unless the moral duty

promised to pay the debt are not in themselves sufficient. They afford some ground to raise the presumption of a promise, but are not such in themselves. *Prewitt v. Caruthers*, 12 S. & M. 491; *Yoxtheimer v. Keyser*, 11 Penn. St. 365.

(*uv*) *Merriam v. Bayley*, 1 Cush. 77; *Cambridge Inst'n for Savings v. Littlefield*, 6 Cush. 210.

(*uw*) *Williams v. Dyde, Peake, Cas.* 68; *Maxim v. Morse*, 8 Mass. 127; *Shippey v. Henderson*, 14 Johns. 178; *Dupuy v. Swart*, 3 Wend. 135. — If the old debt was due by note or specialty, a *parol* promise merely will not sustain an action on the note or specialty itself. *Graham v. Hunt*, 8 B. Mon. 7.

(*ux*) *Besford v. Saunders*, 2 H. Bl. 116; *Fleming v. Hayne*, 1 Stark. 370; *Branch Bank v. Boykin*, 9 Ala. 320; *Scouton v. Eislor*, 7 Johns. 36; *Bush v. Barnard*, 8 id. 407. — So in promises by an adult to pay "when he is able" a debt contracted during infancy, the defendant's ability to pay must be shown. *Penn v. Bennett*, 4 Camp. 205; *Cole v. Saxby*, 3 Esp. 160;

Davies v. Smith, 4 id. 36; *Thompson v. Lay*, 4 Pick. 48; *Everson v. Carpenter*, 17 Wend. 419. So of a promise to pay a debt barred by the Statute of Limitations. *Tanner v. Smart*, 6 B. & C. 603; *Haydon v. Williams*, 7 Bing. 163; *Gould v. Shirley*, 2 Mo. & P. 581; *Tompkins v. Brown*, 1 Denio, 247; *Laforge v. Jayne*, 9 Penn. St. 410.

(*uy*) *Penn v. Bennett*, 4 Camp. 205; *Fleming v. Hayne*, 1 Stark. 371; *Wait v. Morris*, 6 Wend. 394.

(*uz*) *Dupuy v. Swart*, 3 Wend. 135; *Moore v. Viele*, 4 id. 420; *Walbridge v. Harroon*, 18 Vt. 448; *White v. Cushing*, 30 Me. 267; *Graham v. Hunt*, 8 B. Mon. 7.

(*ua*) *Way v. Sperry*, 6 Cush. 238.

(*v*) *Way v. Sperry*, 6 Cush. 238; *Turner v. Chrisman*, 20 Ohio, 332; *Dodge v. Adams*, 19 Pick. 429; *Ehle v. Judson*, 24 Wend. 97; *Warren v. Whitney*, 24 Me. 651; *Geer v. Archer*, 2 Barb. 420; *Nash v. Russell*, 5 Barb. 556; *Mardis v. Tyler*, 10 B. Mon. 382; *Watkins v. Halstead*, 2 Sandf. 311, and page *381, *ante*.

(*x*) Approved in *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629.

were once a legal one, may be found in the case of a widow, who promises to pay for money expended at her request or lent to her during her marriage. It has been held in England, in a case examined in a former note, (*w*) that this promise was binding, and there are many *dicta* to that effect in this country; (*x*) but the current of recent decision in England is in favor of the view, that the promise of a married woman has not, when given, any legal force, and therefore is not voidable, but void; and cannot be ratified by a subsequent promise after the coverture has ceased, nor be regarded as a sufficient consideration for a new promise; and we have therefore expressed our belief, in that note, that the case of *Lee v. Muggeridge* is not law. (*y*) It has, however, been held that the promise of a widow to pay for goods furnished during her coverture, *on the faith of her separate estate*, was binding. (*a*)

It seems to have been held in England, formerly, that while a promise in consideration of future illicit cohabitation was certainly void, a promise in consideration of past cohabitation, especially if grounded upon seduction by the promisor, was

* sufficient. It appears to be now held, that the consideration is equally insufficient in either case. (*b*) * 436

SECTION III.

ADEQUACY OF CONSIDERATION.

If the consideration is valuable it need not be *adequate*; that is, the court will not inquire into the exact proportion between the value of the consideration and that of the thing to be done

(*w*) See note, *ante*.

(*x*) *Cook v. Bradley*, 7 Conn. 57; *Hatchell v. Odom*, 2 Dev. & B. 302; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420. This was expressly held in *Franklin v. Beatty*, 27 Miss. 347.

(*y*) *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8 A. & E. 467; *Eastwood v. Kenyon*, 11 id. 438. See also *Lloyd v. Lee*, 1 Stra. 94. [In accord with the later English cases are *Hetherington v. Hixon*, 46 Ala. 297; *Waters v. Bean*, 15 Ga. 358; *Maher v. Martin*, 43 Ind. 314; *Musick v. Dodson*, 76 Mo. 624; *Watkins v. Halstead*, 2 Sandf. 311; *Kent v. Rand*, 64 N. H. 45; *Hayward v. Barker*, 52 Vt. 429. Contrary decisions are *Goulding v.*

Davidson, 26 N. Y. 604; *Hemphill v. McClimans*, 24 Pa. 367.]

(*a*) *Vance v. Wells*, 8 Ala. 399; *Hubbard v. Bugbee*, 55 Vt. 506. But see *contra*, *Thomas v. Passage*, 54 Ind. 106.

(*b*) It appears to be so determined by *Beaumont v. Reeve*, 8 A. & E. (N. S.) 483, although the court had some difficulty in coming to this conclusion. See also on this point *Binnington v. Wallis*, 4 B. & Ald. 650; *Jennings v. Brown*, 9 M. & W. 496; *Annandale v. Harris*, 2 P. Wms. 432; *Walker v. Perkins*, 1 W. Bl. 517; *Eastwood v. Kenyon*, 11 A. & E. 438; *Wallace v. Rappleye*, 103 Ill. 229; *Phillips v. Pullen*, 50 N. J. L. 439. But see, *contra*, *Massey v. Wallace*, 32 S. C. 149.

for it. (c) (x) But it must have some real value : and if this be very small, this circumstance may, even by itself, and still more when connected with other indications, imply or sustain a charge of fraud. (d) The courts, both of law and of equity, refuse

* 437 * to disturb contracts on questions of mere adequacy, whether the consideration is of benefit to the promisor, or of injury to the promisee.¹ Nevertheless, if an agreement be unreasonable or unconscionable, but not in such a way or to such a degree as to imply fraud, courts of equity will not decree a specific performance, (e) and though courts of law will not declare the contract void, they will give only reasonable damages to the plaintiff who seeks compensation for a breach of it. (f) When adequacy of consideration becomes material, whether it exists is a question for the court. (g)

As the consideration must have some value and reality, the assumption of a supposed danger or liability, which has no foundation in law or in fact, is not a valuable or sufficient con-

(c) *Skeate v. Beale*, 11 A. & E. 983; *Hitchcock v. Coker*, 6 id. 438, 456; *Hubbard v. Coolidge*, 1 Met. 84; *Whittle v. Skinner*, 23 Vt. 532; *Sanborn v. French*, 2 Foster (N. H.), 246; *Phillipps v. Bate-man*, 16 East, 372; *Kirwan v. Kirwan*, 2 Cr. & M. 623; *Cole v. Trecothick*, 9 Ves. 246; *Floyer v. Sherard*, Ambl. 18; *MacGhee v. Morgan*, 2 Sch. & L. 395, n. (u); *Low v. Barchard*, 8 Ves. 133; *Speed v. Phillips*, 3 Anst. 732; *Harlan v. Harlan*, 20 Penn. St. 303; *Davidson v. Little*, 22 id. 245.

(d) *Cockell v. Taylor*, 15 E. L. & E. 101; s. c. 15 Beav. 103; *Edwards v. Burt*, id. 435; s. c. 2 De G. M. & G. 55; *Johnson v. Dorsey*, 7 Gill, 269; *Wormack v. Rogers*, 9 Ga. 60; *Judge v. Wilkins*, 19

Ala. 765; *Milnes v. Cowley*, 8 Price, 620; *Preble v. Boghurt*, 1 Swanst. 329; *Mayor v. Williams*, 6 Md. 235. Mere folly or weakness or want of judgment will not defeat a contract. *James v. Morgan*, 1 Lev. 111; s. c. 1 Keb. 569; *Thornborrow v. Whiteacre*, 2 Ld. Raym. 1164. See *Chitty, Cont.* 32; *Birdsong v. Birdsong*, 2 Head, 289.

(e) *Osgood v. Franklin*, 2 Johns. Ch. 23; *Mortlock v. Butler*, 10 Ves. 292; *Gasque v. Small*, 2 Strob. Eq. 72.

(f) See *Cutler v. How*, 8 Mass. 257; *Cutler v. Johnson*, id. 266; *Baxter v. Wales*, 12 Mass. 365.

(g) *Best, C. J.*, in *Homer v. Ashford*, 3 Bing. 327.

¹ A leading case is *Haigh v. Brooks*, 10 A. & E. 309. In general, "The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced." *Per Blackburn, J.*, in *Bolton v. Madden*, L. R. 9 Q. B. 55. See also, *Wolford v. Powers*, 85 Ind. 294; *Colt v. McConnell*, 116 Ind. 249; *Train v. Gold*, 5 Pick. 380, 384; *Williams v. Jensen*, 75 Mo. 681; *Perkins v. Clay*, 54 N. H. 518; *Traphagen's Exec. v. Voorhees*, 44 N. J. Eq. 21; *Worth v. Case*, 42 N. Y. 362; *Earl v. Peck*, 64 N. Y. 596; *Cowee v. Cornell*, 75 N. Y. 91; *Cummings's Appeal*, 67 Penn. St. 404; *Giddings v. Giddings's Adm.*, 51 Vt. 227.

To this general rule there is one exception. Payment or promise of payment of a smaller sum of money is not a sufficient consideration for an immediate obligation to pay a greater sum. See vol. ii., 822. —W.

(x) In general, the courts do not inquire into the adequacy or the consideration when there is no fraud. *Oldenburg v. Baird*, 26 Ind. App. 379, 58 N. E. 1073; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. .

797; *St. Louis, &c. Ry. Co. v. Phillips*, 66 Fed. 35, 13 C. C. A. 315; *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181.

sideration, (*h*) nor is the performance of that which the party was under a previous valid legal obligation to do; (*i*)¹ (*x*) and where one

(*h*) *Cabot v. Haskins*, 3 Pick. 83.

(*i*) *Harris v. Watson*, Peake, Cas. 72; *Murphey*, 181; *Smith v. Bartholomew*, 1 *Stilk v. Myrick*, 2 Camp. 317; *Callagan Met. 276*; *Crowhurst v. Laverack*, 16 E. *v. Hallett*, 1 Caines, 104; *Willis v. Peck-* L. & E. 497; s. c. 8 Exch. 208; *L'Amo-* *ham*, 1 Br. & B. 515; *Collins v. Godefroy*, *reux v. Gould*, 3 Seld. 349.

¹ Such a previous legal obligation may be either to the promisee, to a third party, or to the public. In none of these cases will performance of the obligation or a promise to perform it serve as the consideration for the promise of another.

Instances of the first class where the previous obligation was to the promisee are the following:—

A promise made in consideration of the entire or partial payment of a debt immediately due is without consideration. *Foakes v. Beer*, 9 App. Cas. 605; *Barron v. Vandvert*, 13 Ala. 232; *Thompson v. Robinson*, 34 Ark. 44; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Smith v. Tyler*, 51 Ind. 512; *State v. Davenport*, 12 Iowa, 335; *Pemberton v. Hoosier*, 1 Kan. 108; *Jenness v. Lane*, 26 Me. 475; *Emmitsburg R. R. Co. v. Donoghue*, 67 Md. 383; *Warren v. Hodge*, 121 Mass. 106; *Weber v. Couch*, 134 Mass. 26; *Carraway v. Odeneal*, 56 Miss. 223; *Willis v. Gammill*, 67 Mo. 730; *Russ v. Hobbs*, 61 N. H. 93; *Watts v. Frenche*, 19 N. J. Eq. 407; *Parmelee v. Thompson*, 45 N. Y. 58; *Turnbull v. Brock*, 31 Ohio St. 649; *Pomeroy v. Slade*, 16 Vt. 220; *Smith v. Phillips*, 77 Va. 548. See also vol. ii., Chapter on Payment.

A promise to pay the whole or part of a debt is, of course, equally ineffectual for a consideration as actual payment. *Jones v. Waite*, 5 Bing. N. C. 341; *Tucker v. Bartle*, 85 Mo. 114; *Smith v. Phillips*, 77 Va. 548.

So, completing a railroad, already partly built, in accordance with a contract to build the whole, will not support a promise to pay additional compensation. *Ayres v. Chicago, & C. R. R. Co.* 52 Iowa, 478. And where seamen have engaged to serve for a whole voyage, a promise to pay them extra wages if they will finish the voyage is *nudum pactum*. *Stilk v. Myrick*, 2 Camp. 317; *Harris v. Watson*, Peake, 72; *Fraser v. Hatton*, 2 C. B. n. s. 512, *Harris v. Carter*, 3 E. & B. 559; *Bartlett v. Wyman*, 14 Johns. 260.

See also, as bearing out the general proposition, *Jackson v. Cobbin*, 8 M. & W. 790; *Bayley v. Homan*, 3 Bing. N. C. 915; *Deacon v. Gridley*, 15 C. B. 295; *McCaleb v. Price*, 12 Ala. 753; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Mathews*, 42 Ind. 7; *McCarty v. Hampton Assoc.*, 61 Iowa, 287; *Conover v. Stillwell*, 34 N. J. L. 54; *Crosby v. Wood*, 6 N. Y. 369; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Festerman v. Parker*, 10 Ired. 474; *Withers v. Ewing*, 40 Ohio St. 400; *Erb v. Brown*, 69 Pa. 216; *Cobb v. Cowdery*, 40 Vt. 25.

In some States it has been held that if one party to a contract refuses to perform unless promised some further pay or benefit than the contract provides, and such a promise is made, it is binding. The ground taken is that the making of the new promise shows a rescission of the original contract and the substitution of another. *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96 (but see *Nelson v. Pick-*

(*x*) There is no consideration for a promise which merely binds the promisor to do what he is already bound to do, nor is performance of such a promise a consideration. *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53; *Bloodgood v. Wuest*, 74 N. Y. S. 913; *Wescott v. Mitchell*, 95 Me. 377, 50 Atl. 21; *Domenico v. Alaska Packers' Ass'n*, 112 Fed. 554; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334; *Skinner v. Garnett G. M. Co.*, 96 Fed. 735; *Allen v. Plasmeyere* (Neb.), 90 N. W. 1125; *Pollak v. Billing* (Ala.), 32 So. 639. So an agreement to pay for

services required by law is without consideration. *Willey v. Robinson*, 85 Hun, 362. And a promise to refrain from illegal acts or to fulfil a statutory obligation, is not sufficient. *Voorhees v. Reed*, 17 Ill. App. 21; *Newton v. Chicago, & C. Ry. Co.*, 66 Iowa, 422. The abandonment of a wholly wrongful detention of another's goods, as it tends to encourage the commission of wrong for profit, cannot be the basis or consideration of even a compromise agreement with the owner. *Fink v. Smith*, 170 Penn. 124, 32 Atl. 566.

through mistake of the law acknowledges himself under an obligation which the law does not impose, he is not bound by

wick, Associated Co., 30 Ill. App. 333; *Goldsbrough v. Gable* (Ill. 1892); 29 N. E. Rep. 722; *Coyner v. Lynde*, 10 Ind. 282; *Munroe v. Perkins*, 9 Pick. 298; *Holmes v. Doane*, 9 Cush. 135; *Rollins v. Marsh*, 128 Mass. 116; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489; *Conkling v. Tuttle*, 52 Mich. 130 (but see *Eudriss v. Belle Isle Ice Co.*, 49 Mich. 279; *Widiman v. Brown*, 83 Mich. 241); *Lattimore v. Harsen*, 14 Johns. 330. See also *Stewart v. Keteltas*, 36 N. Y. 388. The presumption of rescission upon which these cases rest seems an improbable one; the natural inference being that one party is endeavoring against the will of the other to escape from an unsatisfactory contract and to take advantage of the latter's necessities. In so far as a rescission is presumed without evidence that it in fact took place, the cases are at variance with the general principle and the authorities above cited.

Considerable discussion has arisen in regard to the second class of cases where the previous obligation is a contract with a third party. Admitting that mere performance of an act promised to A would not be a good consideration for the promise of B, it has been said that a promise to B to perform would be, for it is said that coming under an obligation to another person to do that act is a detriment and constitutes a good consideration, and it has been so decided in England. *Scotson v. Pegg*, 6 H. & N. 295. See also *Shadwell v. Shadwell*, 30 L. J. C. P. 145; *Langd. Sum. Cont.* § 84. But see *Jones v. Waite*, 5 Bing. N. C. 341, 351, 356, 359. On the other hand it has been pointed out that this argument begs the question by assuming that the second promise does create an obligation, which would not be the case unless that promise was itself a sufficient consideration for the counter promise, the very point in issue. And the attempt has been made to escape this difficulty by saying that the second promise is to be read as being or including a promise not to exercise the right of rescinding the original contract. *Anson, Cont.* (5th ed.) 89; *Pollock, Cont.* (5th ed.) 177. But this is not true in fact. The promise is to perform a certain act, not to refrain from rescinding the earlier contract. It may well be that one of the parties to the later contract does not even know of the existence of the earlier one, and it can hardly be doubted that in any event the party making the two promises might rescind the prior contract with the consent of his co-contractor, and yet be free from liability on his second promise if he actually performed the act promised. In this country it is generally held, and it is believed correctly, that such a second promise cannot serve as a consideration. *Johnson's Adm. v. Sellers's Adm.*, 33 Ala. 265; *Schuler v. Myton*, 48 Kan. 282; *Gordon v. Gordon*, 56 N. H. 170; *Bartlett v. Wyman*, 14 Johns. 260; *Robinson v. Jewett*, 116 N. Y. 40. And see *Peelman v. Peelman*, 4 Ind. 612; *Reynolds v. Nugent*, 25 Ind. 328; *Brownlee v. Lowe*, 117 Ind. 420; *Putnam v. Woodbury*, 68 Me. 58; *Larsen v. Wyman*, 14 Wend. 246; *Stidham v. Sandford*, 36 N. Y. Sup. 341; *Pond v. Starkweather*, 99 N. Y. 411; *Merrick v. Giddings*, 1 Mack. (D. C.) 394; *Davenport v. Congregational Society*, 33 Wis. 387. In most of these cases no distinction is made between a promise to perform what one is bound by contract with another to perform, and the actual performance of it. Both are held insufficient consideration.

The following are illustrations of the third class where the previous obligation is to the public.

Forbearance or a promise to forbear to commit a tort is not a good consideration. *McCaleb v. Price*, 12 Ala. 753; *Botkin v. Livingston*, 21 Kan. 232; *Commonwealth v. Johnson*, 3 Cush. 454; *Callagan v. Hallett*, 1 Caines, 104; *Crosby v. Wood*, 6 N. Y. 369; *Robinson v. Jewett*, 116 N. Y. 40; *Tolhurst v. Powers*, 133 N. Y. 460; *Cleveland v. Lenze*, 27 Ohio St. 383.

Nor is performance of official duty. *Bent v. Wakefield, &c. Bank*, 4 C. P. D. 1; *Marking v. Needy*, 8 Bush, 22; *Pool v. Boston*, 5 Cush. 219; *Davies v. Burns*, 5 Allen, 349; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Kick v. Merry*, 23 Mo. 72; *Gilmore v. Lewis*, 12 Ohio, 281; *Stamper v. Temple*, 6 Humph. 113.

Nor is agreeing to rescind an unlawful contract. *Hooker v. De Palos*, 28 Ohio St. 251.

Nor is attendance in court of witnesses who have been served with subpoenas sufficient consideration for a promise to pay them more than the legal fees. *Dodge v. Stiles*, 26 Conn. 463; *Sweany v. Hunter*, 1 Murphey, 181.

But performance or a promise to perform something which differs in any way,

such promise; (*j*) although, in general, ignorance of the law is no excuse or defence, for if it were, a "premium would be held out to ignorance." (*k*)

* SECTION IV.

* 438

PREVENTION OF LITIGATION.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. (*l*) Thus, a mutual submission of demands and claims to arbitration is binding so far as this, that the mutual promises are a consideration each for the other. (*m*) But the submission must be mutually binding; that is, equally obligatory on both parties, or the consideration fails. On the same ground a mutual compromise is sustained. (*n*) With the courts of this country, the prevention

(*j*) *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, id. 483; *May v. Coffin*, 4 id. 347; *Silvernail v. Cole*, 12 Barb. 685; *Ross v. McLauchlan*, 7 Gratt. 86.

(*k*) *Bilbie v. Lumley*, 2 East, 469.

(*l*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 444; *Wiseman v. Roper*, 1 Chanc. 158; *Stapilton v. Stapilton*, 1 Atk. 3.

(*m*) *Hodges v. Saunders*, 17 Pick. 470; *Jones v. Boston Mill Corp.*, 4 id. 507; *Williams v. The Commercial Exchange Co.*,

29 E. L. & E. 429; s. c. 10 Exch. 569; *Conn. Dig. Action upon the Case on Assumpsit* (A. 1), (B. 2).

(*n*) *Durham v. Wadlington*, 2 Strob. Eq. 258; *Van Dyke v. Davis*, 2 Mich. 145; *Hoge v. Hoge*, 1 Watts, 216, where a compromise of a doubtful title was held binding upon the parties, although ignorant of their rights, unless vitiated by fraud sufficient to avoid any other contract. See *Cavode v. McKelvey*, *Addison*, 56; *O'Keson v. Barclay*, 2 Penn. St. 531.

however slightly, from what is required to satisfy the previous obligation, is a good consideration.

Thus if a debtor gives or agrees to give new security for a debt, or changes or agrees to change the time for its payment, or agrees to give increased interest, there is sufficient consideration for a promise. *Manufacturing Co. v. Bradley*, 105 U. S. 175; *Kinsey v. Wallace*, 36 Cal. 462; *Warner v. Campbell*, 26 Ill. 282; *Williams v. Scott*, 83 Ind. 405; *Gates v. Hamilton*, 12 Iowa, 50; *Hubbard v. Igden*, 22 Kan. 363; *Preston v. Henning*, 6 Bush, 556; *Chute v. Pattee*, 37 Me. 102; *Keirn v. Andrews*, 59 Miss. 39; *Clarkson v. Creely*, 35 Mo. 95; *Wright v. Bartlett*, 43 N. H. 548; *Day v. Gardner*, 42 N. J. Eq. 199; *Jaffray v. Davis*, 124 N. Y. 164; *Fawcett v. Freshwater*, 31 Ohio St. 637.

So if a ship's crew continue a voyage after the number of hands is so reduced that the continuation is a danger which they are not bound by their original articles to incur, it will support a promise to pay extra wages. *Hartley v. Ponsonby*, 7 E. & B. 872.

So if the performance or promise to perform of an official goes beyond what his duty as such official requires of him, it will be a good consideration. *England v. Davidson*, 11 A. & E. 856; *Morrell v. Quarles*, 35 Ala. 544; *Pilie v. New Orleans*, 19 La. An. 274; *Gregg v. Pierce*, 53 Barb. 387; *McCandless v. Allegheny Bessemer Steel Co.*, 152 Pa. 139; *Texas, &c. Mfg. Co. v. Mechanics' Fire Co.*, 54 Tex. 319; *Davis v. Munson*, 43 Vt. 676; *Reif v. Page*, 55 Wis. 496.

In *Day v. Gardner*, 42 N. J. Eq. 199, it was intimated that payment of taxes by the mortgagor would be sufficient consideration to support a promise by the mortgagee to relinquish a portion of his mortgage debt, though the mortgagor was legally bound to pay the taxes. This seems contrary to the weight of authority; and see especially *Newton v. Chicago, &c. Ry. Co.*, 66 Iowa, 422. — W.

of litigation is not only a sufficient, but a highly favored consideration; (o) and no investigation * into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them. (p) ¹

So giving up a suit or any equivalent proceedings, instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof. (q) And in these cases inequality of consideration does not constitute a valid objection; it is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful. (x) But a promise by a son not to complain of his father's distribution of his estate, * 440 is * no consideration for the father's promise not to sue a note given by the son. (r) It has been said that equity regards the termination of family controversies as a sufficient consideration for an agreement, even if the controversies had no good foundation. (rr)

(o) *Ibid.*; Zane v. Zane, 6 Munf. 406; Taylor v. Patrick, 1 Bibb, 168; Fisher v. May, 2 id. 448; Truett v. Chaplin, 4 Hawks, 178; Brown v. Sloan, 6 Watts, 321; Stoddard v. Mix, 14 Conn. 12; Rice v. Bixler, 1 W. & S. 456; Barlow v. Ocean Ins. Co., 4 Met. 270.

(p) *Ex parte* Lucy, 21 E. L. & E. 199; Mills v. Lee, 6 Monr. 91; Moore v. Fitzwater, 2 Rand. (Va.) 442; Bennet v. Paine, 5 Watts, 259; Pierson v. McCahill, 21 Cal. 122; Clark v. Gamwell, 125 Mass. 428; Flannagan v. Kilcoine, 58 N. H. 443.

(q) See Longridge v. Dorville, 5 B. &

Ald. 117; Wilbur v. Crane, 13 Pick. 284; Mills v. Lee, 6 Monr. 97; Union Bank v. Geary, 5 Pet. 114; Bennet v. Paine, 5 Watts, 259; Muirhead v. Kirkpatrick, 21 Penn. St. 237; Livingston v. Dugan, 20 Mo. 102; Hey v. Moorhouse, 6 Bing. N. C. 52; Stracy v. Bank of England, 6 Bing. 754; Atlee v. Backhouse, 3 M. & W. 648; Richardson v. Mellish, 2 Bing. 229; Thornton v. Fairlie, 2 Moore, 397, 408, 409.

(r) White v. Bluett, 24 E. L. & E. 434.

(rr) Smith v. Smith, 36 Ga. 184; Supreme Assembly v. Campbell (R. I.), 22

¹ See *post*, p. * 441, note 1.

(x) In England the compromise of a claim believed by the parties to be good, but not so in fact, and the giving of a promissory note to postpone payment of such a claim, are for good consideration. Kingsford v. Oxenden, 55 J. P. 182, 789. So in Massachusetts. Prout v. Pittsfield Fire District, 154 Mass. 450, 28 N. E. 679; Bent v. Weston, 167 Mass. 529, 46 N. E. 386; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248. *Contra*, in Illinois and Kansas. Bates v. Sandy, 27 Ill. App. 552; Hanchett v. Ives, 171 Ill. 122, 49 N. E. 206; Price v. First Nat. Bank (Kans.), 64 Pac. 639. See Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. Ed. 860; German Sav. Bank v.

Geneser (Iowa), 89 N. W. 201; Fink v. Smith, 170 Penn. St. 124, 32 Atl. 566; Fink v. Farmers' Bank, 178 Penn. St. 154, 35 Atl. 636; Traders' Nat. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094; Taylor v. Weeks (Mich.), 88 N. W. 466; Haskell v. Tukesbury, 92 Me. 551, 43 Atl. 500; Di Iorio v. Di Brasio, 21 R. I. 208, 42 Atl. 1114; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495; Rowe v. Barnes, 101 Iowa, 302, 70 N. W. 197; Citizens Sav. Bank v. Babbitt's Estate, 71 Vt. 182, 44 Atl. 71; Stearns v. Lake Shore Ry. Co., 112 Mich. 651, 71 N. W. 148; Llano Imp. Co. v. Pacific Imp. Co., 66 Fed. 526, 30 U. S. App. 253; Cooper v. Jackson (Ky.), 57 S. W. 254.

A promise to pay money, in consideration that the promisee would abandon proceedings in which the public are interested, is not sustainable, because such consideration is void on grounds of public policy. (s) ¹(x) So, obtaining the passage of a law by corrupt means is no valid consideration. (t) (y)

SECTION V.

FORBEARANCE.

An agreement to forbear, for a time, proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise. (u) But this consideration fails if it be shown * that the claim is wholly and certainly unsus- * 441

Atl. 307; Burkholder's Appeal, 105 Pa. 31; Williams v. Williams, L. R. 2 Ch. 294.

(s) See Coppock v. Bower, 4 M. & W. 361; Keir v. Leeman, 9 A. & E. (N. S.) 371; Wall v. Charlick, N. Y. Leg. Obs. July, 1850, 230.

(t) Marshall v. Baltimore & Ohio R. Co., 16 How. 314.

(u) See 1 Roll. Abr. 24, pl. 33; Com. Dig. *Action upon the Case upon Assumpsit* (B. 1); 3 Chitty, Com. L. 66, 67. See Atkinson v. Bayntum, 1 Bing. N. C. 444; Willats v. Kennedy, 8 Bing. 5; Moston v. Burn, 7 A. & E. 19; King v. Upton, 4 Greenl. 387; Elting v. Vanderlyn, 4 Johns. 237; Murhead v. Kirkpatrick, 21 Penn.

St. 237. An agreement by a surety to forbear a suit against his principal, *after he shall have paid the debt of the principal*, is a good consideration to support a promise, although at the time of the agreement the surety had no cause of action against the principal. Hamaker v. Eberley, 2 Binn. 506. See Jennison v. Stafford, 1 Cush. 163; Giles v. Ackles, 9 Barr. 147; Silvis v. Ely, 3 W. & S. 420; Watson v. Randall, 20 Wend. 201; Ford v. Rehman, Wright, 434; Gilman v. Kibler, 5 Humph. 19; Colgin v. Henley, 6 Leigh, 85; Rood v. Jones, 1 Doug. (Mich.) 183; Martin v. Black, 20 Ala. 309; McKinley v. Watkins, 13 Ill. 140.

¹ Or an agreement in consideration of withholding suit upon a bond not to expose and make public the commission of the crime of adultery by the obligee with the obligor's wife. (z) Brown v. Brine, 1 Ex. D. 5. — K.

(x) Weber v. Shay, 56 Ohio St. 116, 46 N. E. 377; Jones v. Dannenberg Co., 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271. Such illegality may be found as well in the implied as in the express terms of an agreement: Jones v. Merionethshire P. B. B. Society, [1892] 1 Ch. 173; in a promise not to prosecute as well as in suppressing an existing prosecution. Smith Premier Typewriter Co. v. Mayhew (Neb.), 90 N. W. 939. It does not exist when the accused is wholly innocent of the alleged offense: Woodham v. Allen, 130 Cal. 194, 62 Pac. 398; or when he is thus forced to secure by bond the performance of a legal obligation, such as the support of an abandoned family. Bea v. People, 101 Ill. App. 132. The contract, if based on a promise to conceal a crime, is invalid, though there may also

be another consideration which is good. Folmar v. Siler (Ala.), 31 So. 719. See Traders' Nat'l Bank v. Steere, 165 Mass. 389, 393, 43 N. E. 187.

"Public policy" aims at the protection of the public, irrespective of the defendant's knowledge of illegality. Church v. Proctor, 66 Fed. 240, 13 C. C. A. 426. It may vary with a change in the laws, and the contract, if invalid for this cause when made, may yet be enforced if valid when sued upon. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 S. Ct. 540; 41 L. Ed. 1007, 58 Fed. 58, 24 L. R. A. 73; Hartford F. Ins. Co. v. Chicago, & C. Ry. Co., 62 Fed. 904.

(y) See *infra*, p. * 458, n. (d) and (x).

(z) See Case v. Smith, 107 Mich. 416, 65 N. W. 279.

tainable at law or in equity;¹ but mere proof that it is
 * 442 doubtful will not invalidate * the consideration. (w) Nor

(w) *Longridge v. Dorville*, 5 B. & Ald. Peek, 11 Vt. 483; *Truett v. Chaplain*, 4 117; *Zane v. Zane*, 6 Munf. 406; *Blake v. Hawks*, 178.

¹ Whether giving up or forbearing to sue upon a claim which is without foundation can ever constitute a good consideration is a question upon which there is great conflict of authority.

In England the question was not settled until very recently, but it had been supposed that forbearing or promising to forbear suit would not be a sufficient consideration to support a promise unless the claim forborne was well founded or at least doubtful in law or fact. See *Banes's Case*, 9 Rep. 93 b; *Barber v. Fox*, 2 Wms. Saund. 136; *Loyd v. Lee*, 1 Strange, 94; *Jones v. Ashburnham*, 4 East, 455; *Longridge v. Dorville*, 5 B. & Ald. 117; *Payne v. Wilson*, 7 B. & C. 423; *Smith v. Algar*, 1 B. & Ad. 603; *Morton v. Burn*, 7 A. & E. 19; *Edwards v. Baugh*, 11 M. & W. 641; *Llewellyn v. Llewellyn*, 3 Dowl. & L. 318; *Wade v. Simeon*, 2 C. B. 548; *Smyth v. Holmes*, 10 Jurist, 862; *Henderson v. Stobart*, 5 Ex. 99; *Crowther v. Farrar*, 15 Q. B. 677; *Cook v. Wright*, 1 B. & S. 559. In 1870, however, the point was squarely decided in the case of *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

But only a year before *Callisher v. Bischoffsheim* was decided, however, Lord Romilly, M. R., had reached an opposite conclusion in *Graham v. Johnson*, L. R. 8 Eq. 36.

In *Ockford v. Barelli*, 25 L. T. N. S. 504 (1871), the Court of Exchequer followed *Callisher v. Bischoffsheim*.

Ex parte Banner, 17 Ch. D. 480 (C. A. 1881), did not really involve the question because the claim forborne in that case was not simply unfounded, but known by the claimant to be so. Brett, L. J., (at p. 490) said: "I take it that *Ockford v. Barelli* was decided upon the authority of *Callisher v. Bischoffsheim*." See *Miles v. New Zealand, &c. Co.*, 32 Ch. D. 266.

In this country the rule established by the late English decisions, that forbearance of an "honest claim" as defined in the case last cited, is a good consideration regardless of the actual validity of the claim, is followed, or a somewhat similar rule laid down, in *Union Bank v. Geary*, 5 Pet. 99; *Morris v. Munroe*, 30 Ga. 630; *Grandin v. Grandin*, 49 N. J. L. 508; *Zoebis v. Van Minden*, 120 N. Y. 406; *Bellows v. Sowles*, 55 Vt. 391; *Hewitt v. Currier*, 63 Wis. 386; *Saxton v. McNair*, 71 Wis. 459. And see *Prout v. Pittsfield Fire District*, 154 Mass. 450; *Dailey v. King*, 79 Mich. 568; *Clark v. Turnbull*, 47 N. J. L. 265; *Wildman v. St. Johnsbury, &c. R. R. Co.*, 25 At. Rep. 896 (Vt. 1892).

On the other hand it is held that such forbearance will not constitute a good consideration unless the claim forborne was valid, or at least sufficiently doubtful in fact or law to render a claim reasonable, in *Stewart v. Bradford*, 26 Ala. 410; *Mulholland v. Bartlett*, 74 Ill. 58; *Bates v. Sandy*, 27 Ill. App. 552 (but see *Parker v. Enslow*, 102 Ill. 272); *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24 (but see *Moon v. Martin*, 122 Ind. 211); *Tucker v. Ronk*, 43 Iowa, 80 (but see *Richardson, &c. Co. v. Hampton*, 70 Iowa, 573); *Cline v. Templeton*, 78 Ky. 550; *Schroeder v. Fink*, 60 Md. 436; *Palfrey v. Portland, &c. R. R. Co.*, 4 Allen, 55 (see also *Dunham v. Johnson*, 135 Mass. 310); *Demars v. Musser-Sauntry, &c. Co.*, 37 Minn. 418; *Gunning v. Royal*, 59 Miss. 45; *Long v. Towl*, 42 Mo. 545; *Kidder v. Blake*, 45 N. H. 530 (but see *Pitkin v. Noyes*, 48 N. H. 294); *Davison v. Ford*, 23 W. Va. 617. See also *Richardson v. Comstock*, 21 Ark. 69; *Swem v. Green*, 9 Col. 358; *Fleming v. Ramsey*, 46 Pa. 252; *Warren v. Williamson*, 8 Baxt. 427; *Smith v. Penn*, 22 Gratt. 402.

In all jurisdictions it would be admitted that forbearance of a claim is no consideration if the claimant knows his claim to be unfounded or conceals material facts relating thereto. *Ex parte Banner*, 17 Ch. D. 480; *McKinley v. Watkins*, 13 Ill. 140; *Headley v. Hackley*, 50 Mich. 43; *Feeter v. Weber*, 76 N. Y. 334; *Ormsbee v. Howe*, 54 Vt. 182. But see *Moon v. Martin*, 122 Ind. 211.

The English rule has the practical advantage that it puts an end to litigation. Under any other rule it can never be certain that forbearance or promise of forbearance is a valid consideration until suit is brought upon the promise made in exchange for it, for the final test under any other rule is whether the court thinks the claim forborne valid, reasonable, or doubtful. Theoretically also it is believed that the English rule is the true

is it necessary that the forbearance should extend to an entire discharge; any delay which is real and not merely colorable, is enough. (x) Nor is it material whether the proceedings to be forborne have been commenced or not. (y) Nor need the agreement to a delay be for a time certain; for it may be for a reasonable time only, and yet be a sufficient consideration for a promise. (z)¹(xx) But in declaring on a promise made on such a consideration, the plaintiff must allege and prove the actual time of forbearance, and if this be judged by the court to be

(x) *Sage v. Wilcox*, 6 Conn. 81. Here the delay was *one year*. *Baker v. Jacob*, 1 Bulst. 41. Here the delay was a *fortnight*, or thereabouts. See also *ante*, note (u).

(y) *Wade v. Simeon*, 2 C. B. 548; *Miles v. New Zealand, &c. Co.*, 32

Ch. D. 266; *Hamaker v. Eberley*, 2 Binn. 506.

(z) *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Sidwell v. Evans*, 1 Penn. St. 385; *Downing v. Funk*, 5 Rawle, 69; *Hakes v. Hotchkiss*, 23 Vt. 235. See also *ante*, note (u).

one; that the law should determine the validity of the consideration from the standpoint of the parties themselves in this class of cases, as it certainly does in others. Thus a contract of marine insurance "lost or not lost" is binding, though the vessel be lost at the time, *infra*, II. 486. So a wager as to an event which has already happened, though contrary to public policy, is not without consideration. *March v. Pigot*, 5 Burr. 2802. So in a recent case where several heirs knowing that their deceased ancestor had taken out a policy of life insurance in the name of one of them, but not knowing in the name of which one, agreed that they would divide the proceeds equally, it was held that their agreement was binding. *Supreme Assembly v. Campbell*, 22 At. Rep. 307 (R. I.). And see *Howe v. O'Mally*, 1 Murphey, 287; *Seward v. Mitchell*, 1 Cold. 87. In all these cases last put, one party actually gave nothing, and from the standpoint of universal intelligence ran no risk of giving anything in return for what he received. The contracts were held binding because the law regards the question not from the standpoint of universal intelligence, or in the light of what events subsequently show, but from the standpoint of the parties to the contract at the time they entered into it. — W.

¹ On an agreement to extend time of payment and forbear to sue, if no definite time is agreed on, a reasonable time will be presumed. *Calkins v. Chandler*, 36 Mich. 320. — K.

(xx) Forbearance may be absolute, or for a definite time, or even for a reasonable time, but an agreement which does not bind to a forbearance for a little time, or for some time, is without consideration; yet, in the absence of a specified time, a reasonable time may be held intended. *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Haskell v. Tukesbury*, 92 Me. 551, 555, 43 Atl. 500; *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749; *Peterson v. Russell*, 62 Minn. 220, 64 N. W. 555; *Staver v. Missimer* (6 Wash. 173), 36 Am. St. Rep. 142, 145 n.; *McMicken v. Safford*, 64 N. E. 540, 100 Ill. App. 102. Mutual promises not to sue are a consideration for each other. *Aldridge v. Aldridge*, 13 P. D. 210.

The discontinuance of a pending suit, and agreeing not to prosecute it further, will support both an agreement to pay the

claim at a future date, and also a promise to pay the accrued costs and attorney's fees. *Weilage v. Abbott* (Neb.), 90 N. W. 1128. So of an agreement by one heir not to contest a will in consideration of receiving an extra payment. *Merkert's Estate v. Grobe* (Iowa), 90 N. W. 490. An agreement to compromise a suit cannot be set aside in that suit; a fresh suit must be brought for the purpose. *Emeris v. Woodward*, 43 Ch. D. 185.

If a person having a legacy upon land, requires the devisee to pay it, and he promises to do so, there is a valid consideration, in the nature of forbearance, on which he may be held in an action at law. *Barry v. Barry*, 28 L. R. Ir. 45, 50. But a mere voluntary forbearance to sue, not based upon a request or promise, does not bind the other party. *Commercial Bank v. Redfield*, 122 Cal. 405, 55 Pac. 160.

reasonable, the action will be sustained; (a) but where the stay of action is wholly uncertain, or such as can be of no benefit to the debtor or detriment to the creditor, it is not enough. (b)

It is not enough to allege in the declaration that disputes and controversies existed concerning a certain debt, and that the promise on which the action is brought was made in consideration that the plaintiff promised not to sue for that debt; for this is no allegation that a debt actually existed, and there must be such an allegation; but with it there may be an allegation of disputes and controversies concerning its amount. (c) It * 443 seems * to be settled, that a general agreement to forbear all suits is to be construed as a perpetual forbearance; (d) and a promise resting on the consideration of such forbearance is no longer binding, when a suit, which was to be forborne, is commenced.

It is not material that the party who makes the promise, in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay. (e) It is enough that he requests such forbearance; for the benefit to the defendant will be supposed to extend to him, and it would also be enough to make the consideration valid, that the creditor is injured by the delay. But there must have been some party who could have been sued. (f) And in cases in which the person to be forborne is not mentioned, but the forbearance may be understood to be forbearance of whoever might be sued, * 444 the promise founded on such consideration is * binding, if there be any person liable to suit, though the defendant himself is not liable. (g)

In general, a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise, (h) or a waiver of any equitable right; (i) and so it is, although it be a waiver of an action for a tort, by committing which the person

(a) *King v. Upton*, 4 Greenl. 387; *Barnehurst v. Cabbot*, Hardr. 5.

(b) *Jones v. Ashburnham*, 4 East, 455; *Nelson v. Serle*, 4 M. & W. 795; *Bixler v. Ream*, 3 Penn. St. 282. See also *Rix v. Adams*, 9 Vt. 233.

(c) *Edwards v. Baugh*, 11 M. & W. 641. But see *ante*, p. * 441, note 1.

(d) *Clark v. Russell*, 3 Watts, 213; *Sidwell v. Evans*, 1 Penn. St. 385.

(e) *Smith v. Algar*, 1 B. & Ad. 603. See *Emmott v. Kearns*, 5 Bing. N. C. 559; *Maud v. Waterhouse*, 2 C. & P. 579.

(f) *Jones v. Ashburnham*, 4 East, 455; *Nelson v. Serle*, 4 M. & W. 795.

(g) See *Jones v. Ashburnham*, 4 East, 455.

(h) *Stebbins v. Smith*, 4 Pick. 97; *Smith v. Weed*, 20 Wend. 184; *Haigh v. Brooks*, 10 A. & E. 309; s. c. 2 Per. & D. 477; 3 id. 452; *Farmer v. Stewart*, 2 N. H. 97; *Nicholson v. May*, Wright, 660; *Hinman v. Moulton*, 14 Johns. 466; *Williams v. Alexander*, 4 Ired. Eq. 207; *Waterman v. Barratt*, 4 Harring. (Del.) 311.

(i) *Whitbeck v. Whitbeck*, 9 Cowen, 266; *Thorpe v. Thorpe*, 1 Salk. 171; s. c. 12 Mod. 455.

doing the wrong gained a benefit, although the other party suffered no real injury from it. (*j*) Forbearance to eject a tenant at will is a sufficient consideration for a guaranty of past and future rent. (*jj*) So is forbearance by a collector to enforce the collection of taxes by a sale of the land a good consideration for the owner's promise to pay the tax. (*jk*)

And a promise to pay one if he would prove a debt against a deceased husband, (*k*) or to pay a debt denied to be due, if the party creditor would swear to it, rests upon a sufficient consideration. And in an action upon such promise, it has been held that the defendant cannot show that the plaintiff was mistaken or swore falsely. (*l*)

The incurring of a liability in consequence of the promise of another, is held to be a good consideration; (*m*) and a subsisting legal obligation to do a thing is a good consideration for a promise to do that thing. (*n*)

* SECTION VI.

* 445

ASSIGNMENT OF DEBT.

An assignment of a debt or a right is a good consideration for a promise by the assignee. (*o*) Such assignment may not be good at law, but it is valid in equity; and courts of law, for many purposes, and to a certain extent, recognize the validity of the transfer, if the assignee obtains a benefit which the law considers a sufficient and a proper consideration to found a promise upon. (*p*) But if

(*j*) *Davis v. Morgan*, 4 B. & C. 8; *Brealey v. Andrew*, 2 Nev. & P. 114; s. c. 7 A. & E. 108.

(*jj*) *Vinal v. Richardson*, 13 Allen, 521.

(*jk*) *Burr v. Wilcox*, 13 Allen, 269.

(*k*) *Traver v. —*, 1 Sid. 57.

(*l*) *Brooks v. Ball*, 18 Johns. 337.

(*m*) *Underhill v. Gibson*, 2 N. H. 352; *Homes v. Dana*, 12 Mass. 190; *Bryant v. Goodnow*, 5 Pick. 228. See also *Chapin v. Lapham*, 20 id. 467; *Blake v. Cole*, 22 id. 97; *Ward v. Fryer*, 19 Wend. 494. In *Baileyville v. Lowell*, 20 Me. 178, it was determined, that an agreement by the owner of an execution against the inhabitants of a town, that if they would at once assess the amount required, and collect the same, he would make a certain discount, is founded on sufficient consideration, and will be enforced.

(*n*) *Cook v. Bradley*, 7 Conn. 57; *Warner v. Booge*, 15 Johns. 233; *Jewett v. Warren*, 12 Mass. 300. See *Russell v. Buck*, 11 Vt. 166; *Deacon v. Gridley*, 23 E. L. & E. 345; s. c. 15 C. B. 295.

(*o*) *Loder v. Cheslevn*, 1 Sid. 212; *Mouldsdale v. Birchall*, 2 W. Bl. 820; *Price v. Seaman*, 4 B. & C. 525; s. c. 7 Dow & R. 14, *Graham v. Gracie*, 13 Q. B. 548; *Whittle v. Skinner*, 23 Vt. 532; *Harrison v. Knight*, 7 Tex. 47; *Edson v. Fuller*, 2 Foster (N. H.), 185.

(*p*) *Price v. Seaman*, 4 B. & C. 525, 7 Dow. & R. 14, 10 Moore, 24, 2 Bing. 487; *Peate v. Dicken*, 1 C. M. & R. 430; s. c. 5 Tyr. 116. And an assignment of a chose in action need not be by deed. *Howell v. McIvers*, 4 T. R. 690; *Health v. Hall*, 4 Taunt. 326.

the transaction amounts to maintenance, which is illegal, the consideration fails, and the promise is void.

SECTION VII.

WORK AND SERVICE.

Work and service are a very common consideration for a promise, and always sufficient, if rendered at the request of the party promising. (*q*) This request may often be implied; it is so, generally, from the fact that the party making the promise accepts and holds the benefit resulting from the work or service. (*r*) And it * 446 is an equally sufficient consideration for a * promise, if the work or service be rendered to a third party at the request of the promisor; (*s*) and such request will often be implied from very slight circumstances; as, in the case of clothing supplied to a child, where the mere knowledge and silence of the father are enough. (*t*)

If the work and service rendered are merely gratuitous, and performed for the defendant without his request or privity, however meritorious or beneficial they may be, they afford no cause of action. (*u*) and perhaps no consideration for a subsequent promise, although, as we have seen, a precedent request may in law be presumed from the promisor's acceptance of the service. So, if a workman employed and directed to do a particular thing choose to do some other thing, without the direction or assent of the employer, the implied promise of the employer to pay for his labor will not extend to the new work; (*v*) but if the work is accepted by the employer, it would be a sufficient consideration for a promise to pay for it, and such acceptance might imply such promise. (*x*)

(*q*) *Hunt v. Bate*, Dyer, 272, n.; 1 Roll. Abr. 11, pl. 2, 3. In *Taylor v. Jones*, 1 Ld. Raym. 812, it was held that giving a soldier leave of absence at the instance of a third person is a good consideration for a promise from him to the captain to bring him back in ten days, or pay a sum of money.

(*r*) 1 Wms. Saund. 264 n. (1); *Tipper v. Ricknell*, 3 Bing. N. C. 710. And see *Lewis v. Trickey*, 20 Barb. 387.

(*s*) See cases cited *supra*, note (*q*).

(*t*) *Law v. Wilkins*, 6 A. & E. 718; *Nichole v. Allen*, 3 C. & P. 36. See, however, *Mortimore v. Wright*, 6 M. & W. 485, where Lord Abinger denies these cases

to be sound law. It is a question for the jury whether the circumstances are sufficient in any particular case. *Baker v. Keen*, 2 Stark. 501. See further, as to this point, *ante*, p. * 299, note (*h*), *et seq.*

(*u*) *Hunt v. Bate*, Dyer, 272 a; 1 Roll. Abr. 11, pl. 1; *Hayes v. Warren*, 2 Stra. 933; *Roscorla v. Thomas*, 3 Q. B. 234; *Jeremy v. Goochman*, Cro. E. 442; *Dogget v. Vowell*, Moore, 643; *Hines v. Butler*, 3 Ired. Eq. 307. See also *ante*, p. * 432, note (*t*); *Frear v. Hardenbergh*, 5 Johns. 272; *Bartholomew v. Jackson*, 20 Johns. 28.

(*v*) *Hort v. Norton*, 1 McCord, 22. See also *Phetteplace v. Steere*, 2 Johns. 442.

(*x*) As to injunctions to restrain the breach of contracts for personal services,

see *Duff v. Russell* (N. Y.), 32 Am. L. Reg. N. s. 649.

* SECTION VIII.

* 447

TRUST AND CONFIDENCE.

Trust and confidence in another often form a sufficient consideration to hold that other to his undertaking. As if one intrusts money, goods, or property of any kind, to any person, on the faith of that person's promise to act in a certain way in reference to those goods, or that money or property, such person, having accepted the trust, will be held to his promise, because the trust is itself a sufficient consideration for a promise to discharge and execute the trust faithfully. (*w*) ¹ * Questions involving this * 448 principle seldom arise except in the case of bailments, and will be considered hereafter when we treat of that subject. Here we will only say, that, in general, an agent without remuneration cannot be required to undertake an employment or trust, or held liable for not doing so; but if he undertake and begin it, he is liable for the consequences of neglect or omission in completing his work.

(*w*) Doctor & Stud. Dial. 2c. 24; *Holt*, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 919. Thus, where a coffee-house keeper accepted a large sum of money from the plaintiff, and promised to take proper care of it for a certain period, it was held that an action would lie on this promise for gross neglect and want of caution, whereby the money was lost. *Doorman v. Jenkins*, 2 A. & E. 256; and see *Whitehead v. Greetham*, 10 Moore, 182, 2 Bing. 464, McClel. & Y. 205. In

the absence of an express undertaking to procure *good* security, the party would only be bound to use reasonable care and caution. *Dartnell v. Howard*, 6 Dow. & R. 443; s. c. 4 B. & C. 345. See *Shillibeer v. Glyn*, 2 M. & W. 143; *Wheatley v. Law*, Cro. J. 668; *Robinson v. Threadgill*, 13 Ired. L. 39; *Bainbridge v. Firmstone*, 8 A. & E. 743; s. c. 1 Per. & D. 3; and see *Smith*, Lead. Cas. vol. i. p. 96 (ed. 1841).

¹ As in *Hammond v. Hussey*, 51 N. H. 40, where a teacher undertook to examine pupils for admission to a high school at the request of the school committee, and was held liable for a false report that the plaintiff was not qualified. See *Jenkins v. Bacon*, 111 Mass. 373, which was to the effect, that a person gratuitously undertaking to buy and keep a government bond for another is responsible for its loss to the extent of its value irrespective of his negligence; *Morton, J.*, dissenting, on the ground that it was for the jury to decide whether he was liable or not by reason of negligence.—K.

SECTION IX.

A PROMISE FOR A PROMISE.

A promise is a good consideration for a promise. (x)¹ And it is so previous to performance and without performance. As, if one promises to become a partner in a firm, and another promises to receive him into the firm, both of these promises are binding, each being a sufficient consideration for the other. (y) So a promise by a seller to refund in case of deficiency in the thing sold is a good consideration for a promise to pay for any excess therein. (yy) If one promises to teach a certain trade, this is a consideration for a promise to remain with the party a certain length of time to learn, and serve him during that time; but without such promise to teach, the promise to remain and serve, though it be made in expectation of instruction, is void. (z)

* 449 The reason of * this is, that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement. (a) (xx)

(x) *Nichols v. Raynbred*, Hob. 88; *Hebden v. Rutter*, 1 Sid. 180; *Strangborough v. Warner*, 4 Leon. 3; *Gower v. Capper*, Cro. E. 543; *Parke, J.*, in *Wentworth v. Bullen*, 9 B. & C. 840; *Cartwright v. Cook*, 3 B. & Ad. 703; *Miller v. Drake*, 1 Caines, 45; *Rice v. Sims*, 8 Rich, L. 416; *Garret v. Malone*, id. 335; *James v. Fulcrood*, 5 Tex. 512; *Docray v. Dunn*, 37 Me. 442; *The New York and New Haven Railroad Co. v. Pixley*, 19 Barb. 428; *Kiester v. Miller*, 25 Penn. St. 481; *Backus v. Spaulding*, 116 Mass. 418. See *White v. Demilt*, 2 Hall, 405; *Howe v. O'Mally*, 1 Murphey, 287.

(y) *McNeill v. Reed*, 2 M. & Scott, 89; s. c. 9 Bing. 68.

(yy) *Seward v. Mitchell*, 1 Cold. 87.

(z) *Lees v. Whitcomb*, 2 Mo. & P. 86;

s. c. 5 Bing. 34; *Sykes v. Dixon*, 9 A. & E. 693; s. c. 1 Per. & D. 463. See also *Bates v. Cort*, 3 Dow. & R. 676. Where the defendant signed the following instrument: "Mr. James—, as you have a claim on my brother for £5 17s. 9d., for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th January, 1833," it was held, that the promise, being without consideration, was a *nudum pactum*, and gave no cause of action. *James v. Williams*, 5 B. & Ad. 1109.

(a) *McKinley v. Watkins*, 13 Ill. 140; *Lester v. Jewett*, 12 Barb. 502; *Nichols v. Raynbred*, Hob. 88; *Kingston v. Phelps*, Peake, 227; *Biddell v. Dowse*, 6 B. & C. 255; *Hopkins v. Logan*, 5 M. & W. 241; *Burton v. G. N. R. Co.*, 9 Exch. 507; *Dor-*

¹ Such a contract has been called a bilateral contract, while a promise given in consideration for actual performance or forbearance has been termed a unilateral contract. In the one case there is a promise on both sides, in the other on but one side. See *Stevenson v. McLean*, 5 Q. B. D. 346, 351; *Davis v. Wells*, 104 U.S. 159; *Barrett v. Dean*, 21 Iowa, 423; *Barry v. Capen*, 151 Mass. 99; *First Nat. Bank v. Watkins*, 154 Mass. 385; *Coleman v. Applegarth*, 68 Md. 21; *Stensgaard v. Smith*, 43 Minn. 11, 15. — W.

(xx) One party to a contract is not bound thereby when it does not bind the other party; when there is no liability, there is no obligation, as when one party stipu-

* This has been doubted, from the seeming want of * 450 mutuality in many cases of contract. As where one promises to see another paid, if he will sell goods to a third person; or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand, or suspend legal proceedings, or the like. (b) Here it is said

sey v. Rockwood, 12 How. 126; Stiles v. McClellan, 6 Col. 89; Cool v. Cunningham, 25 S. C. 136. See especially Governor and Copper Miners v. Fox, 16 Q. B. 239; Payne v. New South Wales Co., 28 E. L. & E. 579; s. c. 10 Exch. 283. — If, however, a contract like the above, although not originally binding upon one party, by reason of some defect or informality in the execution, or for any other cause, and therefore not *originally* binding upon the other party, nevertheless be ex-

ecuted by the party not originally liable, the other party cannot refuse performance on the ground that the contract was not originally binding. Fishmongers' Company v. Robertson, 5 Man. & G. 131. See Phelps v. Townsend, 8 Pick. 392; Commercial Bank v. Nolan, 7 How. (Miss.) 508.

(b) In Kennaway v. Treleavan, 5 M. & W. 501, Parke, B., said, citing Newbury v. Armstrong, 6 Bing. 201: "A great number of the cases are of contracts not bind-

lates that he shall not be liable for damages because of his failure from any cause to perform; but performance by one party, on the other party's demand, of a contract thus voidable for want of mutuality makes it binding on the latter. Harvester King Co. v. Mitchell, Lewis & Staver Co., 89 Fed. 173. See East Omaha Land Co. v. Hansen (Iowa), 90 N. W. 705; Koppitz-Melchers Brewing Co. v. Behm (Mich.), id. 676. Wisconsin, &c. Ry. Co. v. Braham, 71 Iowa, 484, 32 N. W. 392; Nilles v. Welsh, 89 Iowa, 491, 56 N. W. 657; Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. So it is held in Nebraska, that there is no consideration for a bond to secure the performance of a contract, which does not bind the obligee. Keith County v. Ogalalla P. & I. Co. (Neb.), 89 N. W. 375.

An accepted offer to supply all such goods as shall be needed or consumed in the acceptor's business during a limited time is binding; but an accepted offer to sell or deliver articles at specified prices during a limited time in such quantities as the acceptor may want in his business, without indicating the quantity, is void for want of consideration and mutuality. Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 145, 15 L. R. A. 218; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 81; Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; Missouri, &c. Ry. Co. v. Bagley, 60 Kan. 424, 56 Pac. 759.

As both parties must be bound, it is only when the defendant has had the benefit of the consideration for which he bargained that he is held to perform his

unilateral contract. Nunnally v. Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; Jordan v. Indianapolis Water Co. (Ind. App.), 61 N. E. 12. In general, and in all cases where the unilateral contract is wholly executory, the promises, to be binding, must be concurrent and obligatory upon each party at the same time. Morrow v. Southern Express Co., 101 Ga. 810, 28 S. E. 998; Marietta Paper Manuf. Co. v. Bussey, 104 Ga. 477, 480, 31 S. E. 415.

In concluding a valuable article in 32 Am. L. Rev. 409, 419, upon the Mutuality of Contracts, Mr. Alfred F. Sears, Jr., of Portland, Or., says: "I assert, therefore, unhesitatingly the rule, supported alike by reason and authority, that where a consideration is sought for to uphold a promise to perform given acts, that consideration must be something of value; if a promise, one capable of enforcement in some tribunal, legal or equitable, and that failing, the agreement is a mere nude part, void for want of mutuality in the obligation, lacking the reciprocal tie and consequently without avail in any forum."

It is also an established rule that there must be mutuality of remedy on the contract in order that it may be enforced against either party; this applies especially when specific performance is sought. See e. g. Karrick v. Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. Ed. 484; Duff v. Hopkins, 33 Fed. 599; Johnston v. Trippe, id. 530; Leicester Piano Co. v. Front Royal Impr. Co., 55 Fed. 190; Watts v. Kellar, 56 Fed. 1; Hackley v. Oakford, 98 Fed. 781, 39 C. C. A. 284; Federal Oil Co. v. Western Oil Co., 112 Fed. 373; *infra*, vol. iii. p. * 354.

that the party making the promise is bound, while the other party is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee within a reasonable time engages to do, or else does or begins to do, the thing which is the condition of the *451 first promise. * Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing, in a way which binds him to complete it, here also is a mutuality of obligation. But if without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until that other party does the thing required of him.

A very large proportion of our most common contracts rests upon this principle. Thus, in the contract of sale, the proposed buyer says, I will give you so much for these goods; and he may withdraw this offer before it is accepted, and if his withdrawal reaches the seller before the seller has accepted, the obligation of the buyer is extinguished; but if not withdrawn, it remains as a continuing offer for a reasonable time, and, if accepted within this time, both parties are now bound as by a promise for a promise; there is an entire mutuality of obligation. The buyer may tender the price and demand the goods, and the seller may tender the goods and demand the price. (c) This subject, however, belongs rather to the topic "Assent."

A written agreement to submit disputes and claims to arbitration must be signed by all parties, or it is obligatory upon none.

ing on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guaranty falls under that class, when a party says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guaranty; but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it." See also *Yard v.*

Eland, 1 *Ld. Raym.* 368; *Caballero v. Slater*, 25 *E. L. & E.* 285; *s. c.* 24 *C. B.* 300; *Mozley v. Tinkler*, 1 *C. M. & R.* 692; *Morton v. Burn*, 7 *A. & E.* 19; *Train v. Gold*, 5 *Pick.* 380; *Cottage Street Church v. Kendall*, 121 *Mass.* 528; *Wellington v. Apthorp*, 145 *Mass.* 69, 73; *L'Amoureux v. Gould*, 3 *Seld.* 349; *White v. Baxter*, 71 *N. Y.* 254; *Powers v. Bumcratz*, 12 *Ohio St.* 273.

(c) See *White v. Demilt*, 2 *Hall*, 405; *Babcock v. Wilson*, 17 *Me.* 372; *Appleton v. Chase*, 19 *Me.* 74.

For no party can hold another to the award, without showing that he himself would have been equally bound by it. (*d*)

It should be added, that the common law makes an exception * to this requirement of mutuality, in the case of * 452 contracts between infants and persons of full age; following in this respect the civil law, and the law prevailing on the continent of Europe. The infant is not bound, while the adult is; the infant may avoid his contract, but the adult cannot. (*e*) This rule has been applied to the contract of future marriage, as well as to other contracts. Where a man of full age enters into such contract with a woman who is a minor, if he breaks the contract she has her remedy by action. (*f*) If she breaks it he has no action. But a woman under age may perhaps be bound by a marriage contract properly securing her interests, and deliberately entered into, with the approbation of her parents or guardians. (*g*)

SECTION X.

SUBSCRIPTION AND CONTRIBUTION.

Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others. (*h*)¹ If there be a chartered

(*d*) *Kingston v. Phelps*, Peake, Cas. 227; *Biddell v. Dowse*, 6 B. & C. 255; s. c. 9 Dow & R. 404; *Antram v. Chase*, 15 East, 212.

(*e*) See *ante*, p. * 329.

(*f*) *Holt v. Ward Clarendieux*, 2 Stra. 937; *Hunt v. Peake*, 5 Cowen, 475; *Willard v. Stone*, 7 Cowen, 22; *Cannon v. Alsbury*, 1 A. K. Marsh. 78. — So an infant may maintain an action on a mercantile contract, although he would not be bound himself. *Warwick v. Bruce*, 2 M. & Sel. 205.

(*g*) *Anslie v. Medlycott*, 9 Ves. 14; *Simson v. Jones*, 2 Russ. & M. 365; *Durnford v. Lane*, 1 Bro. Ch. 111; *Fonblanque*, Eq. 74; and see *ante*, p. * 330.

(*h*) *Society in Troy v. Perry*, 6 N. H. 164; *George v. Harris*, 4 id. 533; *Hanson v. Stetson*, 5 Pick. 506; *State Treasurer v. Cross*, 9 Vt. 289; *University of Vermont v. Buell*, 2 Vt. 48; *Commissioners v. Perry*, 5 Hamm. 58; *Ohio, &c. College v. Love*, 16 Ohio, 20; *Comstock v. Howd*,

15 Mich. 237. — It is on this ground that subscriptions to charitable or benevolent objects have often been held binding, when there was no other consideration for each subscriber's promise than the promise of other subscribers. Yet many authorities seem to hold it necessary in such cases that there shall be some promise or engagement by the committee, corporation, or other person to whom the subscription paper runs, or that something should be done on their part, as the erection of the building, providing materials or the like, in order to render the subscription binding. See *Limerick Academy v. Davis*, 11 Mass. 114; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Troy Academy v. Nelson*, 24 Vt. 189; *Gittings v. Mayhew*, 6 Md. 113; *Phipps v. Jones*, 20 Penn. St. 260; *Barnes v. Perine*, 9 Barb. 202; *Wilson v. Baptist Education Soc.*, 10 Barb. 309; *Galt's Ex'rs v. Swain*, 9 Gratt. 633; *L'Amoureux v. Gould*, 3 Seld. 349; No. 42 Am. Jur. 281-283; *Foxcroft Academy v. Favor*, 4

¹ In this country it has generally been held that the promise of one who subscribes money for charitable, religious, or other purposes is supported by a sufficient considera-

- * 453 * company or corporation, one who subscribes agreeably to the statute and by-laws acquires a right to his shares; and

Greenl. 382 n. (Bennett's ed.). This point was very fully discussed in the case of *Trustees of Hamilton College v. Stewart*, 2 Denio, 403; s. c. 1 N. Y. 581. But see *Barnes v. Perine*, 12 N. Y. 23; *Johnston v. Wabash College*, 2 Cart. (Ind.) 555; *Edinboro' Academy v. Dobinson*, 37 Penn. St. 210.

tion, but as to the nature of the consideration widely varying opinions have been expressed.

1. The commonest theory is that if the work for which the subscription was made has been begun or liability incurred in regard to it, the subscription thereupon becomes a binding contract. *Miller v. Ballard*, 46 Ill. 377; *Trustees of M. E. Church v. Garvey*, 53 Ill. 401; *Gittings v. Mayhew*, 6 Md. 113; *Cottage St. Church v. Kendall*; 121 Mass. 528; *Pitt v. Gentle*, 49 Mo. 74; *James v. Clough*, 25 Mo. App. 147; *Ohio, &c. College v. Love's Exec.*, 16 Ohio St. 20. See also *Richelieu Hotel Co. v. International Military Enc. Co.*, 29 Northeastern Rep. 1044 (Ill.); *Johnson v. Otterbein University*, 41 Ohio St. 527.

2. It has been held that if any acts whatever have been done or any liability incurred on the faith of the subscription it becomes binding. *Des Moines Univ. v. Livingston*, 57 Iowa, 307, 65 Iowa, 202; *McCabe v. O'Connor*, 69 Iowa, 134.

According to these views the subscription is an offer until acts have been done or liability incurred, and consequently until that time may be withdrawn, and is revoked by the death or insanity of the subscriber. *Pratt v. Baptist Society of Elgin*, 93 Ill. 475; *Beach v. First Methodist Church*, 96 Ill. 177; *Helfenstein's Estate*, 77 Pa. 328. See also *Reimensnyder v. Gans*, 110 Pa. 17.

3. The rule is stated in Virginia thus: The subscription must be acceded to and the party apprised that his offer is accepted, and then if labor or money is expended on the faith of the subscription, it is binding. *Galt's Exec. v. Swain*, 9 Gratt. 633.

4. It has been suggested that the fact that others were led to subscribe is sufficient consideration. *Hanson Trustees v. Stetson*, 5 Pick. 506; *Watkins v. Eames*, 9 Cush. 537; *Ives v. Sterling*, 6 Met. 310 (this doctrine was, however, repudiated in *Cottage St. Church v. Kendall*, 121 Mass. 528); *Comstock v. Howd*, 15 Mich. 237 (but see *Northern, &c. R. R. v. Eslow*, 40 Mich. 222).

5. A theory widely held is that the promise of each subscriber is supported by the promises of the others. *Christian College v. Hendley*, 49 Cal. 347; *Higert v. Trustees of Indiana, &c. Univ.*, 53 Ind. 326; *Petty v. Trustees of Church*, 95 Ind. 278; *Congregational Soc. in Troy v. Perry*, 6 N. H. 164; *Edinboro' Academy v. Dobinson*, 37 Pa. 210.

6. The view last given is adopted in Nebraska with the qualification that the beneficiary must have expended labor or money or incurred obligation to render the subscriber liable. *Homan v. Steele*, 18 Neb. 652.

7. Lastly, it has been held that from the acceptance by the beneficiary or its trustees of a subscription a promise is implied to execute faithfully the object subscribed for. *Collier v. Baptist Educational Soc.*, 8 B. Mon. 68; *Trustees of Kentucky, &c. School v. Fleming*, 10 Bush, 234; *Trustees of Maine Central Institute v. Haskell*, 73 Me. 140; *Helfenstein's Estate*, 77 Pa. 328; *Trustees of Troy Academy v. Nelson*, 24 Vt. 189. And this implied promise supports the subscriber's promise.

Doubtless the chief reason of this great diversity of opinion is that in fact there is rarely if ever any consideration for a charitable subscription; it is given and taken as a promise of a pure gratuity. Anxiety to enforce at law a promise so binding in honor has led the courts to find fictitious considerations. The promise of a subscriber, being gratuitous at the outset, cannot become binding because the promisee acts on the faith of it. It was well said by an English judge, "If A says 'I will give you, B, £1000,' and B in reliance on that promise spends £1000 in buying a house, B cannot recover the £1000 from A." *In re Hudson*, 54 L. J. Ch. 811, 813. Nor is the case altered if A makes the promise in order to enable B to buy a house. If indeed the promise is made in consideration that B will buy a house, when B does so there is a binding contract. And a subscription may take that form. *Paddock v. Bartlett*, 68 Iowa, 16; *Homan v. Steele*, 18 Neb. 652; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164; see also *Fort Wayne, &c. v. Miller*, 131 Ind. 499. In each of these cases various citizens promised to pay a corporation or individual sums of money set opposite the subscribers' names if the corporation or individual would erect a mill or building in the town, — the intention of

as the company is under an obligation to give him the shares, this would be a consideration for the promise, and would make his subscription obligatory on him. (i)

On the important question, how far voluntary subscriptions for charitable purposes, as for alms, education, religion, or other public uses, are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as on all points settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established. (j)

(i) *Chester Glass Company v. Dewey*, 16 Mass. 94; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; see *Davis v. Smith American Organ Co.*, 117 Mass. 456; *New Bedford Turnpike v. Adams*, 8 Mass. 138. There is no privity of contract between a party signing and a committee appointed by his co-signers at a meeting which he did not attend; although the committee proceeded and expended money. *Curry v. Rogers*, 1 Foster (N. H.), 247.

(j) *Bryant v. Goodnow*, 5 Pick. 228; *Warren v. Stearns*, 19 id. 73; *Robertson v. March*, 3 Scam. 198; *Macon v. Shep-*

the subscribers being to pay their subscriptions in return for the advantages they as citizens of the town would derive from its increased commercial facilities. Here a binding unilateral contract arose when the mill or building was erected. A charitable subscription, however, can seldom be fairly interpreted in this way. Furthermore an action can be maintained on such a promise only when the thing requested has been actually done, not merely begun.

Nor can the promise of each subscriber be held a consideration for the others, because the subscribers do not promise each other, but each promises the common beneficiary, and the question almost invariably arises in a suit brought by the beneficiary against the subscriber. In one case the court, seeing that the several promises of the subscribers could not be consideration for each other unless they were mutual, held that they were so, and that to sue one subscriber all the other subscribers must join; and this though the promise was made in terms to certain specified trustees. *Moore v. Chesley*, 17 N. H. 151. And see *Chambers v. Calhoun*, 18 Pa. 13. Doubtless it is possible for A to agree to subscribe in return for a promise of B to subscribe to the same object, but in the case of charitable subscriptions this rarely occurs in fact. Subscriptions to form a corporation were sustained on this ground in *West v. Crawford*, 80 Cal. 19; *Shober's Adm. v. Lancaster, &c. Assoc.*, 68 Pa. 429. In *La Fayette County Monument Corp. v. Ryland*, 80 Wis. 29, an offer was made by the defendant to a county board to pay a certain corporation \$1000 towards the erection of a monument if the county board would raise and pay \$2000 for the same purpose. In this case it was rightly held that when the county board had raised and paid the specified sum, the defendant's promise became binding.

The view that from the acceptance of the subscription a counter promise by the beneficiary or its trustees is implied seems more plausible, but is also usually untenable. The beneficiary or its trustees ordinarily enter into no obligation to receive the money subscribed and deal with it in a certain way. They only undertake to deal with it in a certain way if and when they receive it,—an obligation which only becomes binding when the money subscribed is paid and is no greater or different from what the law would impose.

In accordance with what is believed to be sound reason, it is held in England and in New York that an ordinary charitable subscription is a gratuitous promise and cannot be enforced. *In re Hudson*, 54 L. J. Ch. 811; *Presbyterian Church v. Cooper*, 112 N. Y. 517 (following the case of *Trustees of Hamilton College v. Stewart*, 1 N. Y. 581); *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601. — W.

And the expenses or liabilities need not have been incurred by the plaintiff if others of the subscribers incurred them on the faith of the defendant's subscription. (*jj*) (*x*) Further than * 454 this it is not easy to go, unless such * subscriptions are held to be binding merely on grounds of public policy. To

pard, 2 Humph. 335; University of Vermont v. Buell, 2 Vt. 48; Canal Fund v. Perry, 5 Hamm. 58; Barnes v. Perine, 9 Barb. 202; Homes v. Dana, 12 Mass. 190. See also Thompson v. Page, 1 Met. 570, and Farmington Academy v. Allen, 14 Mass. 172; Collier v. B. E. Society, 8 B.

Mon. 68; Mouton v. Noble, 1 La. An. 192; Brouwer v. Hill, 1 Sandf. 620; Plank Road v. Griffin, 21 Barb. 454; Troy Academy v. Nelson, 24 Vt. 189; Watkins v. Eames, 9 Cush. 537; McLure v. Wilson, 43 Ill. 356.

(*jj*) Miller v. Ballard, 46 Ill. 377.

(*x*) A subscription to a church or charitable fund is not binding if the promisee has incurred no liability in reliance thereon, and the promises of other subscribers are not a consideration as between the promisor and the promisee. Cottage St. M. E. Church v. Kendall, 121 Mass. 528; Presbyt. Church v. Cooper, 112 N. Y. 517, 3 L. R. A. 468 and note; Hart v. Tichnor (Minn.), 32 Am. L. Reg. n. s. 443 and note. The mere reliance of a promisee upon the promise without other consideration does not impart validity to what was before void, nor does it give to the promise any new validity when it is not contemplated by the terms of the bargain as the equivalent of the promise. Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; Martin v. Meles, 179 Mass. 114, 60 N. E. 397; French v. Boston Nat. Bank, 179 Mass. 404, 60 N. E. 793; Mann v. O'Neil (Wash.), 69 Pac. 635. When the promise is made to trustees to be afterwards appointed, they become the promisees when chosen; and if they proceed to erect a building, or otherwise incur liabilities, in reliance upon subscriptions made, before these are retracted, there is a good consideration, and the promise becomes valid and binding in law. Hudson Real Estate Co. v. Tower, 156 Mass. 82, 30 N. E. 465; s. c. 161 Mass. 10, 36 N. E. 680; Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197; Miller v. Western College, 71 Ill. App. 587; School District v. Stocking (Mo.), 40 S. W. 656; Trustees v. Hoffman (Mo. App.), 69 S. W. 474; Lasar v. Johnson, 125 Cal. 549, 58 Pac. 161; Bryant's Pond Steam-Mill Co. v. Felt, 87 Me. 234, 32 Atl. 888; Beatty v. Western College, 17 Ill. 280, 52 N. E. 432; Locke v. Belmont Cong. Society, 157 Mass. 589, 32 N. E. 949; Cottage Hospital v. Merrill, 92 Iowa, 649, 61 N. W. 490; First M. E. Church v. Donnell, 95 Iowa, 494, 64 N. W. 412; Montpelier Seminary v. Smith's Estate, 69 Vt. 382, 38 Atl. 66; Grand

Isle v. Kinney, 70 Vt. 381, 41 Atl. 130; Irwin v. Lombard Uni., 56 Ohio St. 9, 46 N. E. 63; Badger Paper Co. v. Rose, 95 Wis. 145, 70 N. W. 302; Schuler v. Myton, 48 Kan. 282, 29 Pac. 163.

In the recent Massachusetts cases more stress is laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. See Martin v. Meles, *supra*. But later subscriptions may be supported by the consideration of earlier ones when made in reliance thereon, though it is in a separate instrument; this is presumed to be so especially when the subscriptions are conditioned upon the raising of a certain sum. First Univ. Church v. Pungs, 126 Mich. 670, 86 N. W. 235; Waters v. Union Trust Co. (Mich.), 89 N. W. 687. Upon such promises the liability and rights of the different subscribers may be joint or several. See Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756; Laramie v. Tanner, 69 Minn. 156, 71 N. W. 1028. When a definite total amount is the only condition stipulated, the obtaining and gathering in of other subscriptions, and contracting for and erecting the building with reasonable despatch, are a sufficiently prompt acceptance of a subscription to bind the promisor. Hodges v. Nalty (Wis.), 89 N. W. 535; see Howell v. Trustees M. E. Church, 61 Ill. App. 121; McCorry v. Holden, 68 id. 351; Rogers v. Galloway Female College, 64 Ark. 627, 44 S. W. 454. But where a board of trade building was subscribed for on condition that it be completed and occupied within two years, this condition was held to go to the whole promise, and the promisor was held not liable to pay any part of his subscription. Cincinnati, &c. R. Co. v. Bensley, 51 Fed. 738, 2 C. C. A. 480, 19 L. R. A. 796. And so of a change, not assented to, in the location of the proposed building. Roth-erberger v. Glick, 22 Ind. App. 288.

say that they are obligatory, because they are all promises, and the promise of each subscriber is a valid consideration for the promise of every other, seems to be reasoning in a vicious circle. The very question is, are the promises binding? for if not, then they are no consideration for each other. To say that they are binding because they are such considerations, is only to say that they are binding because they are binding; it assumes the very thing in question. (*k*)

Where subscriptions are made upon the condition that they are not valid unless a certain sum be raised, all of the subscribers must be equally liable, and if some subscribe only to make up the sum or to induce others, they themselves not to be called on, no subscription is binding. (*kk*) The sum to be raised need not have been paid in, but is raised when the subscriptions of solvent and responsible persons are received to the full amount. (*kl*)

It is now common to put a seal to such a subscription book or paper. Sometimes a seal is put to each name. Sometimes one seal, with a declaration in the heading, or in the *in testimonium*, that each subscriber adopts and uses it as his seal. In any such case it would seem, on general principles, that the objection of want of consideration could not be brought against an action on the subscription. (*km*)

In general, subscriptions on certain conditions in favor of * the party subscribing are binding when the acts stipu- * 455
lated as conditions are performed. (*l*)¹

(*k*) That such subscriptions are valid where no expenses or liabilities are incurred because of them, and on the ground of mutuality of promise, seems at least to be implied in some cases. See *George v. Harris*, 4 N. H. 533. From this case it would appear, that such a subscription may at all events be treated as an agreement of the subscribers by and with each other, upon the failure to perform which by any one of them, the others can join in an action of assumpsit against him to recover the amount of his subscription. See also *Society in Troy v. Perry*, 6 N. H. 164; *Same v. Goddard*, 7 id. 435; *Fisher v. Ellis*, 3 Pick. 323; *Amherst Academy v. Cows*, 6 id. 427. In the last two cases a promissory note was given in discharge of the subscription, although it is not easy to see how that strengthened the obligation. In *Ives v. Sterling*, 6 Met. 310, the court notice the conflict of

opinion, without attempting to reconcile it. In New York the authorities are in similar conflict. See *Whitestown v. Stone*, 7 Johns. 112; *McAuley v. Billinger*, 20 id. 89. *Trustees of Hamilton College v. Stewart*, 1 N. Y. 581; s. c. 2 Denio, 403; *Caul v. Gibson*, 3 Barr, 416; *Collier v. Baptist Educational Society*, 8 B. Mon. 68; *Barnes v. Perine*, 9 Barb. 202; s. c. 2 Kern. 18. In *Methodist Ep. Church v. Garvey*, 53 Ill. 401, a subscriber was held liable for his subscription because the trustees had borrowed money on the faith thereof.

(*kk*) *New York, &c. Co. v. De Wolf*, 31 N. Y. 273.

(*kl*) *Westminster College v. Gamble*, 42 Mo. 411.

(*km*) *Ball v. Dunsterville*, 4 T. R. 313; *Cooch v. Goodman*, 2 Q. B. 580, 598.

(*l*) *Williams College v. Danforth*, 12 Pick. 541.

¹ As to whether the obligation of subscribers to a subscription paper is joint or several, see *Davis v. Shafer*, 50 Fed. 764; *Darnall v. Lyon*, 19 S. W. 506 (Tex. App.). — W.

SECTION XI.

OF CONSIDERATION VOID IN PART.

It sometimes happens that a consideration is void in part; and the question arises whether this fact makes the whole consideration invalid, and the promise itself of no obligation. If one or more of several considerations, which are recited as the ground of a promise, be only frivolous and insufficient, but not illegal, and others are good and sufficient, then undoubtedly the consideration may be severed, and those which are void disregarded, while those which are valid will sustain the promise. (*m*) (*x*) But where the consideration is entire and incapable of severance, then it must be wholly good or wholly bad. If the promise be entire and not in writing, and a part of it relate to a matter which by the statute of fraud should be promised in writing, such part * 456 being void, avoids the whole contract, (*n*) but if it be * such in its nature that it may be divided, and the part not required to be in writing by the statute may be enforced without injustice to the promisor, that portion of the agreement will be binding. (*o*)

(*m*) *Parish v. Stone*, 14 Pick. 198; *King v. Sears*, 2 C. M. & R. 48; *Jones v. Waite*, 5 Bing. N. C. 341; *Sheerman v. Thompson*, 11 A. & E. 1027; *Best v. Jolly*, 1 Sid. 38; *Cripps v. Golding*, 1 Roll. Abr. 30, *Action sur Case*, pl. 2; *Bradburne v. Bradburne*, Cro. E. 149; *Coulston v. Carr*, id. 848; *Crisp v. Gamel*, Cro. J. 127; *Shackell v. Rosier*, 2 Bing. N. C. 646, per *Tindal*, C. J.; *Erie Railway v. Union, &c. Co.*, 35 N. J. L. 240.

(*n*) *Mechelen v. Wallace*, 7 A. & E. 49;

s. c. 2 Nev. & P. 224; also *Chater v. Beckett*, 7 T. R. 203; *Lord Lexington v. Clarke*, 2 Vent. 223; *Thomas v. Williams*, 10 B. & C. 664; *Wood v. Benson*, 2 Tyr. 93; *Mayfield v. Wadsley*, 2 B. & C. 357; *Foquet v. Moore*, 16 E. L. & E. 466; s. c. 7 Exch. 870; *Irvine v. Stone*, 6 Cush. 508; *Noyes's Ex'r v. Humphreys*, 11 Gratt. 636; *Collins v. Merrell*, 2 Met. (Ky.) 163. (*o*) *Irvine v. Stone*, 6 Cush. 508; *Wood v. Benson*, 2 Tyr. 93; *Rand v. Mather*, 11 Cush. 1.

(*x*) If one of two distinct considerations is void merely for insufficiency, and not for illegality, the contract will be supported by the other. *King v. King*, 63 Ohio St. 363, 59 N. E. 111, 81 Am. St. Rep. 635; *Whitbeck v. Ramsay*, 74 Ill. App. 524.

A contract for musicals for several weeks of seven days each, if it violates the Lord's Day statutes, is entire and

wholly void. *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420; s. c. 170 Mass. 560, 49 N. E. 1020; *McClanathan v. Friedel*, 85 Hun, 175, 32 N. Y. S. 588. So when any part of an entire consideration is illegal at common law or by statute, the contract will not be enforced. *Crichfield v. Bermudez A. P. Co.*, 174 Ill. 466, 51 N. E. 552.

SECTION XII.

ILLEGALITY OF CONSIDERATION.

In general, if any part of the entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. (*p*) Indeed the courts go far in refusing to found any rights upon wrong-doing. Thus, no action can be maintained for property held for an illegal purpose, as for making counterfeit coin. (*q*)

No contract to violate a law of a State — as, for example, to sell liquors contrary to a statute (*x*) — can be enforced within that State. (*r*) There must, however, be an illegal intent of some

(*p*) *Collins v. Blantern*, 2 Wils. 347; *Benyon v. Nettlefold*, 2 E. L. & E. 113; *Donallen v. Lennox*, 6 Dana, 91; *Brown v. Langford*, 3 Bibb, 500; *Hinesburg v. Sumner*, 9 Vt. 23; *Armstrong v. Toler*, 11 Wheat. 258; *Woodruff v. Hinman*, 11 Vt. 592; *Buck v. Albee*, 26 Vt. 184; *Deering v. Chapman*, 22 Me. 488; *Filson v. Himes*, 5 Barr, 452; *Dedham Bank v. Chickering*, 4 Pick. 314; *Perkins v. Cummings*, 2 Gray, 258; *Coulter v. Robertson*, 14 Sm. & M. 18; *Gamble v. Grimes*, 2 Cart. (Ind.) 392; *Carleton v. Bailey*, 7 Foster (N. H.), 230; *Hoover v. Pierce*, 27 Miss. 13. See also *Howden v. Simpson*, 10 A. & E. 815; *Hall v. Dyson*, 10 E. L. & E. 424; s. c. 17

Q. B. 785; *Sherman v. Barnard*, 19 Barb. 291; *Widoe v. Webb*, 20 Ohio St. 431.

(*q*) Discs of German silver were seized on their way to a place in which the appearance of Mexican silver dollars was to have been given them, and no action could be maintained for their recovery. *Spalding v. Preston*, 21 Vt. 1. See also *Bloss v. Bloomer*, 23 Barb. 604, where a promise to make and sell forged trade-marks was held void, and *Hanauer v. Doane*, 12 Wall. 342.

(*r*) *Territt v. Bartlett*, 21 Vt. 184. See also *Wootton v. Miller*, 7 Sm. & M. 380. See, however, as qualifying the rule, when the contract is not made within

(*x*) In *Sheehy v. Sheehy*, [1901] 1 I. R. 239, it was held that the fact that part of the consideration of a mortgage consists of spirituous liquors supplied on credit, contrary to the Tippling Acts, vitiates the security only to the extent that the consideration is illegal. See *Traders' Nat'l Bank v. Steere*, 165 Mass. 389, 43 N. E. 187.

The courts will not consciously lend their aid for the enforcement of any illegal contract. *Claffin v. U. S. Credit System Co.*, 165 Mass. 501, 43 N. E. 293. But, as to contracts valid on their face, illegality is never presumed, and the party setting it up has the burden of proof. *Forsyth Manuf. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087. So a contract valid on its face is not impaired by the performance of one of several illegal acts in executing it. *Dunham v. Hastings Pavement Co.*, 68 N. Y. S. 221, 57 App. Div. 426. An illegal contract will not be

executed; but if fully executed and carried out by the parties, the price or thing named by them, or a new consideration, may be a legal consideration between them for an express or implied promise, and the courts will not unravel the past transaction to find its origin. *Com'th v. Shober*, 3 Penn. Sup. Ct. 554; *Hertzler v. Geigley*, 196 Penn. St. 419, 46 Atl. 366, 79 Am. St. Rep. 724; *Cook v. Meyers*, 166 Ill. 282, 46 N. E. 765; *Brightman v. Bates*, 175 Mass. 105, 109, 55 N. E. 809. Recovery may be had upon such a contract as that of building a drain to a sewer although performed in an illegal way. *Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041.

Money paid under an illegal contract, which has been performed in part, cannot be recovered back. *Kearley v. Thomson*, 24 Q. B. D. 742. But contributions made to a competition which amounts in law to a lottery, though the court will not aid its administration as a trust, may be recovered at law if notice is given to the holder before distribution. *Barclay v. Pearson*, [1893] 2 Ch. 154.

kind; mere knowledge that an illegal use may, or even will, be made of the thing, seems not to be enough. (s)

* 457 * A distinction must be taken between the cases in which the consideration is illegal in part, and those in which the promise founded on the consideration is illegal in part. If any part of a consideration is illegal, the whole consideration is void; because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal. But if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, (u)¹ unless the two are so mingled and bound together that they cannot be separated; in which case the whole promise is void.

A distinction has been taken between the partial illegality of a consideration when against a statute, and when against common law. There are cases which sustain this distinction, (v) but we think it rests upon no sound principle; and it has been held, on good grounds, that the violation of a merely local or municipal law, avoids a contract as effectually as if the law were of universal application. (w) A statute has no more power in avoiding a contract partially opposed to it than the common law, (x)

that State, *McConihe v. McMann*, 1 Williams, 95; *Backman v. Wright*, id. 187; *Smith v. Godfrey*, 8 Foster (N. H.), 379; *Sortwell v. Hughes*, 1 Curtis, C. C. 244; *Read v. Taft*, 3 R. I. 175. See also *Kennett v. Chambers*, 14 How. 38, as to illegal contracts.

(s) *Kreiss v. Seligman*, 8 Barb. 439; *Kerwin v. Doran*, 29 Mo. App. 397; *Delavina v. Hill*, 65 N. H. 94.

(u) See *Bishop of Chester v. John Freland*, Ley, 79; *Kerrison v. Cole*, 8 East, 236; also *Norton v. Simmes*, Hob. 14. In *Leavitt v. Palmer*, 3 Comst. 37, *Bronson*, J., said: "It is undoubtedly true that where a deed or other contract contains distinct undertakings, some of which are legal and some illegal, the former will be in certain cases upheld, though the latter are void." And the principle was fully rec-

ognized in *Bank of Australasia v. Bank of Australia*, 6 E. F. Moore, 152. See also *Chase's Ex' v. Burkholder*, 18 Penn. St. 50.

(v) *Norton v. Simmes*, Hob. 14; *Mallevier v. Redshaw*, 1 Mod. 35. *Twisden*, J.; *Com. Dig. Covenant* (F.); *Bac. Abr. Conditions* (K.); *Hacket v. Tilly*, 11 Mod. 93; *Butler v. Wigge*, 1 Wms. Saund. 66 a, n. (1); 1 Pow. on Cont. 199; *Lee v. Coleshill*, Cro. E. 529; *Pearson v. Humes*, Carter, 230; *Mosdell v. Middleton*, 1 Vent. 237; *Van Dyck v. Van Beuren*, 1 Johns. 362.

(w) *Beman v. Tugnot*, 5 Sandf. 153; *Harris v. Rannels*, 12 How. 80.

(x) See the Hon. *Theron Metcalf's* articles 23 Am. Jur. 2. Although a contract contain some provisions or promises void by statute, yet other agreements therein which

¹ As if two classes of items, one legal and the other illegal, are embraced in the same account, recovery may be had upon the lawful items. *Goodwin v. Clark*, 65 Me. 280. But where shares of stock were surrendered for new shares, a part of which were to be used in bribing certain persons and the rest returned to the person surrendering, the agreement to return the remainder was held void, as well as the portion relating to bribery. *Tobey v. Robinson*, 99 Ill. 222. So where a note was given for bags of fertilizer, some of which were not branded as required by law, it was held that the contract was entire and the whole promise failed. *Allen v. Pearce*, 84 Ga. 606. — W.

unless it contain an express provision that all * such agree- * 458
ments shall be wholly void, (y) and then the contract is
entirely void; as, for example, a promissory note even in the
hands of an innocent indorsee. (z) But, while the law is suffi-
ciently distinct where the whole consideration or the whole
promise is illegal, questions still remain, where the illegality is
but partial, which can only be determined by further adjudication.

Where the consideration is altogether illegal, it is insufficient
to sustain a promise, and the agreement is wholly void. This is
so equally, whether the law which is violated be statute law or
common law. It has been held in England, (a) that where a
statute provided a penalty for an act, without prohibiting the act
in express terms, there the penalty was the only legal consequence
of a violation of the law, and a contract which implied or required
such violation was nevertheless valid. But Lord *Holt* (b) denied
the doctrine; and Sir *James Mansfield* established a better rule of
law, (c) holding that where a statute provides a penalty for an
act, this is a prohibition of the act. We apprehend that this has
always been the prevailing, if not the uncontradicted rule of law
on this subject in this country. (d) This rule is said not to

would be valid, if standing alone, may still be enforced. See *Monys v. Leake*, 8 T. R. 411; *Kerrison v. Cole*, 8 East, 231; *Doe v. Pitcher*, 6 Taunt. 359; *Greenwood v. Bishop of London*, 5 Taunt. 727; *Newman v. Newman*, 4 M. & Sel. 66; *Wigg v. Shuttleworth*, 13 East, 87; *Gaskell v. King*, 11 East, 165; *Howe v. Synges*, 15 id. 440; *Tinckler v. Prentice*, 4 Taunt. 549; *Fuller v. Abbott*, 4 id. 105; *Shackell v. Rosier*, 2 Bing. N. C. 646; *Jones v. Waite*, 5 id. 841. The case of *Jarvis v. Peck*, 1 Hoff. Ch. 479; s. c. 10 Paige, Ch. 119, so far as it may be considered as having recognized any distinction of this kind, is not in our opinion sound law.

(y) Thus, where the statute declares a certain contract to be "void to all intents and purposes whatever," it has been held, that if such a contract also contain stipulations not within the intent of the statute, the latter will be considered void by force of the statute. See *Crosley v. Arkwright*, 2 T. R. 603; *Dann v. Dollman*, 5 id. 641. (z) *Bridge v. Hubbard*, 15 Mass. 96; *Hay v. Ayling*, 3 El. & E. 416, n.; s. c. 16 Q. B. 423.

(a) *Comyns v. Boyer*, Cro. E. 485; and see *Gremare v. Le Clerk Bois Valon*, 2 Camp. 144.

(b) In *Bartlett v. Vinor*, Carth. 252; s. c. Skin. 322, *Holt*, C. J., said: "Every contract made for or about any matter or

thing which is prohibited or made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

(c) *Drury v. Defontaine*, 1 Taunt. 136.

(d) *Wheeler v. Russell*, 17 Mass. 258; *Coombs v. Emery*, 14 Me. 404; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. De Grand*, 15 Mass. 39; *Seidenbender v. Charles*, 4 S. & R. 159; *Mitchell v. Smith*, 1 Binn. 118; *Sharp v. Teese*, 4 Halst. 352; *De Begnis v. Armistead*, 10 Binn. 107; s. c. 3 M. & Scott, 516; *Cope v. Rowlands*, 2 M. & W. 149; *Fergusson v. Norman*, 5 Bing. N. C. 86; *Territt v. Bartlett*, 21 Vt. 184; *Bancroft v. Dumas*, 21 Vt. 456; *Bell v. Quin*, 2 Sandf. 146; *Eberman v. Reitzell*, 1 W. & S. 181; *Hale v. Henderson*, 4 Humph. 199; *Elkins v. Parkhurst*, 17 Vt. 105; *Brackett v. Hoyt*, 9 Foster (N. H.), 264; *Griffith v. Wells*, 3 Denio, 226. — The repeal of a prohibitory act will not *per se* render valid a contract made during the existence of the act, contrary to its provisions. But the legislature may give a remedy by express enactment. *Milne v. Huber*, 3 McLean, 212. By the laws of New York every contribution of money intended to promote the election of any

* 459 apply, however, where the *penalty is for some other purpose than to make the act illegal, as to raise a revenue, etc. We think this distinction very difficult. (e)

SECTION XIII.

IMPOSSIBLE CONSIDERATIONS.

Impossible considerations are wholly bad and insufficient. We have seen that a consideration which one cannot perform without a breach of the law is bad, and so is one which cannot be performed at all. (f) The reason is obvious from such

person or ticket is prohibited by the statute (1 R. S. 136, § 6), except for defraying the expenses of printing, and the circulation of votes, handbills, and other papers, previous to such election; and this, whether the immediate purpose for which the money is designed be in itself corrupt or not; and, in *Jackson v. Walker*, 5 Hill (N. Y.), 27, where the defendant agreed to pay the plaintiff \$1,000, in consideration that the latter, who had built a log cabin, would keep it open for the accommodation of political meetings to further the success of certain persons nominated for members of Congress, &c., it was held that the agreement was illegal, and could not be enforced. (x) See also *Cundell v. Dawson*, 4 C. B. 376; *Jerome v. Bigelow*, 66 Ill. 452.

(e) In *Cundell v. Dawson*, 4 C. B. 376, *Wilde*, C. J., intimated, that statutes enacted simply for the security of the rev-

enue, did not come within the principle. And in *Smith v. Mawhood*, 14 M. & W. 452, it was held that the excise act, requiring certain things of dealers in tobacco, did not avoid a contract of sale of tobacco by one not complying with these requisitions, as their effect is only to impose a penalty. But where it appears to be the intention of the legislature to prohibit a contract as well as to impose a penalty for making it, such contract is illegal and void, although the prohibition be intended only for purposes of revenue. And see *Abbot v. Rogers*, 30 E. L. & E. 446; s. c. 16 C. B. 277, and *Lewis v. Welch*, 14 N. H. 294; *Ellis v. Higgins*, 32 Me. 34, and *Hill v. Smith*, *Morris* (Iowa), 70.

(f) 5 Vin. Abr. 110, 111, *Condition* (C.) a, (D) a; 1 Roll. Abr. 419; Co. Lit. 206 a; 2 Bl. Com. 341; *Shep. Touch.* 164. See 22 Am. Jur. 20-22. In *Nerot v.*

(x) So a secret political agreement for the editorial influence and favor of a newspaper has recently been held illegal. *Livingston v. Page* (Vt.), 52 Atl. 965. So of log-rolling contracts, and agreements for influencing a branch of a city government by signing a petition by property-owners as to such matters as laying street-railway tracts. *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, 32, 45 N. E. 507, 35 L. R. A. 588; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466, 51 N. E. 552; *Richardson v. Scott's Bluff Co.*, 59 Neb. 400, 81 N. W. 309, 80 Am. St. Rep. 682; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735; *Savill Bros. Lim'd v. Langman*, 79 L. T. 44. It is not against public policy to pay one for becoming a director in a corporation: *Almy v. Orne*, 165 Mass. 126, 42 N. E. 561; or for a majority of stockholders to agree to

act together: *Brightman v. Bates*, 175 Mass. 108, 55 N. E. 809; or to employ an attorney to influence the official action of the Secretary of the Interior as to the issue of patents on timber-land entries: *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; or to agree to reimburse a sheriff for the pay of special deputies necessary to protect the promisor's property from a mob. *McCandless v. Alleghany Bessemer Steel Co.*, 152 Penn. St. 139, 25 Atl. 579.

Public policy does not permit contracting parties to declare their relation to be different from that fixed and allowed by law. *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763. There can be no estoppel as to contracts void because contrary to public policy. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960, 51 L. R. A. 889.

* consideration no possible benefit or advantage could be * 460 derived to the one party, and no detriment to the other; and if that which is offered or provided as a consideration cannot happen, the mere words alone are a nullity. It is undoubtedly possible, that one may make a promise which is utterly impossible to perform, and nevertheless the promisee may derive a positive advantage from the mere fact that the promise is made. In such a case, supposing the transaction free from all taint of fraud, this advantage would be a good consideration, but not the promise by itself.

But a promise is not void, merely because it is difficult, or even improbable. And it seems that if the impossibility applies to the promisor personally, there being neither natural impossibility in the thing, nor illegality nor immorality, then he is bound by his undertaking, and it is a good consideration for

* the promise of another. (g) The reason of this appears * 461 to be, that if a party binds himself to such an undertaking, he may either procure the thing to be done by those who can do it, or else pay damages for not doing it. (x) The party receiving

Wallace, 3 T. R. 17, Lord *Kenyon* observed: "Every person, who in consideration of some advantage, either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go, and that not only in fact but in law. Now the promise made the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform, because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them. The assignees did not stipulate only for their own acts, but also that the commissioners should forbear to examine the bankrupt; but

clearly they had no right to tie up the hands of the commissioners by any such agreement." And see *Ashurst*, J.'s, observations.

(g) See Co. Lit. 206 a, n. 1; Platt on Cov. 569; 3 Chitty on Com. Law, 101; *Blight v. Page*, 3 B. & P. 296, n.; *Worsley v. Wood*, 6 T. R. 718, *Kenyon*, C. J. And see *Tuffnell v. Constable*, 7 A. & E. 798, *arguendo*. It will be no excuse for the non-performance of an agreement to deliver goods of a certain quantity or quality, that they could not be obtained at the particular season when the contract was to be executed. *Gilpins v. Consequa*, 1 Pet. C. C. 91; *Youqua v. Nixon*, id. 221. And see *Mactier v. Frith*, 6 Wend. 103, 123.

(x) When the law creates a duty, and the party is disabled from its performance without his own fault, the law excuses him; but he is bound to fulfil duties or obligations created by his own contract, even in cases of accident or insurmountable obstacles. *Chicago, &c. Ry. Co. v. Hoyt*, 149 U. S. 1, 13 S. Ct. 779, 37 L. Ed. 629, 39 Fed. 415; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 45 Atl. 692, 81 Am. St. Rep. 467. If the obstacle cannot reasonably be supposed to have been in the parties' contemplation when they contracted, it will not be held included in general words

which do not necessarily refer to it as a possibility. *Chicago, &c. Ry. Co. v. Hoyt*, *supra*.

In a contract for repairing a building it is an implied condition that the building shall continue to exist, and if it is destroyed without the fault of the contractor, he may recover for what he has already done. *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455. And inability, from sickness or disease, of one party to perform a contract for work excuses non-performance by either party. *Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522.

such a promise may know that the promisor himself cannot do the thing he undertakes, but may not know that he has not already made, or has it not in his power to make, such arrangement with him who can do it as will secure its being done. He has a right, therefore, to expect that it will be done, and to pay for such promise or undertaking, either by his own promise or otherwise. But if the thing undertaken is in its own nature and obviously impossible, he cannot expect it will be done; and to enter into any transaction based upon such undertaking, is a fraud or a folly which the law will not sanction. Hence, it would seem that an engagement by one, entered into with a second party, that a third party shall do something which the first cannot do, is a good consideration for a promise by the second party. (*h*) The cases which seem to oppose this rule are, * 462 generally, at least, * cases in which the consideration was open to the objection of illegality. (*i*)

By the Code Napoleon, B. 3, tit. 3, c. 4, s. 1, it appears, that while a promise to do an impossible thing is null, a promise *not* to do an impossible thing is a sufficient foundation for an obligation which rests upon it. We have no such distinction in the common law.

SECTION XIV.

FAILURE OF CONSIDERATION.

When the consideration appears to be valuable and sufficient, but turns out to be wholly false or a mere nullity, or where it may have been actually good, but before any part of the contract has been performed by either party, and before any benefit has been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, there a promise resting on this consideration is no longer obligatory, and the party paying or depositing money upon it can recover it back. (*j*) But where the consideration fails only in *part*, prin-

(*h*) Thus a promise to procure the consent of a landlord to the assignment of a lease is binding. *Lloyd v. Crispe*, 5 Taunt. 249. And where one of several partners in a *firm* agreed to introduce the plaintiff (a stranger) into it, it was decided that the agreement was valid, although the other partners were ignorant of its existence, and their assent was of course essential to the admission of the plaintiff. *McNeil v. Reed*, 2 M. & Scott, 89; s. c. 9 Bing. 68.

(*i*) *Harvey v. Gibbons*, 2 Lev. 161, sometimes cited as showing that a contract is void if the consideration is impossible, may be rested more properly on the ground that the consideration was illegal. So of *Nerot v. Wallace*, 3 T. R. 17 *supra*, note (*f*), p. * 459.

(*j*) *Woodward v. Cowing*, 13 Mass. 216; *Moses v. Macferlan*, 3 Burr. 1012; *Spring v. Coffin*, 10 Mass. 34; *Lacoste v. Flotard*, 1 Rep. Const. Ct. 467; *Wharton v. O'Hara*, 2 Nott & McC. 65; *Pettibone*

ciples analogous to those which govern an inquiry into the adequacy of a consideration would be applied to it. If there * were a substantial consideration left, although much * 463 diminished, it would still suffice to sustain the contract.

But if the diminution or failure were such as in effect and reality to take away all the value of the consideration, it would be regarded as one that had wholly failed. But if the consideration, and the agreement founded upon it, both consisted of several parts, and a part of the consideration failed, and the appropriate part of the agreement could be apportioned to it, then they might be treated as several contracts, and a recovery of money paid be had accordingly. (k) (x)

It is often difficult to say whether a consideration is divisible and capable of apportionment, or so entire that it must stand or fall together. (l) Perhaps no better rule can be given than * that if the thing to be done be in its own nature * 464 separable and divisible, and there be no express stipulation

n. *Roberts*, 2 Root, 258; *Boyd v. Anderson*, 1 Overt. 438; *Murray v. Carret*, 3 Call. 373; *Treat v. Orono*, 26 Me. 217; *Sanford v. Dodd*, 2 Day, 437; *Colville v. Besley*, 2 Denio, 139, *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491; affirmed in 1 Q. B. D. 679; *Wilson v. Hentges*, 26 Minn. 288. The failure of consideration must be *total*. *Charlton v. Lay*, 5 Humph. 496; *Dean v. Mason*, 4 Conn. 428. The measure of damages in such a case is the sum paid; no allowance is to be made for the plaintiff's loss and disappointment. *Neel v. Deens*, 1 Nott & McC. 210. No action lies on an agreement promising to pay for tuition for a specified time, if, during the whole of that time, the promisor was prevented by ill-

ness from attending and receiving the tuition. *Stewart v. Loring*, 5 Allen, 306.

(k) See *Franklin v. Miller*, 4 A. & E. 605; *Ritchie v. Atkinson*, 10 East, 295; *Roberts v. Havelock*, 3 B. & Ad. 404.

(l) See *Adlard v. Booth*, 7 C. & P. 108; *Chapel v. Hickey*, 2 Cr. & M. 214. The plaintiff is not entitled to the actual value of his labor *per se*, but only the agreed price *minus* such a sum as would complete the work according to the contract. *Thornton v. Place*, 1 Man. & R. 218. In *Ellis v. Hamlen*, 3 Taunt. 53, it was *held*, that if a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover, upon a *quantum valebant*, for the work, labor, and materials.

(x) In general, the consideration of a contract is entire when the contract itself is entire; and, the parties' rights being reciprocal, full performance by one is required to his claiming any benefit under the contract from the other. *Diefenback v. Stark*, 56 Wis. 462, 468, 14 N. W. 621, 43 Am. Rep. 719; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826; *Huyett & Smith Manuf. Co. v. Chicago Edison Co.* (157 Ill. 233), 59 Am. St. Rep. 272, 277 n.; *Tripp v. Smith*, 180 Mass. 122, 61 N. E. 804.

"There is no authority, and no principle in reason or law, for saying that where a purpose or consideration has not entirely (but only partially) failed and is not really apportionable, the Court will ap-

portion it for the purposes of directing payment." *Per Fry, L. J.*, in *Boote cum-Linacre v. County Council*, 60 L. J. Q. B. 323, 331.

A person who agrees for consideration to provide for another during life, and fails to do so, is not entitled to any part of the agreed consideration, and, if it is already paid, he may recover it back. *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Lathrop v. Mayer*, 86 Mo. App. 355; *Cummings v. Moore* (Tex. Civ. App.), 65 S. W. 1113. See *Smith v. Blandin*, 133 Cal. 441, 65 Pac. 894; *Owen v. Pomona L. & W. Co.*, 131 Cal. 530, 63 Pac. 850, 64 id. 253; *Szymanski v. Chapman*, 61 N. Y. S. 310.

or necessary implication which makes it absolutely one thing, and that part which fails may be regarded, to use the language of the court in one case, "not as a condition going to the *essence* of the contract," (*m*) in such case the failure does not destroy the rights growing out of the performance of the residue. (*x*)

* 465 But the other * party may have his claim or action for damages arising from such failure. (*n*)

In Vermont it seems to be the law, that the maker of a note cannot avail himself of a partial failure of the consideration, unless he has offered to rescind the contract. (*o*)

The bargain may, perhaps, be such as to preclude an inquiry into failure of consideration. As if one buys a cargo of corn to arrive, "the quantity to be taken from the bill of lading," and that quantity is paid for, the buyer cannot recover back a part of the price, because the cargo is short, nor could the seller demand more if it went beyond the bill; supposing good faith on both sides. (*p*) Here, however, if a few bags or bushels only, instead of the cargo bargained for, should arrive, it would seem difficult to hold the buyer for the whole price. Such contracts are like those for the purchase of land, where the contents or dimensions of the lot are stated with the addition of "more or less."

The intention being to prevent an unimportant variation * 466 * from annulling the bargain, or raising new questions; but not to prevent the effect of a failure of consideration, which, though not absolutely complete, or, strictly speaking, partial and not total, is still substantially total.

(*m*) See *Lucas v. Godwin*, 3 Bing. N. C. 746; *Mondel v. Steel*, 8 M. & W. 870; *Chapel v. Hickes*, 2 Cr. & M. 214; *Allen v. Cameron*, 3 Tyr. 907. Lord *Ellenborough* seems to have laid down the just rule in *Farnsworth v. Garrard*, 1 Camp. 38, where it was held that when the plaintiff declares on a *quantum meruit* for work and labor done and materials found, the defendant may reduce the damages, by showing that the work was improperly done; and may entitle himself to a verdict by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.

(*n*) Although it was formerly held that the only remedy was by cross action (*Tye v. Gwynne*, 2 Camp. 346; *Moggridge v. Jones*, 3 id. 38), yet the party may now

resort to the cross action or not, at his election. *Harrington v. Stratton*, 22 Pick. 510; *Mixer v. Coburn*, 11 Met. 559; *Perley v. Balch*, 23 Pick. 286; *Hammatt v. Emerson*, 27 Me. 308; *Coburn v. Ware*, 30 Me. 202; *Spalding v. Vandercook*, 2 Wend. 431; *Drew v. Towle*, 7 Foster (N. H.) 412; *Albertson v. Halloway*, 16 Ga. 377. The cases of *Scudder v. Andrews*, 2 McLean, 564; *Pierce v. Cameron*, 7 Rich. L. 114; *Pulsifer v. Hotchkiss*, 12 Conn. 234, and some others, seem, however, not in accordance with this principle. See, however, as to this last case, *Andrews v. Wheaton*, 23 Conn. 112.

(*o*) *Burton v. Schermerhorn*, 21 Vt. 289.

(*p*) *Covas v. Bingham*, 22 E. L. & E. 183; s. c. 2 E. & B. 836.

(*x*) See *Barrus v. Phaneuf*, 166 Mass. 123, 45 N. E. 54. The consideration of a conditional promise does not fail merely because the condition is not satisfied and

the promise calls for no performance. *Gulton v. Marcus*, 165 Mass. 335, 43 N. E. 125.

While it is true that a failure of consideration is a good ground for the recovery of the money paid, it is a familiar and well-settled principle of law, that where a person with full knowledge of all the circumstances pays money voluntarily, and without compulsion or duress of persons or goods, he shall not afterwards recover back the money so paid. (*q*) But money paid by a mistake of fact which causes an unfounded belief of a liability to pay, may generally be recovered back, (*qq*) even if the mistake arises from negligence; (*qr*) but not if the mistake affects only the motives of the party in paying the money, and not his obligation. (*qs*)

SECTION XV.

RIGHTS OF A STRANGER TO THE CONSIDERATION.

In some cases, in which the consideration did not pass directly from a plaintiff, and the promise was not made directly to him, it has been made a question how far he might avail himself of it, and bring an action in his own name, instead of the name of the party from whom the consideration moved, and to whom the promise was made. It seems to have been anciently held (*r*) as a rule of law (though not universally so), (*s*) that no stranger to the consideration of an agreement could have an action on such agreement, although it were made expressly for his benefit; and this rule has been recognized and enforced in modern times. (*t*) But it is certain that if the * actual promisee * 467 is merely the agent of the party to be benefited, that party may sue upon the promise, whether his relation to and interest in the agreement were known or not. (*u*) (*x*) This, however, rests

(*q*) This rule is well considered in *Forbes v. Appleton*, 5 Cush. 117. For illustrations of the kind of duress which avoids it, see *Preston v. Boston*, 12 Pick. 7, and *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181. Also *Fulham v. Down*, 6 Esp. 26, n.; *Hills v. Street*, 5 Bing. 37; *Snowdon v. Davis*, 1 Taunt. 359.

(*qq*) *Cox v. Prentice*, 3 M. & S. 344; *Dails v. Lloyd*, 12 Q. B. 531; *Townsend v. Crowdy*, 29 L. J. C. 300; *Barber v. Brown*, 26 L. J. C. 41; *Milnes v. Duncan*, 6 B. & C. 671; *Standish v. Ross*, 3 Exch. 527; *Mills v. Alderbury Union*, 3 Exch. 590.

(*qr*) *Kelly v. Solari*, 9 M. & W. 54, 58;

Bell v. Gardiner, 4 M. & G. 11; *Townsend v. Crowdy*, 8 C. B. (N. S.) 477.

(*qs*) *Aiken v. Short*, 25 L. J. Exch. 321; *Chambers v. Miller*, 32 L. J. C. 30; *Martin v. Morgan*, 1 B. & B. 239.

(*r*) *Crow v. Rogers*, 1 Stra. 592; *Bourne v. Mason*, 1 Vent. 6; s. c. 2 Keb. 457, Bull. N. P. 134. And in the late case of *Jones v. Robinson*, 1 Exch. 456, *Parke*, B., says: "It is true that no stranger to the consideration can sue."

(*s*) *Dutton v. Poole*, 1 Vent. 318, 332; s. c. T. Jones, 103, 2 Lev. 210.

(*t*) *Price v. Easton*, 4 B. & Ad. 433; s. c. 1 Nev. & M. 303.

(*u*) As in the familiar instance of principals suing for goods sold by their factors,

(*x*) See *supra*, p. * 49, n. (*x*). The rule that the consideration for a promise

must move from the promisee holds good in ordinary cases where a promise is made

upon the ground that the consideration actually moves from such party, and that he cannot be regarded as a stranger to it. But it seems to be held in recent cases, that, while the rule itself is not denied, it would generally be held inapplicable where the beneficiary has any concern whatever in the transaction. (*v*) (*x*) In some

who may be supposed perhaps to have been the principals, and to whom alone the promise was made. *Hornby v. Lacy*, 6 M. & Sel. 166; *Coppin v. Craig*, 7 Taunt. 243; *Morris v. Cleasby*, 1 M. & Sel. 576.

to one man for another's benefit; but it does not apply when the consideration is supplied by an agent who obtains the promise for and on behalf of his principal. *Fleming v. Bank of New Zealand*, 83 L. T. 1.

A third person can sue upon a contract, though made for his benefit, only when the promisee owes him some duty or obligation, or he is a party to the consideration. *Murphy v. Whitney*, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123; *Embler v. Hartford Steam Boiler Insp. Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512, 40 N. Y. S. 450; *Norwich Union F. Ins. Society v. Weilhouse*, 113 Ga. 970, 39 S. E. 397; *Dexter v. Sayward*, 51 Fed. 729; *Baxter v. Camp* (71 Conn. 245), 71 Am. St. Rep. 169, 176 n.; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861, 10 L. R. A. 815; *Roddy v. Mo. Pac. Ry. Co.*, 104 Mo. 234, 15 S. W. 1112; 15 Harv. L. Rev. 767; *Ibid.* 43; *supra*, p. 248 n. The fact that one will profit incidentally from the enforcement of a vendee's covenant to repair a ditch which has been substituted for a natural watercourse does not enable him to rely thereon for his own benefit. *Case v. Hoffman*, 100 Wis. 314, 75 N. W. 945, 44 L. R. A. 728.

So one who has supplied materials to a contractor cannot sue the sureties upon a bond to secure his pay. *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, and extended note. Even in equity, the third person must have an actual, beneficial interest placing him in the position of a *cestui que trust* under the contract. *Gandy v. Gandy*, 30 Ch. D. 57; *Clarke v. Birley*, 41 id. 422, 433; *Case v. Hoffman*, *supra*. But, upon subscriptions for a college established by a church, the college, as the beneficiary, has the right to sue. *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636. On the other side, with respect to the subscribers, individual subscriptions are

(*v*) See, *e. g.*, *Lilly v. Hays*, 1 Nev. & P. 26; s. c. 5 A. & E. 550. See also *Jones v. Robinson*, 1 Exch. 454; *Thomas v. Thomas*, 2 Q. B. 85; *Hinkley v. Fowler*, 15 Me. 285; *Carnegie v. Morrison*, 2 Met. 401; *Dolph v. White*, 2 Kern. 296.

several, and not joint, contracts. See *Cornish & Co. v. West*, 82 Minn. 107, 84 N. W. 750; *Chicago Bldg. & Manuf. Co. v. Graham*, 78 Fed. 83, 41 U. S. App. 680.

The assignee of a judgment, when its real owner, may sue an attaching officer, for not accounting for goods sold, either in his own name or in the name of the assignor, if he does not object. *Jackson v. Smith*, 52 N. H. 9. An outsider may also be enabled by statute to sue on a contract. *In re Rotherham Alum Co.*, 25 Ch. D. 103, 111. The Cal. Civil Code, § 1559, by which "a contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it," does not apply when the third person is only remotely or incidentally to be benefited as a result of the contract. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862.

(*x*) See Prof. Williston's articles in 15 Harv. L. Rev. 767; 16 Id. 43; *Hall v. Alford* (Ky.), 49 S. W. 444; *Electric Appliance Co. v. U. S. Fidelity Co.* (Wis.), 53 L. R. A. 609 and note. In Massachusetts, when a party to a contract who is unwilling or hesitates to perform it because a hard one, is requested by a third person who is interested in its performance, though having no legal means of compelling it or of recovering damages for its breach, yet makes an independent promise to pay for such performance, he is bound by such promise. *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197. See *Monahan v. Judd*, 165 Mass. 93, 42 N. E. 555.

The rule that a written contract cannot be contradicted by parol evidence applies only in suits between its parties and their privies; when the suit is between a party to an instrument and a stranger, either can introduce parol testimony differing from the contents of the instrument. *Hankinson v. Vantine*, 152 N. Y. 20, 30, 47 N. E. 1107; *Emmett v. Penoyer*, 76 Hun. (N. Y.) 551, 28 N. Y. S. 234; *Dunn v. Price*, 112 Cal. 46, 51, 44 Pac. 354. And al-

cases, the actual promisee would be considered only the agent of the beneficiary, and in others the beneficiary would be regarded as the trustee of the party to whom the promise was directly made, and, as such trustee, might maintain an action in his own name. (w) In this country, the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat * more positively asserted; (x) and we * 468 think it would be safe to consider this a prevailing rule with us; indeed it has been held that such promise is to be deemed made to the third party if adopted by him, though he was not cognizant of it when made. (y) (xx)

But where the promise is made under seal, and the action must be debt or covenant, then it must be brought in the name of the party to the instrument; and a third party for whose benefit the promise is made cannot sue upon it. (z)

(w) See *Pigott v. Thompson*, 3 B. & P. 149.

(x) See 22 Am. Jur. 16-20; *Hind v. Holdship*, 2 Watts, 104; *Arnold v. Lyman*, 17 Mass. 400; *Bridge v. Niagara Ins. Co.* 1 Hall, 247; *Jackson v. Mayo*, 11 Mass. 152, n. (a); *Hinkley v. Fowler*, 15 Me. 285; *Hull v. Marston*, 17 Mass. 575; *Felton v. Dickinson*, 10 id. 287; *Helms v. Kearns*, 40 Ind. 124; *Delaware & H. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *National Bank v. Grand Lodge*, 98 U. S. 123; *Keller v. Ashford*, 133 U. S. 6; *Lawrence v. Fox*, 20 N. Y. 268; *Gifford v. Corrigan*, 117 N. Y. 257; *Beers v. Robinson*, 9 Penn. St. 229. But see *contra* *Exchange Bank v. Rice*, 107 Mass. 37. This question was fully examined in *Carnegie v. Morrison*, 2 Met. 381, by *Shaw*, C. J., the old case of *Dutton v. Poole*, 1 Vent. 318, being adopted as good law, and in *Brewer v. Dyer*, 7 Cush. 337, the same doctrine is reaffirmed. — So the American

courts have held, that a promise to three, upon a consideration moving from them and a fourth person, will support an action by the three. *Cabot v. Haskins*, 3 Pick. 83. See also *Farrow v. Turner*, 2 A. K. Marsh. 496; *Crocker v. Higgins*, 7 Conn. 347; *Miller v. Drake*, 1 Caines, 45. See also *Bigelow v. Davis*, 16 Barb. 561.

(y) *Lawrence v. Fox*, 20 N. Y. 268; *Steman v. Harrison*, 42 Penn. St. 49.

(z) *Lord Southampton v. Brown*, 6 B. & C. 718; *Offly v. Ward*, 1 Lev. 225; *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Hinkley v. Fowler*, 15 Me. 285; *Flynn v. No. American Ins. Co.*, 115 Mass. 449; *Crowell v. Currier*, 12 C. E. Green, 152; *Fairchild v. North-eastern Ins. Co.*, 51 Vt. 613. But see, *contra*, *Garvin v. Mobley*, 1 Cush. 48; *Rogers v. Gosnell*, 51 Mo. 466; *Coster v. Mayo*, 43 N. Y. 399; *Bassett v. Hughes*, 43 Wis. 319.

though a contract may be partly written and partly oral (see *supra*, p. * 430 n. (y)), the collateral parol agreement can properly relate only to a subject distinct from that to which the written contract applies. *Godkin v. Monahan*, 83 Fed. 116, 119; *Rackemann v. Riverbank Impr. Co.*, 167 Mass. 1, 44 N. E. 990; *Huffman v. Ellis* (Neb.), 90 N. W. 552; *Peterson v. Chicago, &c. Ry. Co.*, 80 Iowa, 92, 98, 45 N. W. 573. It is at least doubtful whether a contemporaneous oral contract, purposely omitted from a sealed written contract, can, either as to subject-matter or parties, be set up to contradict and destroy it. See *Shea v. Leisy*, 85 Fed. 243, 245.

(xx) In Massachusetts, the rule is now settled, practically without exception, that upon an agreement, for good consideration, that one party will pay, out of funds in his hands belonging to the other party, a specified sum to a third person, who is not a party to the agreement, and from whom no consideration moves, no action lies in favor of such third person to recover the money so held from the party holding it. *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381, 21 N. E. 947; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Saunders v. Saunders*, 154 Mass. 337, 28

SECTION XVI.

THE TIME OF THE CONSIDERATION.

Considerations may be of the past, of the present, or of the future. When the consideration and the promise founded upon it are simultaneous, then the consideration is of the present time; the whole agreement is completed at once, and the consideration and the promise are concurrent. When the consideration is to do a thing hereafter, it is of the future, and is said to be executory; when the promise to do this is accepted, and a promise in return founded upon it, this latter promise rests on a sufficient foundation, and is obligatory. When the consideration is wholly past, it is said to be executed; and in relation to considerations of this kind many nice questions have arisen.

It may be stated, as the general rule, that a past or executed * 469 consideration is not sufficient to sustain a promise founded upon it, unless there was a request for the consideration previous to its being done or made. (x) This request should be alleged, in a declaration which sets forth an executed consideration, as that on which the promise is founded that is sought to be enforced. Without such previous request a subsequent promise has no force; because the consideration being entirely completed and exhausted, it cannot be considered that it would not have been made or given, but for a promise which is subsequent and independent. A familiar illustration is afforded by the case of a guarantor. If one lends money to another, and at a subsequent time a third party, who did not request the loan, and is not benefited by it, promises to see that it is repaid, such promise is

N. E. 270; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469. As to contracts under seal, clearly only those who are parties to them can sue thereon. *Flynn v. Mass. Benefit Ass'n*, 152 Mass. 288, 25 N. E. 716; *Saunders v. Saunders*, *supra*. Yet, when a party has a remedy over against another's act, which he is summoned to defend, either for breach of contract or for negligence, he may by proper notice call upon such other person to defend the suit, and recover from him both the amount of the judgment against himself and the reasonable expenses incurred in the defence. *Westfield v. Mayo*, 122 Mass. 100, 109, 23 Am. Rep. 292; *Consolidated Hand-Method L. M. Co. v. Bradley*, 171 Mass. 127, 50 N. E. 464.

(x) In general, past transactions or acts are a sufficient consideration only when performed in pursuance of a previous request. See *Montgomery v. Downey* (Iowa), 88 N. W. 810; *Chamberlin v. Whitford*, 102 Mass. 448; *Holloway v. Rudy* (Ky.), 10 S. W. 650; *Baker v. Union Stock-Yards Nat. Bank* (Neb.), 89 N. W. 269; *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748; *Ferguson v. Harris* (39 S. C. 323), 39 Am. St. Rep. 731, 740 n.; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588; *Myers v. Dean*, 32 N. Y. S. 237. A promise of personal service is a good consideration for a promise to pay for past and future services. *Graham v. Stanton*, 177 Mass. 321; 58 N. E. 1023.

void, because no consideration passes from the promisee to the promisor. But if the promisor requests the loan, or if his promise is made previous to the loan, or at the same time, then it will be supposed that the loan is made because of the promise. It will also be supposed, that the promisor is benefited by the loan because he requests it, or, at least, that the lender parts with his money in consequence of the promise, and this is a detriment to him, at the instance of the promisor, which is equally good by way of a consideration.

But this previous request need not always be express or proved, because it is often implied. As, in the first place, where one accepts or retains the beneficial result of such voluntary service. Here, the law generally implies both a previous request and a subsequent promise of repayment. No one can compel another to accept a gratuitous and unrequested service; no one can make himself the creditor of another, without his consent, or against his will. But if that other chooses to accept such service or, the service being rendered voluntarily, chooses to retain all the benefit thereof to himself, this puts the service on the same footing, in the law, as one rendered at request, and for which a promise is made. The cases where goods are supplied to an infant, and the father is held responsible, often fall within this rule. (a)

* And, in the second place, where one is compelled to * 470 do for another what that other should do, and was compellable to do. Here also the law implies, not only a previous request that the thing should be done, but also a promise to compensate for the doing of it. (b) As where one is surety for another,

(a) See *Law v. Wilkin*, 6 A. & E. 718; *Fishmongers' Co. v. Robertson*, 5 Man. & G. 192; *Doe v. Taniere*, 13 Jur. 119; *Abbot v. Hermon*, 7 Greenl. (Bennett's ed.) 118, n. See also *Roberts v. Marston*, 20 Me. 275; *Hayden v. Madison*, 7 Greenl. 76; *Weston v. Davis*, 24 Me. 374; *Hatch v. Purcell*, 1 Foster (N. H.), 544; *Newell v. Hill*, 2 Met. 180. If a conveyance of an interest in land be made in the common form of a quit-claim deed, containing this stipulation, "provided said grantee shall pay said grantor or his assigns, twenty-two dollars annually from this date on demand," until the happening of a certain event; and the grantee holds under the deed, but fails to make the annual payments when demanded, the grantor may sustain an action of assumpsit against the grantee to recover the money. *Huff v. Nickerson*, 27 N. E. 106. — But if one

build a house for his own convenience on the land of another, by his permission, there is no implied agreement on the part of the owner of the land to pay the value of such house. *Wells v. Banister*, 4 Mass. 514. Neither can a school district be held liable for unauthorized repairs upon their school-house, from the fact that they afterwards used the house; for this acceptance and holding of the repairs cannot be considered as voluntary, because the house could not well be used without making use of the repairs. *Davis v. Bradford*, 24 Me. 349. — So the law will not imply a promise on the part of a pauper to pay from his estate moneys expended by the town of his settlement for his support. *Charlestown v. Hubbard*, 9 N. H. 195; *Deer Isle v. Eaton*, 12 Mass. 328.

(b) See *Jeffreys v. Gurr*, 2 B. & Ad. 833; *Pownal v. Ferrand*, 6 B. & C. 439;

and pays the debt which the other owes. Here the surety *471 can recover *what he pays, without proving that the principal debtor either requested him to pay the money, or promised to repay him; for the law implies all this. In receiving him as surety, or in requesting him to become his surety, he will be considered as having requested him to pay the debt; and if such request to pay the debt were express, the general principles of law would imply the promise of repayment. The compulsion in this case must be a legal one; or, in other words, there must be an obligation which the law will enforce. (c)

And, in the third place, where one does voluntarily, and without request, that which he is not compellable to do for another who is compellable to do it. As if one who is not surety, nor bound in any way, pays a debt due from another. He has not the same claim and right as if he had been compellable to pay this debt. For now the law, if there be a subsequent promise to repay the money, will indeed imply the previous request, as, if there had been a previous request, it would have implied a subsequent promise; but it will not imply both the promise and the *472 request, as in the former case. (d) The reason *is, that the debtor shall not be obliged to accept another party as his creditor without his consent. He owes some one; and he may have partial defences, or other reasons for wishing to arrange the debt with him to whom it is due, and not with another; and if another comes in without request or necessity and pays the debt, the debtor is not obliged to substitute him in the place of his original creditor unless he chooses to do it. But he may do this if he so wishes; and if, after the debt is paid by this third party, the debtor choose to promise him repayment, he is held to such promise, and the consideration, although executed, is sufficient, for the law implies a previous request; or, what is the same thing, will not permit the debtor to deny the allegation of such request in the declaration.

It is, however, to be observed, that where the law implies both the previous request and also a subsequent promise, there

Exall v. Partridge, 8 T. R. 308; *Grissell v. Robinson*, 3 Bing. N. C. 10; *Davies v. Humphreys*, 6 M. & W. 153; *Nichols v. Bucknam*, 117 Mass. 483.

(c) *Pitt v. Purssord*, 8 M. & W. 538.

(d) *Wing v. Mill*, 1 B. & Ald. 104. In this case a pauper residing in the parish of A received during his illness a weekly allowance from the parish of B, where he was settled. *Held*, that an apothecary, who attended the pauper, might maintain

an action for the amount of his bill against the overseer of B, who expressly promised to pay the same. — But without such express promise, such action, it seems, could not be maintained. *Paynter v. Williams*, 1 Cr. & M. 819. See further *Doty v. Wilson*, 14 Johns. 378; *Gleason v. Dyke*, 22 Pick. 393; *Dearborn v. Bowman*, 3 Met. 155; *Curtis v. Parks*, 55 Cal. 106; *Patillo v. Smith*, 61 Ga. 265.

no other promise than that which is so implied can be enforced, if the consideration for the promise be an executed one. (e)¹ In * other words, no express promise made after a consider- * 473 ation has been wholly executed, and founded wholly upon that consideration, can be enforced, if it differs from the promise which the law implies. Otherwise, there would be two distinct and perhaps antagonistic promises resting upon one consideration. From what has been said, it will be seen that where the consideration is wholly executed, the law implies in some cases a previous request, provided a promise be proved; but will not imply a request and thence imply a promise. On the other hand, wherever the law implies a promise, there it will also * imply a request; and hence it may be said that express * 474 request is unnecessary where the law implies a promise. (f)²

(e) *Kaye v. Dutton*, 7 Man. & G. 807, where *Tindal*, C. J., said: "Two objections were made to the declaration, first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, namely, *Brown v. Crump*, 1 Marsh. 567, 6 Taunt. 300; *Granger v. Collins*, 6 M. & W. 458; *Hopkins v. Logan*, 5 M. & W. 241; *Jackson v. Cobbin*, 8 M. & W. 790; and *Roscorla v. Thomas*, 3 Q. B. 234; s. c. 2 Gale & D. 508, certainly support that proposition to this extent, that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may, perhaps,

be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate*, and several cases mentioned in the margin of the report of that case, seem to go to that extent; as also do some others collected in *Roll. Abr. Action sur Case (Q.)*." See also *Jackson v. Cobbin*, 8 M. & W. 790; *Hopkins v. Logan*, 5 M. & W. 241; *Lattimore v. Garrard*, 1 Exch. 809; *Roscorla v. Thomas*, 3 Q. B. 235.

(f) Hence, in declaring in an executed consideration, it is not necessary to allege a precedent request where the law will imply a promise without a request. See *Osborne v. Rogers*, 1 Wms. Saund. 264, n. (1), as corrected by the learned note of Mr. Sergeant *Manning*, appended to the case of *Fisher v. Pyne*, 1 Man. & G. 265. See also *Victors v. Davies*, 12 M. & W. 758; *Rastall's Entries*, tit. 'Dette;' and Co. Ent. tit. 'Debt;' *Acome v. The American Mineral Co.*, 11 How. Pr. 24.

¹ In *Pool v. Horner*, 64 Md. 131, the parties intended to enter into an enforceable contract, but failed to do so on account of the Statute of Frauds. Subsequently the plaintiff having performed all the stipulations on his part, the defendant promised to pay \$235 to the plaintiff. It was held that this promise was supported by a sufficient consideration, the plaintiff's acts having been performed at the defendant's request, cf. p. * 454, note 1, *post*. — W.

² "A question still not free from uncertainty is whether a past benefit is in any case a good consideration for a subsequent promise. On our modern principles it should

not be. And it is admitted that it generally is not. For the past service was either rendered without the promisor's consent at the time, or with his consent, but without any intention of claiming a reward as of right, in neither of which cases is there any foundation for a contract; or it was rendered with the promisor's consent and with an expectation known to him of reward as justly due, in which case there were at once all the elements of an agreement for reasonable reward. It is said, however, that services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth." Pollock, *Cont.* (5th ed.) 169. — W.

* CHAPTER II.

* 475

ASSENT OF THE PARTIES.

SECT. I. — *What the assent must be.*

THERE is no contract, unless the parties thereto assent; and they must assent to the same thing in the same sense. (a)¹ (x) A

(a) Hazard v. New England Marine Ins. Co., 1 Sumner, 218. See Bruce v. Pearson, 3 Johns. 534; Greene v. Bateman, 2 Woodb. & M. 359; Tuttle v. Love, 7 Johns. 470; Eliason v. Henshaw, 4 Wheat. 225; Falls v. Gaither, 9 Port. (Ala.) 605; Keller v. Ybarra, 3 Cal. 147; Hutchison v. Bowker, 5 M. & W. 535; Hamilton v. Terry, 10 E. L. & E. 473; s. c. 11 C. B. 954; Barlow v. Scott, 24 N. Y. (10 Smith) 40; Hutcheson v. Blake-man, 3 Met. (Ky.) 80; Holtzman v. Millandon, 18 La. An. 29. See *post*, * 494, note (j).

¹ It is not the merely mental assent of parties to the same proposition that is of importance. It is the assent as expressed by their words or acts which is controlling. This was well expressed by Lord *Blackburn* in a recent case in the House of Lords.

"But when you come to the general proposition which Mr. Justice *Brett* seems to have laid down, that a simple acceptance in your own mind without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of Edward IV. (17 Edw. IV. T. Pasch case 2), Chief Justice *Brian* decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them and would give 2s. 6d. for them, he might take them; that was the justification. . . . *Brian* says: 'Moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, go and look at them, and if you are pleased with them signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact.' I take it, my Lords, that that which was said three hundred years ago and more is the law to this day." *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666, 692. See also pp. 688, 697.

And the same judge in another case said: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." *Smith v. Hughes*, L. R. 6 Q. B. 597, 607. An equally strong statement is made by *Holmes, J.*, in *Mansfield v. Hodgdon*, 147 Mass. 304, 306.

So, where A sold goods to B, supposing that B was acting as agent for C, and solely in reliance on that (B, however, having done nothing to justify A's supposition), B acquires title and his vendee cannot be sued for conversion. *Stoddard v. Ham*, 129 Mass. 383. Cf. *Cundy v. Lindsay*, 1 Q. B. D. 348; 2 Q. B. D. 96; 3 App. Cas. 459. And see *Preston v. Luck*, 27 Ch. D. 497.

The case of *Raffles v. Wichelhaus*, 2 H. & C. 906, might seem opposed to what has

(x) There can be no completed contract freely met in agreement at some time, unless the parties' minds have fully and though the contract, as originally pro-

mere assent does not suffice to constitute a contract, for there may be an assent in a matter of opinion, or in some fact which is done and completed at the time, and therefore leaves no obligation behind it. But a contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual. This is sometimes briefly expressed, by saying, that there must be "a request on the one side and an assent on the other." (b) A mere affirmation, or proposition, is not enough. Nor is this any more a contract if it be in writing than if spoken only. (c)

(b) *Tindal*, C. J., in *Jackson v. Gallo-way*, 5 Bing. N. C. 75.

(c) *Tucker v. Woods*, 12 Johns. 190. See also *Bruce v. Pearson*, 3 Johns. 534 ;

Tuttle v. Love, 7 Johns. 470 ; *Weeks v. Tybald*, Noy, 11 ; 1 Roll. Abr. 6 (M.) pl. 1. To render a proposed contract binding there must be an accession to its

been said. There a sale of goods to arrive "ex 'Peerless' from Bombay," was agreed upon. There were two ships of that name sailing from Bombay, and the parties did not have in mind the same ship. It was *held* that no contract had been made. But as has been well said, "The true ground of the decision was not that each party meant a different thing from the other, . . . but that each said a different thing." Holmes, Common Law, 309. "Peerless" had two meanings, and each party was entitled to insist on the meaning he had given the word. See Markby's Elements of Law, §§ 621-625, § 741. See also *post*, vol. ii. * 498. — W.

posed, was finally assented to in a modified form. *Farrow v. Breslar*, 108 Mich. 564, 66 N. W. 492 ; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683 ; *Patton v. Arney*, 95 Iowa, 664, 64 N. W. 635. In such case an action cannot be maintained upon the original proposition or undertaking. *King v. Faist*, 161 Mass. 449, 37 N. E. 456 ; *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95. "A contract is made when, and not before, it has been executed and accepted by both parties, so as to become binding upon both." *Holder v. Aultman*, 169 U. S. 81, 89, 18 S. Ct. 269, 42 L. Ed. 669. Their failure to agree may arise from incompleteness and vagueness, or from illegality, in their wishes or promises : see *e. g.* *Caldwell v. School District*, 55 Fed. 372 ; *Truitt v. Fahey* (Del.), 52 Atl. 339 ; *Arnold v. Carson* (Mo. App.), 69 S. W. 34 ; *McConnell v. Arkansas Brick Co.* (Ark.), 69 S. W. 559 ; *Ex parte Baxter*, [1892] 2 Q. B. 478 ; from incompetency of one or both parties, which is fully considered *supra*, pp. *293-395 ; (and see the remarks of Mr. Justice Champlin in *McWilliams v. Doran*, 103 Mich. 588, 61 N. W. 881) ; from mistake caused by one party's misrepresentation of material facts : see *e. g.*, *Hingston v. Smith Co.*, 114 Fed. 294 ; *Muller v. Kelly*, 16 Fed. 545 ; *Borden v. Richmond & D. R. Co.*, 113 N. C. 570, 8 S. E. 392 ; *Alexander v. Brogley*, 62

N. J. L. 584, 41 Atl. 691 ; or from fraud, undue influence or duress. See *e. g.*, *Lodge v. Hulings* (N. J. Ch.), 51 Atl. 1015 ; *Tuite v. Hart*, 75 N. Y. S. 1098 ; *Atkinson v. Allen*, 71 Fed. 58, 17 C. C. A. 570 ; *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606.

If all the substantial terms are agreed upon, either verbally or by a series of letters or telegrams, an understanding that the contract shall be reduced to writing does not make it incomplete, if that is not positively stipulated for in express terms. *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431 ; *Disken v. Herter*, 77 N. Y. S. 300 ; *Callanan v. Chapin*, 158 Mass. 113, 32 N. E. 941 ; *Lowrey v. Danforth* (Mo. App.), 69 S. W. 39. Under such a stipulation the oral agreement is not the contract entered into. *Weitz v. Independent District*, 79 Iowa, 423, 44 N. W. 696. If the instrument is to be executed in duplicate, it is in effect one instrument, and becomes effective on the delivery of one or both the copies. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 202, 46 Pac. 926.

Although the law favors the protection and upholding of contracts, yet they cannot be upheld when there is no standard by which damages can be measured for their breach. *Faulkner v. Des Moines Drug Co.* (Iowa), 90 N. W. 585.

* It becomes a contract only when the proposition is met * 476
by an acceptance which corresponds with it entirely and
adequately. (x)

An assent, however, may bind the party, although not express
or in writing, if it can be fairly inferred from his profiting by the
stipulations of the contract. (cd) ¹ (y)

terms by both parties, — a mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it. *Johnston v. Fessler*, 7 Watts, 48; *Ball v. Newton*, 7 Cush. 599; and see *Meynell v. Surtees*, 31 E. L. & E. 475; *Eskridge v. Glover*, 5 Stew. & P. 264; *Cope v. Albinson*, 16 E. L. & E. 470; s. c. 8 Exch.

185; *Governor v. Petch*, 28 E. L. & E. 470; s. c. 10 Exch. 610.

(cd) *Smith v. Morse*, 20 La. An. 220; *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666; *Boyd v. Brinckin*, 55 Cal. 427; *Pickrel v. Rose*, 87 Ill. 263; *Baines v. Shoemaker*, 112 Ind. 512; *Botkin v. McIntyre*, 81 Mo. 557; *Allen v. Chouteau*, 102 Mo. 309.

¹ In unilateral contracts it is often, if not generally, the case that acceptance of the offer is only to be inferred from the performance of the consideration. If this is performed in accordance with the terms of the offer, a contract is thereby formed without notifying the offerer of the intention to perform or of the completion of performance. See *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666, 691; *Mathewson v. Fitch*, 22 Cal. 86; *Perkins v. Hadsell*, 50 Ill. 216; *Train v. Gold*, 5 Pick. 380, 385; *Cottage Street Church v. Kendall*, 121 Mass. 528, 530; *Wellington v. Apthorp*, 145 Mass. 69, 73; *Todd v. Weber*, 95 N. Y. 181, 191; *Miller v. McKenzie*, 95 N. Y. 575; *Dayton, &c. Co. v. Coy*, 13 Ohio St. 84, 92; *Patton's Ex. v. Hassinger*, 69 Pa. 311; *Reif v. Page*, 55 Wis. 496. This was well expressed by *Knowlton, J.*, in *First Nat. Bank v. Watkins*, 154 Mass. 385, 387. "It would be an ordinary case of a unilateral contract growing out of an offer of one party to do something if the other will do or refrain from doing something else. If the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer before the action is unnecessary." — W.

(x) The acceptance may be complete and absolute though accompanied by a request for a privilege which the offerer is left at liberty to grant or not at his election. *Culton v. Gilchrist*, 92 Iowa, 718, 61 N. W. 384; see *De Jonge v. Hunt*, 103 Mich. 94, 61 N. W. 341; *Keweenaw Ass'n v. Friedrich*, 112 Mich. 442, 70 N. W. 896.

There must always be a binding offer as well as a complete acceptance, and letters and suggestions do not form a contract unless written with intention to contract. *Patton v. Arney*, 95 Iowa, 664, 64 N. W. 635; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934; *Crooke S. & R. Co. v. Towle*, 13 N. Y. S. 520; *Allen v. Chouteau*, 102 Mo. 309. The owner's statement of his lowest price does not bind him to sell to him who asks. *Harvey v. Facey*, [1893] A. C. 552; see *Leskie v. Haseltine*, 155 Penn. St. 98, 25 Atl. 886.

In Alabama, it is held that an offer deposited in the mail becomes effective as a contract, if accepted, from the date of

mailing. *Hatchett v. Molton*, 76 Ala. 410; *Davis v. Davis*, 93 Ala. 173.

(y) "A contract is express when the parties show their assent in words; it is implied when they show it by acts. In either case the assent must be by one having power to give it." *Foulke & Lyon v. Jackson County*, 84 Iowa, 616, 51 N. W. 71. The meeting of the parties' minds is as essential to the making of an implied as well as an express contract, if the implied contract is an actual and not merely a constructive agreement. *Columbus, H. V. & T. Ry. Co. v. Gaffney (Ohio)*, 61 N. E. 152. Acceptance of a contract by one who does not sign it may be as complete as a formal execution if it be assented to, held, and acted on as a valid instrument. *Vogel v. Pekoe*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 391; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *Home Sav. Ass'n v. Noblesville Monthly Meeting (Ind. App.)*, 64 N. E. 478. So acceptance or assent may be inferred by a jury from a party's silence, though his secret intention was otherwise.

It may however happen, that there is some difference of understanding as to terms not directly referred to, either in the offer or acceptance; and it has been held that such a difference will not prevent the accepted proposition from becoming a contract. (*d*) But a letter accepting an offer, with a qualification that the terms of a contract can afterwards be arranged between the parties, does not constitute an absolute contract, upon which a bill for specific performance will be entertained. (*e*)

When it is proposed by publication to do a certain thing on certain terms, one who desires that thing to be done and if silent as to the terms will be supposed to assent to them; thus, it has been held at *nisi prius*, that if the publisher of a newspaper places distinctly in the usual place of his paper, his terms of advertising, one who orders advertising without any special bargains as to terms, is to be regarded as assenting to the published terms.

Many cases turn upon the question whether this assent to the proposition was entire and adequate.¹ The principle may be

(*d*) *Baines v. Woodfall*, 6 C. B. (N. S.) 657.

(*e*) *Honeyman v. Marryatt*, 6 H. L. Cas. 112.

¹ The following are recent illustrative cases:—

In *Stanley v. Dowdeswell*, L. R. 10 C. P. 102, the reply "I have decided on taking No. 22 Belgrave Road, and have spoken to my agent, . . . who will arrange matters with you," was held not to be a definitive assent to the proposal and hence not to constitute a contract.

In *Baker v. Holt*, 56 Wis. 100, a similar decision was made where the answer to an offer to sell land at a certain price, after accepting the offer in terms, added, "You may make out the deed, leaving the name of the grantee in blank, and forward the same to M. at Grand Rapids, Wis., or to your agent, if you have one here, to be delivered to me on payment of \$200, and the delivery of the necessary security."

See also, *Crossley v. Maycock*, L. R. 18 Eq. 180; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Proprietors, &c. Credit Co. v. Arduin* L. R. 5 H. L. 64; *Siebold v. Davis*, 67 Iowa, 560.

On the other hand an acceptance of an offer to sell land "subject to the title being

Bohn Manuf. Co. v. Sawyer, 169 Mass. 477, 48 N. E. 620.

An express contract covering the entire matter always excludes any implied contract as to the same matter. *Boughton v. Boughton's Estate*, 111 Mich. 26, 69 N. W. 94; *Lester v. Hester*, 93 N. C. 79; *Davidson v. Biermann*, 27 Mo. App. 655; *Nunn v. Towner* (Tex. Civ. App.), 23 S. W. 1117. An implied contract cannot exist where an express contract would contravene a statute: *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151; or in the face of an express refusal and protest as to the act contemplated. *Burwitz v. Jeffers*, 103 Mich. 512, 61 N. W. 784; *Crane Lumber Co. v. Bellows*, 117 Mich. 482, 78 N. W. 536.

In *New York and New Jersey an agree-*

ment of the grantee in a deed signed and sealed only by the grantor, is held to be a covenant under seal and a specialty. *Bowen v. Beck*, 94 N. Y. 86; *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650. In other States, it is in the nature of an assumpsit or implied contract arising from the acceptance of the deed, and so is a simple contract. *Locke v. Homer*, 131 Mass. 93, 102; *Foster v. Atwater*, 42 Conn. 244; *Johnson v. Muzzy*, 45 Vt. 719; *Maule v. Weaver*, 7 Penn. St. 329. Under either view, the agreement is with the grantor only, and creates no direct obligation to a mortgagee upon which the latter can sue at law. *Willard v. Wood*, 135 U. S. 309, 313, 10 S. Ct. 831, 34 L. Ed. 210.

stated thus: The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter. Thus, an offer to sell a certain thing, on certain terms, may be met by the answer, "I will take that thing on those terms," or by any answer which means this, however it may be expressed; and, if the proposition be in the form of a question, as, "I will sell you so and so, will you buy?" the whole of this meaning may * be * 477 conveyed by the word "Yes," or any other simply affirmative answer. And thus a legal contract is completed.

But there are cases, where the answer, either in words or in effect, departs from the proposition, or varies the terms of the offer, or substitutes for the contract tendered, one more satisfactory to the respondent. In these cases there is no assent, and no contract. (x) The respondent is at liberty to accept wholly; or to

approved by our solicitors," has been held unconditional, as the qualification amounts only to what the law would imply. *Hussey v. Horne Payne*, 8 Ch. D. 670; 4 App. Cas. 311.

The whole correspondence or dealings of the parties must be looked at, and although from isolated parts thereof it might seem that an agreement had been reached, yet if the whole correspondence or dealings show this not to have been the case, there is no contract. *Bristol, &c. Bread Co. v. Maggs*, 44 Ch. D. 616. On the other hand, if the parties have once actually come to a final agreement there is then a contract, and no subsequent disputes over details of the arrangement can dissolve it. *Bellamy v. Debenham*, 45 Ch. D. 481 (affirmed on other grounds in, [1891] 1 Ch. 412).

It frequently happens that the terms of a proposed agreement are discussed not with a view to an immediate obligation, but with a view to the execution of a formal contract. In such cases agreement upon the terms of the formal contract will not be binding. Everything is inchoate until the execution of the formal contract. *Ridgway v. Wharton*, 6 H. L. C. 238, 264, 268, 305; *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 638, 646; *Winn v. Bull*, 7 Ch. D. 29; *Fredericks v. Fasnacht*, 30 La. An. 117; *Lyman v. Robinson*, 14 Allen, 242; *Sibley v. Felton*, 31 Northeastern Rep. 10 (Mass.); *Morrill v. Tehama Co.*, 10 Nev. 125; *Water Commissioners v. Brown*, 32 N. J. L. 504; *Brown v. Railroad Co.*, 44 N. Y. 79; *Commercial Tel. Co. v. Smith*, 47 Hun, 494; *Congdon v. Darcy*, 46 Vt. 478.

But if parties agree to make an immediately binding contract, the fact that they also agree that the contract shall subsequently be put into formal shape will not prevent them from being bound by the original agreement. *Bonnewell v. Jenkins*, 8 Ch. D. 70, 73; *Bell v. Offutt*, 10 Bush, 632; *Montague v. Weil*, 30 La. An. 50; *Allen v. Chouteau*, 102 Mo. 309; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Blaney v. Hoke*, 14 Ohio St. 292; *Mackey v. Mackey's Adm.*, 29 Gratt. 158; *Paige v. Fullerton Woolen Co.*, 27 Vt. 485. In each case the question must be determined by ascertaining the intention of the parties as expressed by their words and acts. — W.

(x) If the minds of the parties have clearly met on some things, but not on others, the contract is not final and complete. *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. 226, 26 Am. St. Rep. 244, 12 L. R. A. 561; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10. See *Patrick v. Bowman*, 149 U. S. 411, 13 S. Ct. 811, 866, 37 L. Ed. 790; *Goulding v. Hammond*, 54 Fed. 639, 4 C. C. A. 533; *Kleinhans v. Jones*, 68 Fed. 742, 15 C. C. A. 644; *McConkey*

v. Peach Bottom State Co., 68 Fed. 830, 16 C. C. A. 8; *Strobridge Lithographing Co. v. Randall*, 73 Fed. 619, 19 C. C. A. 611; *Michigan Stone & Supply Co. v. Harris*, 81 Fed. 928, 27 C. C. A. 6; *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. 425; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341; *Michigan Bolt and Nut Works v. Steel*, 111 Mich. 153, 69 N. W. 241. Where a proposal by telegram for a

reject wholly; but one of these things he must do; for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer.¹ (x) The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected, again reply, accepting generally, and upon his acceptance claim the right of holding the other party to his first offer.

An answer or a compliance has been sometimes held insufficient to make a contract, where the difference of terms between the parties did not seem to be very important. (f) In

* 478 * fact the court seldom inquires into the magnitude or effect of this diversity; if it clearly exists, that fact is

(f) *Hutchinson v. Bowker*, 5 M. & W. 535. See also *Slaymaker v. Irwin*, 4 Whart. 369; *Gether v. Capper*, 26 E. L. & E. 275; s. c. 15 C. B. 39, 696; *Vassar v. Camp*, 1 Kern. 441; *Peltier v. Collins*, 3 Wend. 459; *Suydam v. Clark*, 2 Sandf.

133. See the cases of *Sivewright v. Archibald*, 6 E. L. & E. 286; s. c. 17 Q. B. 103; *Moore v. Campbell*, 26 E. L. & E. 522; s. c. 10 Exch. 323; *Jordan v. Norton*, 4 M. & W. 155.

¹ *Hyde v. Wrench*, 3 Beav. 334; *National Bank v. Hall*, 101 U. S. 43, 50; *Ortman v. Weaver*, 11 Fed. Rep. 358; *Baker v. Johnson Co.*, 37 Iowa, 186, 189; *Cartmel v. Newton*, 79 Ind. 1, 8; *Fox v. Turner*, 1 Bradwell, 153. But though a counter offer operates as a rejection of a proposal, it seems that a mere inquiry does not. In *Stevenson v. McLean*, 5 Q. B. D. 346, the defendants made an offer of iron at 40s. a ton, cash, the plaintiffs telegraphed, "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." Later on the same day the plaintiffs telegraphed an unconditional acceptance, and it was held that a contract was thereby created. — W.

contract was understood and acted upon by the parties in different senses, it was held that there was no contract; that it was not for the court to determine the true construction, but that the plaintiff had the burden to show that his construction was the right one. *Falck v. Williams*, [1900] A. C. 176. Where the plaintiff, an extortionate money-lender, concealed his true name, and assumed a false one, in order to induce the contract, the misrepresentation was held so material as to avoid the contract at the defendant's option. *Gordon v. Street*, [1899] 2 Q. B. 641. So a sale is void when the buyer is falsely impersonated, and no act of rescission is necessary. *Loeffel v. Pohlman*, 47 Mo. App. 574.

A contract consummated by a series of correspondence cannot be rescinded by one party as incomplete because the other party refuses to sign the agreement as formally written out. *Harbor Point Club House Ass'n v. Young*, 99 Ill. App. 292.

(x) See *Bellamy v. Debenham*, [1891] 1 Ch. 412; *Jones v. Daniel*, [1894] 2 Ch.

332; *In re London & Northern Bank*, [1900] 1 Ch. 220. If the parties, being together, separate apparently agreed, the jury is warranted in finding that a variation in the acceptance was then assented to. *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164.

Two propositions made on the same paper, but signed separately, one to sell land to the defendant, and the other to buy designated lots "title to be merchantable," are both accepted by the defendant's indorsement on the paper, "I accept the within if the title proves satisfactory;" but the two propositions are distinct contracts, and performance of one is not part performance of the other. *Bolton v. Huling*, 195 Ill. 384, 63 N. E. 140. If no one paper, formally signed, purports alone to express the terms of the contract, all the letters that passed between the parties must be considered in order to determine what the contract was as shown by the writings. *Williams v. Smith*, 161 Mass. 248, 37 N. E. 455.

enough. (x) But it is not material by which of the parties to an agreement the words which make it one are spoken; the intent governs, and if this be clear, and expressed with sufficient definiteness, it is enough. (g)

* At a sale by auction, every bid of any one present is * 479 an offer by him. It becomes a contract as soon as the hammer falls or the bid is otherwise accepted; (j) but until it is accepted it may * be withdrawn by the bidder, * 480 because until then it is not obligatory on him, for want of the assent of the owner of the property, by his agent the auctioneer. (k) ¹ (y)

(g) *Putnam, J.*, in *Hubbard v. Coolidge*, 1 Met. 93. But where a conversation is relied upon as proof of an agreement, it is for the jury to decide whether such an assent of the minds of the parties took place as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement. *Thurston v. Thornton*, 1 Cush. 89.

(j) *Payne v. Cave*, 3 T. R. 148. See

further *Fisher v. Seltzer*, 23 Penn. St. 308.—As sales at auction are clearly within the Statute of Frauds, *Hinde v. Whitehouse*, 7 East, 568; *Kenworthy v. Scofield*, 2 B. & C. 945; *Brent v. Green*, 6 Leigh, 16; the assent would not be binding unless in writing, if the case came within the terms of that statute.

(k) See *post*, pp. * 539, * 540, on the contract of sale by auctions.

¹ It has been suggested (*Langdell, Summary of Contracts*, § 19) that “the true view seems rather to be that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder; and, that, when a bid is made there is an actual sale subject to the condition that no one else shall bid higher.” But the rule laid down in *Payne v. Cave*, as stated in the text, is settled law. *Manser v. Back*, 6 Hare, 443; *Grottenkemper v. Achtermeyer*, 11 Bush, 222.

Consequently not only may the bidder withdraw his bid, but the auctioneer may also decline to accept the highest bid even though the sale has been stated to be without reserve (*Warlow v. Harrison*, 1 E. & E. 295), the bidder's only remedy, if any, being an action against the auctioneer on a promise to sell according to the terms advertised. See *Warlow v. Harrison*, *supra*; *Mainprice v. Wesley*, 6 B. & S. 420; *Harris v. Nickerson*, L. R. 8 Q. B. 286.

Analogous cases have arisen where what might seem to be an offer has been held to amount only to an intimation that offers would be received. Thus in *Spencer v. Harding*, L. R. 5 C. P. 561, the defendants sent out a circular stating that they were instructed to offer certain stock in trade for sale by tender. The plaintiff made the highest tender, and claimed that by so doing he had accepted an open offer and entered into a binding contract. But the court held that the defendant's circular was not an offer but “a mere proclamation that the defendants are ready to chaffer for the sale of goods.” (z) To the same effect is *Moulton v. Kershaw*, 59 Wis. 316. And see *Canning v. Farquhar*, 16 Q. B. D. 727; *Ashcroft v. Butterworth*, 136 Mass. 511; *Ahearn v. Ayres*, 38 Mich. 692.—W.

(x) The acceptance is complete notwithstanding incidental remarks, such as “I should like to know from what time Mr. H. wishes the purchase to date,” or “I shall be obliged if the fences may be seen to at once.” *Simpson v. Hughes*, 66 L. J. Ch. 234, 76 L. T. 237, affirming 45 W. R. 221; *Filby v. Hounsell*, [1896] 2 Ch. 737.

(y) A provision of a trust deed that the trustee is to sell for the “highest and best bid” is complied with by a single

bid made in good faith by the owner of the secured note. *Lathrop v. Tracy*, 24 Col. 382, 65 Am. St. Rep. 229.

(z) So an announcement by the trustees of a scholarship, that an examination therefore will be held, is not an offer to award it to the pupil passing the best examination. *Rooke v. Dawson*, [1895] 1 Ch. 480. The acceptance of an offer to lease houses, which offer concludes, “Such lease to be approved in the customary way

SECTION II.

CONTRACTS ON TIME.

Propositions or offers on time involve questions of the assent of parties which are sometimes difficult. (*l*) Strictly speaking, all offers are on time. If one says, I will sell you this thing for this money, and the other answers, I will buy that thing at that price, all authorities agree that this is a contract. But the * 481 * answer follows the offer; it cannot be actually simultaneous with it, although it is sometimes said to be so. But the offer is regarded as continuing until the acceptance, if the acceptance is made at once. Nor can it be necessary that the acceptance should follow the offer instantaneously. Though the party addressed pauses a minute or two for consideration, still his assent makes a contract, for the offer continues unless it is expressly withdrawn. But how long will it continue? The only answer must be, in general a reasonable time; (*m*) and what this is must be determined by the circumstances of the case. If the party addressed goes away, and returns the next month or the next week, and says he will accept the proposition, he is too late unless the proposer assents in his turn. So it would be probably if he came the next day, or the next hour; or, perhaps, if he went away at all and afterwards returned.

But the proposer may himself determine how long the offer shall continue. He may say, I will give you an hour, or until this time to-morrow, or next week, to make up your mind. Then the party to whom the proposition is made knows how long the offer is to continue. He may avail himself of the hour, the day, or the week given for inquiry or consideration, or making the necessary arrangements; and if within the prescribed time he expresses his assent (supposing the proposition not in the mean-

(*l*) In *Boston and Maine Railroad v. Bartlett*, 3 Cush. 224, it was *held*, that a proposition in writing to sell land, at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract,

the specific performance of which may be enforced by a bill in equity.

(*m*) *Judd v. Day*, 50 Iowa, 247; *Troun- stine v. Sellers*, 35 Kan. 447; *Perec v. Turner*, 10 Me. 185; *Park v. Whitney*, 148 Mass. 278; *Stone v. Harmon*, 31 Minn. 512; *Beckwith v. Cheever*, 21 N. H. 41; *Chicago, &c. Ry. Co. v. Dane*, 43 N. Y. 240; *Keck v. McKinley*, 98 Penn. St. 616.

by my solicitor," is binding, though the solicitor refuses to approve the lease, as the provision only requires him to see that there is nothing irregular or unusual in

the formal lease. *Chipperfield v. Carter*, 72 L. T. 487; see *Hawksley v. Outram*, [1892] 3 Ch. 359; *Lloyd v. Nowell*, [1893] 2 Ch. 744.

time withdrawn), he completes the contract as effectually as if he had answered in the same way at the first moment after the offer was made. (n) ¹ (x)

It seems irrational to say that the proposer is not bound by receiving such delayed assent, although it is given within the specified time, because no consideration had been paid him for the delay, and for the continuance of the offer. If it were said that where one makes an offer, and the other instantly accepts, the offerer nevertheless is not bound, because there is no consideration, then it might be said consistently that he is not bound by an answer made within a time specified by him. But no one * doubts that the offerer is bound by an instantaneous acceptance, although he received no consideration for the offer. And what difference can it make, as to the consideration or the want of it, whether the acceptance follows the offer in a second, or in a minute or two, or in a longer, but still reasonable time, or in a still longer time limited and specified by the proposer himself. (y) All these cases stand on the same footing in respect to consideration.

Undoubtedly, if the offerer gives a day for acceptance, without consideration for the delay, he may at any time within that day, before acceptance, recall his offer. So he may if he gives no time. If he makes an offer, and instantly recalls it before acceptance, although the other party was prepared to accept it the next instant, the offer is effectually withdrawn. But acceptance before withdrawal binds the parties, if made while the offer continues; and the offer does continue in all cases, either a reasonable time (and that only), or the time fixed by the party himself.² (z)

(n) *Wright v. Bigg*, 15 Beav. 592.

¹ *Longworth v. Mitchell*, 26 Ohio St. 334. See also *Smith v. Weaver*, 90 Ill. 392. — An offer by mail stating, in terms, "You will confer a favor by giving me your answer by return mail," is released by a failure to answer by that mail. *Carr v. Duval*, 14 Pet. 77, 82; *Macklay v. Harvey*, 90 Ill. 525. — K.

² Revocation of an offer is ordinarily and properly made by communication from

(x) A proposal by letter, requesting a reply by wire "on receipt of this," is not accepted by an assent mailed two days later. *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393.

Knowingly leading one to suppose that an offer is made to him, and to offer, are the same thing; and, in order to disable the offeree from acceptance, the offerer must first bring home to him actual notice that it has been revoked. *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747; *Brauer v. Shaw*, 168 Mass. 198, 546 N. E. 617; 60 Am. St. Rep. 387.

(y) The rule that time is not of the essence of a contract does not apply to unilateral contracts known as options; in the case of proposals, time is of the essence as to acceptance. *Litz v. Goosling* (Ky.), 21 L. R. A. 127 and note; *Dyer v. Duffy* (W. Va.), 24 id. 339; *Peck v. Freeze*, 101 Mich. 321, 59 N. W. 600. A purchaser's option and a seller's option are equally valid. *Merchant v. O'Rourke*, 111 Iowa, 351, 82 N. W. 759.

(z) In general the acceptance of an offer, or the repudiation of a contract, is complete as soon as it is properly mailed.

It may be said, that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. If the proposer fixes a time he expresses his intention, and the other party knows precisely what it is. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose that the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind. (o)

We hold this to be the true principle, and to be capable of universal application. Thus, where many subscribe for a common result on a certain condition, the first question may be as to the consideration; and this we have already discussed. And it would be another question how long the parties are bound by the

(o) *Moxley v. Moxley's Adm'r*, 2 Met. (Ky.) 309.

the party making the offer to the party receiving it. Whether anything less than this is sufficient has been in some doubt. In some of the older cases it is intimated that a sale to a third party of the property to which the offer referred would of itself amount to a revocation. *Cooke v. Oxley*, 3 T. R. 653, per *Buller, J.*; *Routledge v. Grant*, 4 Bing. 653. But it may now be considered settled that as a rule there can be no revocation without the knowledge of the party to whom the offer was made. *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Kempner v. Cohn*, 47 Ark. 519; *Wheat v. Cross*, 31 Md. 99. Though it has been held that an offer of reward made by public advertisement may be withdrawn in the same way, and that ignorance of the withdrawal is immaterial. *Shuey v. United States*, 92 U. S. 73.

How far knowledge not acquired from the offerer himself that he had changed his mind or had dealt with the property in a manner inconsistent with a longer continuance of the offer would operate as a revocation is not yet wholly clear. On principle it seems that as an offer or acceptance must be made from one party to the other, and evidence that their actions in dealing with third parties showed a willingness or unwillingness to contract would not be received, so the revocation of an offer should only be accomplished by communication from one party to the other. It has, however, been decided that knowledge, even though received by chance from a stranger, that the offerer has sold to another the property to which the offer relates, puts an end to the offer. *Dickinson v. Dodds*, 2 Ch. D. 463; *Coleman v. Applegarth*, 68 Md. 21.

Death of the offerer terminates an offer. *Dickinson v. Dodds*, 2 Ch. D. 463, 475; *Pratt v. Trustees of Baptist Soc. of Elgin*, 93 Ill. 475; *Wallace v. Townsend*, 43 Ohio St. 537; *Helfenstein's Est.*, 77 Pa. 328; *Reimensnyder v. Gans*, 110 Pa. St. 17; *Foust v. Board of Publication*, 8 Lea, 552. So insanity of the offerer. *The Palo Alto*, 2 Ware, 343; *Beach v. First M. E. Church*, 96 Ill. 177. And see *Drew v. Nunn*, 4 Q. B. D. 661. Likewise death or insanity of the person to whom the offer is made, making acceptance of the offer by that person impossible, in effect puts an end to the offer. (x) *In re Cheshire Banking Co.*, 32 Ch. D. 301; *Mactier v. Frith*, 6 Wend. 103; *Leake, Cont.* (3d ed.) 31. — W.

Henthorn v. Fraser, [1892] 2 Ch. 27; *Holland v. Bennett*, [1902] 1 K. B. 867; *L. London & Northern Bank*, [1900] 1 Ch. 220; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 39 Am. L. Reg. n. s. 354; *Olds v. East Tenn. Stone Co.* (Tenn. Ch.), 48 S. W. 333; 2 Kent Com. (14th ed.), 477 and notes.

(x) Insanity is not a defence to an action for breach of a contract, entered into when the party was sane. *Williams v. Hays*, 143 N. Y. 442, 452, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153, 157 N. Y. 541, 52 N. E. 589, 68 Am. St. Rep. 797, 43 L. R. A. 253.

promise contained in such subscription. If no time be agreed on, and there be no express withdrawal, then the law must choose between the period of legal presumption, which * would generally be twenty years, and the principle of * 483 reasonable time; and the first alternative would be very unreasonable, and might be very oppressive. The court will look into all the circumstances of each case, and inquire what the parties actually understood or intended, or, regarding them as rational men, what they must be supposed to have intended. And it seems difficult to reject this rule, without holding principles which would lead to the conclusion that one who offers goods to another, and, receiving no answer, sells them to a third person a year after, may still be held by him to whom the offer was first made, if he shall then see fit to accept the offer; a conclusion so wholly unreasonable as to be impossible.

An analogous and closely connected question has arisen, where the proposition and the reply are both made by letter. And as we think, it must be governed by the same principles. It is unquestionably true as a general proposition, that a contract cannot bind the party proposing it, and indeed, that there is no contract, until the acceptance of the offer by the party receiving it is in some way, actually or constructively, communicated to the party making the offer. (oo) We consider that an offer by letter is a continuing offer until the letter be received, and for a reasonable time thereafter, during which the party to whom it is addressed may accept the offer, and communicate the fact of his acceptance. We hold also that this offer may be withdrawn by the maker at any moment; and that it is withdrawn as soon as a notice of such withdrawal reaches the party to whom the offer is made, and not before. (p)¹ If, therefore, that party accepts

(oo) The general principle is asserted in *Hebb's case*, Law Rep. 4 Eq. 9.

(p) Notwithstanding the case of *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, we deem the rule of the text to be the law in England and in this country; although further adjudication may be necessary to define these rules and determine all their consequences. It was first laid down in England in *Adams v. Lindsell*, 1 B. & Ald. 681, in 1818, where *Cooke v. Oxley*, 3 T. R. 653, was relied upon by counsel. See also *Kennedy v. Lee*, 3 Meriv. 441; *Potter v. Sanders*, 6 Hare, 1; and *Dunlop v. Higgins*, 1 H. L. Cas. 381, where it was laid down, that a letter offering a contract does not bind the party to whom it is ad-

dressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract, but an answer posted on the day of receiving the offer is sufficient; that the contract is accepted by the posting of a letter declaring its acceptance; that a person putting into the post a letter declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office. See also *Stocken v. Collen*, 7 M. & W. 515; *Beckwith v. Cheever*, 1 Foster (N. H.) 41; *Brisbane v. Boyd*, 4 Paige, 17; *Averill v. Hedge*, 12 Conn. 436; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 14 Barb. 341, s. c. 1 Kern. 441; *Clark v. Dales*, 20

¹ See *ante*, p. *481, note 1.

* 484 * the offer before such withdrawal, the bargain is completed; there is then a contract founded upon mutual assent. And an acceptance having this effect is made, and is communicated under the rule already stated, when the party receiving the offer puts into the mail his answer accepting it. (pp)¹ (x)

Barb. 42; Levy v. Cohen, 4 Ga. 1; Eliason v. Henshaw, 4 Wheat. 228; Chiles v. Nelson, 7 Dana, 281; Falls v. Gaither, 9 Port. (Ala.) 605; Hamilton v. Locomotive Mutual Ins. Co., 5 Pa. St. 339, where the case of McCulloch v. Eagle Insurance Co. is ably examined.

(pp) See Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; The Palo Alto, Davies, 844. In Duncan v. Topham, 8 C. B. 225, the contract was said to be closed by mailing the letter of acceptance, although it never reached its destination. See 2 Parsons, Marit. Law, p. 22, note 4.

¹ The earliest case in which the question is at all considered when a contract made through the mail is completed by acceptance is Kennedy v. Lee, 3 Meriv. 441, 455. Lord Eldon there said: "I have always understood the law of the court to be, with reference to this sort of contract, that if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the court will execute." A few years later the case of Adams v. Lindsell, 1 B. & Ald. 681, was decided. The only question really involved in that case was whether the acceptance was within a reasonable time. It was argued, however, by counsel, that a sale made by the offerer while the letter of acceptance was in the post had revoked the offer. To meet this point the court held in words often quoted, that the contract was complete before the sale, namely, when the letter of acceptance was mailed. "For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*." The language in both these cases evidently is based on the idea, now discredited, that it is the mental consensus of two parties at the same moment which constitutes a contract, but the rule laid down in Adams v. Lindsell, that a contract is complete when the letter of acceptance is mailed, has been adopted in numerous cases in England, Scotland, and this country, and is adhered to even though the letter of acceptance is never received. Potter v. Sanders, 6 Hare, 1; Dunlop v. Higgins, 1 H. L. C. 381; Duncan v. Topham, 8 C. B. 225; Harris's case, L. R. 7 Ch. 587; Wall's case, L. R. 15 Eq. 18; Household Fire Ins. Co. v. Grant, 4 Ex. D. 216; (overruling Reidpath's case, L. R. 11 Eq. 86, and British, &c. Telegraph Co. v. Colson, L. R. 6 Ex. 108); Henthorn v. Fraser, [1892] 2 Ch. 27; Thompson v. James, 18 Dunlop, 1; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; Kempner v. Cohn, 47 Ark. 519; Bryant v. Booze, 55 Ga. 438; Haas v. Myers, 111 Ill. 421; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; Hunt v. Higman, 70 Iowa, 406; Ferrier v. Storer, 63 Iowa, 484; Hutcheson v. Blakeman, 3 Met. (Ky.) 80; Wheat v. Cross, 31 Md. 99; Stockham v. Stockham, 32 Md. 196; Abbott v. Shepard, 48 N. H. 14; Hallock v. Commercial Ins. Co., 2 Dutch. 268; Northampton, &c. Ins. Co. v. Tuttle, 40 N. J. L. 476; Mactier v.

(x) Bhugwandass v. Netherlands I. S. Ins. Co., 14 A. C. 83; Page v. Norfolk, 70 L. T. 781; Deutsch v. Pratt, 149 Mass. 415, 21 N. E. 1072; Egger v. Nesbitt, 122 Mo. 667; Goulding v. Hammond, 54 Fed. 639; Seibold v. Davis, 67 Iowa, 560.

One who, after ordering a machine, sends a letter directing that it be held until further notice, thereby countermands the order; but this is not so if, before such letter is received, the other party mails an acceptance of the order, properly

directed; the rule that an acceptance is binding when posted does not apply to the other party's revocation of his offer. Henthorn v. Fraser, [1892] 2 Ch. 27; *In re* Scottish Petroleum Co., 51 L. J. Ch. 841; Peck v. Freese, 101 Mich. 321, 59 N. W. 600; Patrick v. Bowman, 149 U. S. 411, 13 S. Ct. 811, 866, 37 L. Ed. 790; Trounstone v. Sellers, 35 Kan. 447; Ferrier v. Storer, 63 Iowa, 484; 7 Harv. L. Rev. 301.

Thus, if A, in Boston, on the first day of January, writes to B, in Baltimore, making an offer, and this letter reaches Baltimore on the third, and B forthwith answers the letter, accepting the offer, putting the letter into the mail that day; and on the second of January A writes withdrawing the offer, and his letter of withdrawal reaches B on the fourth, there is nevertheless a contract made between the parties. If the offer was to sell goods, B, on tendering the price, may claim the goods; if the offer was to insure B's ship, B may tender the premium and demand the

Frith, 6 Wend. 103; *Vassar v. Camp*, 11 N. Y. 441; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339.

A contrary view seems to obtain in France, *S— v. F—*, Langdell, Cas. Cont. 156; and in Massachusetts the case of *McCulloch v. The Eagle Insurance Co.*, 1 Pick. 278, while not deciding that the completion of a contract by letter could never take place till the receipt of the letter of acceptance, decided that in the case then before the court the offer was revocable till the receipt of the acceptance, and the general rule was laid down: "The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendant, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed." And see *Lewis v. Browning*, 130 Mass. 173. See also *British, &c. Telegraph Co. v. Colson*, L. R. Ex. 108; and the dissenting opinions in *Household Fire Ins. Co. v. Grant*, and *Thomson v. James*, *supra*.

As an original question it may well be questioned whether the view that the acceptance takes effect from its receipt is not the better. The so-called letter of acceptance is not simply an expression of assent to the offer, it is also performance of the consideration, constituting as it does a counter promise, and communication is essential to a promise. And even granting that the question should turn, not on when the offerer actually receives communication, but when the tangible sign has been sufficiently put in his power, the offerer should not be bound until he has or should have some control over the letter of acceptance, and he obviously has and can have no control over it while it is in course of transmission. For a careful examination of the question, see Langdell, Sum. Cont. §§ 14, 15. "The practical conclusion seems to be that every prudent man who makes an offer of any importance by letter, should expressly make it conditional on his actual receipt of an acceptance within some definite time. It would be impossible to contend that a man so doing could be bound by an acceptance which either wholly miscarried or arrived later than the specified time." Pollock, Cont. (5th ed.) 37. That such an express condition will be enforced, see *Household Insurance Co. v. Grant*, 4 Ex. D. 216, 223, 238; *Haas v. Myers*, 111 Ill. 421, 427; *Lewis v. Browning*, 130 Mass. 173.

The letter must be posted within the time limited, if any, or otherwise within a reasonable time, and before a revocation is communicated. *Stevenson v. McLean*, 5 Q. B. D. 346; *Maclay v. Harvey*, 90 Ill. 525; *Abbott v. Shepard*, 48 N. H. 14; *Potts v. Whitehead*, 8 C. E. Green, 512.

It has been generally held also that an acceptance by telegram of an offer made by letter or telegram takes effect from the time of the deposit of the acceptance at the telegraph office for transmission, at least if the acceptor was expressly or impliedly authorized to use that mode of communication. *Stevenson v. McLean*, 5 Q. B. D. 346; *Cowan v. O'Connor*, 20 Q. B. D. 640; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Haas v. Myers*, 111 Ill. 421, 427; *Cobb v. Foree*, 38 Ill. App. 255; *Trevor v. Wood*, 36 N. Y. 307; *Perry v. Mount Hope Iron Co.*, 15 R. I. 380.

Merely writing a letter or telegram of acceptance will not, however, complete a contract. The acceptance must be put beyond the reach of the acceptor. *Trounstone v. Sellers*, 35 Kan. 447.

Nor will posting a letter of acceptance unless the use of the mails is expressly or impliedly authorized as a means of communication. *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Linn v. McLean*, 80 Ala. 360.

Nor unless the letter of acceptance is properly stamped and addressed. *Blake v. Hamburg, &c. Ins. Co.*, 67 Tex. 160. — W.

policy, and hold A as an insurer of his ship. And so of any other offer or proposition. (*g*)

Sometimes a man makes an offer, saying if there be no answer, or none by a return mail, or by a certain time, he shall consider the offer accepted. But he has no right to impose these conditions, and silence is no acceptance of the offer. (*qq*)¹

We have supposed these letters to be properly addressed and mailed, and to reach the proper party at a proper time. Cases undoubtedly may occur where there is delay and hindrance, and the cause of this may be the fault of the proposer, or of the acceptor, or of neither. Such cases may form exceptions * 485 to the * principle above stated and must be decided on their own facts and merits, and by rules which are specially adapted to them. But we should state as the general rule what was lately declared to be law by the House of Lords; that if the party receiving an offer by letter puts his answer of acceptance into the mail, this completes the contract, for he has done all that he could do, and is in no way responsible for the casualties of the mail service. (*r*)

(*g*) *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80.

(*qq*) *Felthouse v. Bindley*, 31 L. J. C. 204.

(*r*) *Dunlop v. Higgins*, 1 H. L. Cas. 381. And see *ante*, p. *484, note 1.

¹ But *Lewis v. Browning*, 130 Mass. 173, approving *McCulloch v. Eagle Ins. Co.*, 1 Pick, 278, *supra*, decided that if an offer is made by letter in which the offerer requests an answer by telegraph "yes" or "no," without which answer by a certain date he "shall conclude" "no," the offer is made dependent on an actual receipt of the telegram on or before that date. — K.

THE SUBJECT-MATTER OF CONTRACTS.

CHAPTER I.

PRELIMINARY REMARKS.

THE subject-matter of every contract is something which is to be done, or which is to be omitted. No very precise or logical division and classification of these various things is known to the common law. The division stated and followed in the Pandects, and referred to by Blackstone, (a) is exact and rational. It recognizes four species of contracts: *Do ut Des*; *Facio ut Facias*; *Facio ut Des*; *Do ut Facias*. But this division is not, in the civil law, strictly followed. The whole subject of purchase and sale (*emptio et venditio*) is treated of before this division is introduced. (b) Blackstone says, "Of this kind (*Do ut Des*) are all sales of goods." But in fact it seems to be confined to giving a thing (not money) to receive a thing in return.

It is impossible to make much use of this classification, in exhibiting the rules of the common law in relation to contracts; and the arrangement of the subject-matters of contracts which we have adopted is the following. We shall treat of Contracts, —

1. For the Purchase and Sale of Real Estate.
2. For the Hiring of Real Estate.
3. For the Purchase and Sale of Chattels.
- * 4. For the Purchase and Sale of Chattels with * 490
Warranty.
5. Of the Right of Stoppage *in Transitu*.
6. For the Hiring of Chattels.
7. Of Guaranty.
8. For the Hiring of persons.

(a) 2 Bl. Com. 444. See *ante*, p. * 430, 18, tit. 18. *Do ut des*, etc. Pandects, lib. note: (n). 19, tit. 5, art. 1, §4.
(b) *Emptio et Venditio*. Pandects, lib.

9. For Service generally.
10. Of and in relation to Marriage.
11. Of Bailment.
12. Of Telegraphs.
13. Of Patents.
14. Of Copyrights.
15. Of Trade-marks.
16. Of Shipping.
17. Of Marine Insurance.
18. Of Fire Insurance.
19. Of Life Insurance.

Before considering these topics severally, a few words may be said of the remedy which the common law affords for injury sustained by a breach of a contract to do a specific thing.

Where the thing to be done is the payment of money, there, in general, the remedy is adequate and perfect. But where the thing to be done is anything else than the payment of money, there the common law can only give a remedy which may be entirely inadequate; for it can give only a money remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of a contract. And even where the contract is specifically for the payment of money, and for nothing else, still the law does not, generally, in form, decree an execution of the contract, but damages for the breach of it. If an action be brought upon a promissory note, or a covenant, the plaintiff sets forth the contract and the breach, and does not pray for an execution of it; but he sets forth also the damages he has sustained, and claims them. The action of debt may, it is true, be brought, not only on a bond, but upon many simple contracts; and in this action the payment of the money due is directly demanded, and such is the judgment if the plaintiff recovers; but this action is not much used at the present time, in this country at least, to enforce simple contracts. Where the contract is for any other thing than the payment of money, the common law knows no other than a money remedy; for it has no power to enforce the specific performance of a contract, with the exception only of those money contracts for which debt will lie.

This inability of the common law was among the earlier and most potent causes which gave rise to courts of equity; for
* 491 * these courts have, both in England and in this country, a very complete jurisdiction over this class of cases. Perhaps this apparent defect in the common law may be explained,

by supposing that, originally, the action of debt gave the power of compelling performance in fact, in the great majority of cases which required it, and that the comparative disuse of this action, and the coming into notice of the great variety of other cases in which this power was needed to do justice, occurred after the forms of the common law had become fixed, and when there was a great unwillingness in the courts to change or enlarge them; and when also another court had grown up which had full power in all such cases. However this may be, this defect in the common law, which must be felt more and more sensibly as society advances beyond the point at which it is willing to measure all rights and wrongs by a money standard, is one cause, undoubtedly, of the disposition which is manifesting itself in this country to bring together all common-law and all equity powers of preventing wrong and enforcing right; as has been done, or attempted to be done in New York, by their last Revised Code; and as will, we think, be done in other States of this Union, in some form and in some measure. Indeed the recent legislation of England, by giving to the Common Law courts a kind of summary equity jurisdiction, seems to seek the same result.

* CHAPTER II.

CONVEYANCES of real property are made by deed; but simple contracts are often made for the purchase of real estate, and the specific performance of these contracts may be enforced in equity, (a) or actions may be brought on them at common law. (b) Neither equity nor law will enforce such contract, if it be founded upon fraud, (c) or gross misrepresentation, (d) or upon an intentional concealment of an important defect in or objection to an estate; (e) (x) but a mere inadequacy of price — not gross, and not attended by circumstances indicating fraud or oppression — is

(a) That specific performance of contracts for the sale or purchase of railway shares will be enforced in equity, see *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 12 Jur. 152; *Wynne v. Price*, 13 id. 295. — The idea formerly entertained, that a court of equity might award compensation for non-performance of a contract of sale, is now exploded. *Todd v. Gee*, 17 Ves. 273; *Sainsbury v. Jones*, 5 Myl. & C. 1.

(b) See *Moses v. McFerlan*, 2 Burr. 1011; *Farrer v. Nightingal*, 2 Esp. 639; *Squire v. Tod*, 1 Camp. 293. It seems, that if the subject-matter of the contract is such that both vendor and purchaser would be reimbursed by damages, a court of equity will decline to interfere, and will leave a party to his remedy at law. This is the case in ordinary agreements for the sale of stock. *Cud v. Rutter*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 159. — It has been thought, however, that in

some cases a bill in equity for specific performance ought to be maintained in such contracts. See 2 Story, Eq. §§ 717, 724.

(c) See *Davis v. Symonds*, 1 Cox, 407; *Seymour v. Delancey*, 6 Johns. Ch. 225; *Acker v. Phoenix*, 4 Paige, 305; *Nellis v. Clark*, 20 Wend. 24; *Miller v. Chetwood*, 1 Green, Ch. 199; *Clement v. Reid*, 9 Sm. & M. 535.

(d) *Cadman v. Horner*, 18 Ves. 10. See also *Lord Clermont v. Tasburgh*, 1 Jac. & W. 112; *Barker v. Harrison*, 2 Collyer, 546; *Best v. Stow*, 2 Sandf. Ch. 298; *Schmidt v. Livingston*, 3 Edw. Ch. 213; *Rodman v. Zilley*, Saxton, 320; *Brealey v. Collins*, Younge, 317.

(e) But general statements by a seller, although not the whole truth, will not amount to such misrepresentation as to avoid the contract. See *Fenton v. Browne*, 14 Ves. 144; *Lowndes v. Lane*, 2 Cox, 363.

(x) In Massachusetts, when the only defect is want of good title, equity will decree specific performance if the title tendered is beyond reasonable doubt, although these are questions as to the title which depend upon circumstantial evidence, and although there may still be a possibility of a defect, and a remote chance that the title may be exposed to litigation and finally held to be imperfect. *Cushing v. Spaulding*, 164 Mass. 287, 41 N. E. 297;

Loring v. Whitney, 167 Mass. 550, 46 N. E. 57; *Couley v. Finn*, 171 Mass. 70, 50 N. E. 460; *Chauncey v. Leominster*, 172 Mass. 340, 152 N. E. 719; *Martin v. Hamlin*, 176 Mass. 180, 57 N. E. 381.

When the evidence of a mistake of fact in drawing up a deed or contract is clear and convincing, equity may correct it, and then carry into effect the instrument as corrected. *Carson v. Davis*, 171 Ill. 497, 49 N. E. 701.

not sufficient to avoid it. (*f*) And where the land is sold with such words as "more or less," but with definite and distinct boundaries, equity will not relieve against a considerable excess or deficiency of land over the description, if there be neither fraud nor gross mistake. (*ff*) (*x*)

It may be well to remark that a mere return of the deed to the grantor, even with an indorsement, "I transfer the within deed to (the grantor) again," will not reconvey a freehold estate which has once vested in the grantee. (*fg*)

Delivery is requisite, and if a deed remains after execution, in the possession and control of the grantor, it takes no effect. (*y*) It

(*f*) *Whitefield v. McLeod*, 2 Bay, 380, *Stewart v. The State*, 2 Har. & G. 114; *Knobb v. Lindsay*, 5 Hamm. 472; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Coles v. Trecothick*, 9 Ves. (Sumner's ed.) 234; *Woodcock v. Bennet*, 1 Cowen, 733; *Minturn v. Seymour*, 4 Johns. Ch. 500; *Birdsong v. Birdsong*, 2 Head, 289, where inadequacy of consideration is said to be only a *badge* of fraud. But inadequacy of price, if gross, and attended by circumstances evincing unconscientious advantage taken by the purchaser of the improvidence and distress of the vendor, will avoid the contract in equity, although the contract be executed. *McKinney v. Pinckard*, 2 Leigh, 149; *Evans v. Llewellyn*, 2 Bro. Ch. 150. See *Groves v. Perkins*, 6 Sim. 576; *Sturge v. Sturge*, 14 Jur. 159. And if the inadequacy of price is so gross as to be itself sufficient evidence of *fraud*, then the contract will

be void. See *Rice v. Gordon*, 11 Beav. 265. But an inequality of price, in order to amount to a fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. *Osgood v. Franklin*, 2 Johns. Ch. 23; and see *How v. Weldon*, 2 Ves. Sen. 516; *Gwynne v. Heaton*, 1 Bro. Ch. 2, *Coles v. Trecothick*, 9 Ves. 246. — Although inadequacy of price is not a ground for decreeing an agreement to be delivered up or a sale rescinded (unless its grossness amounts to fraud), yet it may be sufficient for the court to refuse to enforce performance. *Osgood v. Franklin*, 2 Johns. Ch. 23; *Mortlock v. Buller*, 10 Ves. 292; *Day v. Newman*, cited in *Mortlock v. Buller*. See also, *ante*, p. *436.

(*ff*) *Noble v. Gookins*, 99 Mass. 231.

(*fg*) *Linker v. Long*, 64 N. C. 296; *Parshall v. Shirts*, 54 Barb. 99.

(*x*) The words "more or less" in a deed are precautionary, being intended to cover slight or unimportant inaccuracies; they cannot be construed as extending beyond known monuments or specified measurements and boundaries. *Oakes v. DeLancey*, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628; *Watson v. New York*, 73 N. Y. S. 1027, 67 App. Div. 573. When these words are used, and the deficiency is not too large, the statement of the number of acres is mere description, and not of the essence of the contract. *Libby v. Dickey*, 85 Me. 362, 27 Atl. 253; *Frenche v. Chancellor*, 51 N. J. Eq. 624, 27 N. E. 140; *Moore v. Harmon*, 142 Ind. 555, 41 N. E. 599; *Borkenhagen v. Vanden*, 82 Wis. 206, 52 N. W. 260; *Perkins Manuf. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556. But when the price to be paid is fixed, not by the agreement as an entire sum, but by the quantity, such quantity is an essential element of the bargain, and the grantee having the right

to show by parol a mistake in the quantity, does not waive his right to recover what he has overpaid by accepting a deed silent as to the quantity of land, but describing the land by monuments and by measurements stated to be more or less. *Cardinal v. Hadley*, 158 Mass. 352, 33 N. E. 575.

(*y*) The leaving a deed by the grantor at the registry of deeds for record, and the recording thereof by the register, are not a delivery. *Parrott v. Avery*, 159 Mass. 594, 35 N. E. 94; *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 379; *Derry Bank v. Webster*, 44 N. H. 264; *Robbins v. Rascoe*, 120 N. C. 79, 26 S. E. 807, 38 L. R. A. 238.

The effective date of a deed is the date of its delivery, which may be proved by parol evidence; in the absence of evidence the date written in the deed is *prima facie* evidence of its delivery at that time, though it was not acknowledged until later. *Hall v. Cazenove* (4 East, 477), 14 English Ruling Cas. 737, 743 n.;

may be delivered as an *escrow*, to a third party to be delivered to the grantee; and if to be delivered only on certain terms and conditions, and the depositary delivers the deed in disregard and violation of the conditions, and the grantee refuses or is unable to perform them, the deed would be held void. (*fh*) (*x*)

In all our States a record is required of conveyances of land, and a recorded deed takes effect over a prior deed unrecorded, of which the grantee had no knowledge or notice. But open and visible possession by the former grantee may be notice to the later grantee. (*fi*) The record is said to be notice to all the world; but this means to all who are interested in the title; and is held not to affect strangers to the title who are put upon no inquiry in relation to it. (*fj*)

* 493 * Estates are frequently sold at auction; and in that case, the plans and descriptions should be such as will give true information to such persons as ordinarily attend such sales; for if they are deceptive or materially erroneous, the purchaser is not bound to take the estate; (*g*) and if these descriptions are

(*fh*) *Abbott v. Alsdorf*, 19 Mich. 157. In *Fewell v. Kessler*, 30 Ind. 195, the deed was executed and acknowledged and left with the justice of the peace for the grantee; and it was held a valid delivery.

(*fi*) *Cabeen v. Breckenridge*, 48 Ill. 91.

(*fj*) *Maul v. Rider*, 59 Penn. St. 167.

(*g*) *Dykes v. Blake*, 4 Bing. N. C. 463.

See also *Adams v. Lambert*, 2 Jur. 1078; *Robinson v. Musgrove*, 8 C. & P. 469; *Taylor v. Mortindale*, 1 Y. & Col. Ch. 658; *Symons v. James*, id. 490; *Martin v. Cotter*, 3 Jones L. 506. "If the description be substantially true, and be defective or inaccurate in a slight degree only, the purchaser will be required to perform the contract, if the sale be fair and the title good. Some care and diligence must be exacted of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales;

and therefore, if the purchaser gets substantially the thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price by way of compensation for any small deficiency in the value, by reason of the variation. 2 Kent Com. 437; *King v. Bardeau*, 6 Johns. 38. The estate cannot be too minutely described in the particulars; for although it is impossible that all the particulars relative to the quantity, the situation, &c., should be so specifically laid down as not to call for some allowance when the bargain comes to be executed; yet if a person, however little conversant with the actual situation of his estate, will give a description, he must be bound by that whether conversant of it or not. See *Judson v. Wass*, 11 Johns. 525, 3 Cranch, 270, 2 Bay, 11." Dart, *Vendors and Purchasers* (Am. ed.), p. 51, n. 2.

Lake Erie & Western R. Co. v. Whitman, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612; *Conley v. Finn*, 171 Mass. 70, 50 N. E. 460; *Farwell v. Des Moines Brick Manuf. Co.*, 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63.

(*x*) See *Bowker v. Burdakin* (11 M. & W. 128), 8 English Ruling Cas. 598, 616, 619, notes; *Brown v. Westerfield* (47 Neb. 399), 53 Am. St. Rep. 532, 555 n. When a deed is delivered in *escrow*, the depositary cannot waive performance of the condition, nor can the grantee acquire the

title by fraud or theft without performing such condition. *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311. When there is no depositary, a deed delivered by the grantor to the grantee as his deed, with the understanding that it is not to take effect until the happening of some event or the performance of some condition, neither party can contradict and defeat the deed by showing by parol that it was conditional. *Stavers v. Stavers*, 69 N. H. 158, 45 Atl. 319.

written or printed and circulated among the buyers, or conspicuously posted in sight, then they cannot be controlled by verbal declarations * made by the auctioneer at the time * 494 of the sale. (*h*) And even if it be provided in the terms of sale that any error or misstatement in the description shall not avoid the sale, but be allowed for in the price, such provision will not cover any misstatement of a substantial and important character; but the purchaser may, on that ground, rescind the sale; (*i*) as, if an auctioneer sells lot A to one who, in good faith and without fault supposes he is buying lot B, there is no sale, and no contract between the parties for want of agreement of minds. (*j*) (*x*) And if the error be wholly unintentional, but such that the amount of compensation to be allowed therefor cannot be exactly calculated, the contract may be rescinded. (*k*) Wherever * there is any material mistake, and no such provision re- * 495 specting it, the vendor cannot offer a *pro tanto* allowance, and enforce the sale against the purchaser. And these principles would hold in the case of a sale not at auction, so far as they were applicable. (*l*)

If an estate be sold in separate lots, and one person buy many lots, there is, by the later adjudications and the better reasons a distinct contract for each lot. (*m*) But where the contract is

(*h*) *Gunnis v. Erhart*, 1 H. Bl. 289; *Bradshaw v. Bennett*, 5 C. & P. 48; *Cannon v. Mitchell*, 2 Desaus. 370; *Shelton v. Livius*, 2 Cr. & J. 411; *Powell v. Edmunds*, 12 East, 6; *Ogilvie v. Foljambie*, 3 Meriv. 53; *Rich v. Jackson*, 4 Bro. Ch. 514; *Wright v. Deckline*, Pet. C. C. 199; *Ran-kin v. Matthews*, 7 Ired. L. 286. And it makes no difference that the question arises on a sub-sale of the same premises by the purchaser. *Shelton v. Livius*, 2 Cr. & J. 411. The rule applies in favor of the seller as well as the purchaser. *Powell v. Edmunds*, 12 East, 6. The case of *Jones v. Edney*, 3 Camp. 285, is not at variance with the rule stated in the text.

(*i*) *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Stewart v. Alliston*, 1 Meriv. 26; *Robinson v. Musgrove*, 2 Mood. & R. 92; *Leach v. Mullett*, 3 C. & P. 115.

(*j*) *Sheldou v. Capron*, 3 R. I. 171.

(*k*) *Dobell v. Hutchinson*, 3 A. & E. 355. See also *Mills v. Oddy*, 2 C. M. & R. 103.

(*l*) *Hibbert v. Shee*, 1 Camp. 113; *Robinson v. Musgrove*, 2 Mo. & Rob. 92.

(*m*) This was expressly held in *Emerson v. Heelis*, 2 Taunt. 38. See also *James v. Shore*, 1 Stark. 426. The contracts are separate, both in law and fact, *id.*; *Roots v. Lord Dormer*, 4 B. & Ad. 77; *Baldey v. Parker*, 2 B. & C. 44, *Best, J.*; *Seaton*

(*x*) Specific performance may be had against a bidder who carelessly purchases at auction, at a fair price, one lot of land by mistake for another. *Van Praag v. Everidge*, [1902] 2 Ch. 266: see *Clay v. Kagelmacher*, 98 Ga. 149, 26 S. E. 493.

In general naming the lowest price for property does not bind the owner to accept the inquirer as the purchaser. *Harvey v. Facey*, [1893] A. C. 552; see *Leskie v. Haseltine*, 155 Penn. St. 98, 25 Atl. 886. So the owner may withdraw from an an-

nounced auction sale. *Harris v. Nickerson*, *infra*, p. 497, n. 2. The Massachusetts case, *Hood v. Adams*, cited in that note, decides only that the correspondence between the parties contained no authority to the auctioneer to purchase the property. See, on this point, *Cassell v. Jones*, 20 L. R. A. 503, n.

A single bid suffices to constitute an auction sale. *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 43 N. E. 195.

written and signed for the purchase of several lots at one aggregate price, it is one contract; and this is so where this contract was subsequent to a sale of the same lots severally and at several prices to the same purchaser. (*n*) And if a vendor sell an estate as one lot, and has title to a part, but not to the whole, he cannot enforce the sale; (*o*) but if he sells in several wholly independent lots, it would seem reasonable that he should enforce it as to those to which he could make title, as held by Lord *Brougham*; (*p*) but we should not consider the lots as wholly independent, if in point of fact the buying of them all was, for any reason, a part of the inducement or motive of the buyer for making the purchase.

There has been much question whether a sale at auction might be avoided by the purchaser, because by-bidders or puffers were employed by the owner or auctioneer. The proper * 496 * way is undoubtedly to give notice of such a thing at the sale; but the weight of authority in this country, as well as that of some cases in England, seems to be in favor of permitting an owner, without notice, to employ a person to bid for him, if he does this with no other purpose than to prevent a sacrifice of the property under a given price. (*q*) In a recent interesting

v. Booth, 4 A. & E. 528; *Gibson v. Spurrer*, Peake, Ad. Cas. 49; *Dykes v. Blake*, 4 Bing. N. C. 463. But see *Van Eps v. Schenectady*, 12 Johns. 436; *Stoddart v. Smith*, 5 Binn. 355; *Waters v. Travis*, 9 Johns. 450.

(*n*) *Dykes v. Blake*, 4 Bing. N. C. 463. See *Chambers v. Griffiths*, 1 Esp. 150; *Drewe v. Hanson*, 6 Ves. 675; *Hepburn v. Auld*, 5 Cranch, 262; *Osborne v. Bremar*, 1 Desaus. 486; *Cassamajor v. Strode*, 2 Myl. & K. 706; *Lewin v. Guest*, 1 Russ. 325; *Harwood v. Bland*, Flan. & K. 540.

(*o*) 2 Story, Eq. § 778; *Reed v. Noe*, 9 Yerg. 283; *Dalby v. Pullen*, 3 Sim. 29; *Bates v. Delavan*, 5 Paige, 300; *Johnson v. Johnson*, 3 B. & P. 162; *Parham v. Randolph*, 4 How. (Miss.) 435. But if the part to which the seller has title was the purchaser's principal object, or equally his object with the other part, and is itself an independent subject, and not likely to be injured by being separated from the other part, equity will compel the purchaser to take it at a proportionate price. See *McQuin v. Farquhar*, 11 Ves. 467; *Bowyer v. Bright*, 13 Price, 698; *Buck v. McCaughtry*, 5 Monr. 230; *Simpson v. Hawkins*, 1 Dana, 305; *Collard v. Groom*, 2 J. J. Marsh. 488.

(*p*) *Cassamajor v. Strode*, 2 Myl. & K. 706.

(*q*) This right, provided there exists no actual intention to defraud, is recognized by many recent authorities. See *Latham v. Morrow*, 6 B. Mon. 630; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Bowles v. Round*, 5 Ves. Jr. 508, n. (*b*) (*Sumner's ed.*); *Crowder v. Austin*, 3 Bing. 368; *Veazie v. Williams*, 3 Story, 622; *Thorntt v. Haines*, 15 M. & W. 371; *Wheeler v. Collier*, Mood. & M. 123; *Mortimer v. Bell*, L. R. 1 Ch. 10; *Dart, Vendors and Purchasers*, p. 89. *Contra*, *Towle v. Leavitt*, 3 Foster (N. H.) 360; *Pennock's Appeal*, 14 Pa. St. 446; *Staines v. Shore*, 16 Pa. St. 200; *Darst v. Thomas*, 87 Ill. 222; *Peck v. List*, 23 W. Va. 338. *Veazie v. Williams*, 8 How. 134, seems to hold, that if the bids were intended to enhance the price, and did so, the buyer should have relief in equity. See, as to bids by puffers, at auction, *McDowell v. Simms*, 6 Ired. Eq. 278, and *Tomlinson v. Savage*, id. 430; also, *Doolubdass v. Ramlohl*, 3 E. L. & E. 39, and *Flint v. Woodin*, 13 E. L. & E. 278; s. c. 9 Hare, 618. Where property was advertised for sale "to the highest bidder," a written proposal of "five hundred dollars more than the highest bid," without naming any sum, was not considered valid. *Webster v. French*, 11 Ill. 154. See *Davis v. Petway*, 3 Head, 667.

English case, it was held, that a sale at auction "without reserve" means, that there shall be no bid by or for the vendor at the auction, and that the property shall be sold to the highest bidder, whether the sum offered be equivalent to its value or not. And that the highest *bonâ fide* bidder may sue the auctioneer if he knocks down the hammer at a subsequent and higher bidding of or for the owner; and this whether the auctioneer was or was not privy to such bid. (r) It might be inferred from the language by some of the judges in this case, that by-bidding was not unlawful in cases of ordinary sale by auction, but would be made so if such phrases in the advertisement as "without reserve," "to the highest bidder," or any equivalent phrases were used. (x) It must be often difficult, however, to draw the line between an honest procedure of this sort and a fraudulent design. It is certain, that any unfair conduct on the part of the purchaser in regard to his purchase, prevents his acquiring any title to the goods. (s)¹ But an agreement among many, that one should bid for all, will not necessarily avoid the sale. (t)

At an auction the contract of sale is not completed until the *auctioneer knocks the property down to the pur- *497 chaser; for he is the agent of the vendor, and this is his assent to the offer of the purchaser, and until such assent be given the offer may be withdrawn. (u) But an auctioneer has no authority to rescind the sale for either party without specific orders, although the purchase-money be not yet paid. (v)² (y)

(r) *Warlow v. Harrison*, 1 E. & F. 295. But see *Mainprice v. Westley*, 6 B. & S. 420.

(s) *Fuller v. Abrahams*, 6 J. B. Moore, 316; s. c. 3 Br. & B. 116; *Smith v. Greenlee*, 2 Dev. L. 126.

(t) *Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Switzer v. Skiles*, 3 Gilman, 529.

(u) *Payne v. Cave*, 3 T. R. 148; *Routledge v. Grant*, 4 Bing. 653. If the bid is retracted, the retraction must be loud enough to be heard by the auctioneer, otherwise it amounts to nothing. *Jones v. Nanney, McClel.* 39; s. c. 13 Price, 103.

(v) *Boinest v. Leigneux*, 2 Rich. L. 464.

¹ That when a sale is to be "without reserve," the secret employment by the seller of by-bidders renders the sale voidable by the buyer, see *Curtis v. Aspinwall*, 114 Mass. 187. See also cases cited in note *q.*, p. *496, *ante*. — K.

² An auctioneer's advertisement to sell a certain article by auction does not amount

(x) By-bidding or extravagant puffing, or fictitious bids, avoids an auction sale at the option of a *bonâ fide* purchaser, when it amounts to fraud. *Springer v. Kleinsorge*, 83 Mo. 152; *Flannery v. Jones*, 180 Penn. St. 338, 36 Atl. 856; *Bowman v. McClenahan*, 46 N. Y. S. 945, 44 id. 482; *Locke v. Willingham*, 99 Ga. 297, 25 S. E. 693; *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345; *Peck v. List*, 23 W. Va. 338, 392;

Wick v. Dawson, 42 W. Va. 43, 47, 24 S. E. 587; *Parfitt v. Jepson*, 36 L. T. 251; *Rafferty v. Norris*, 12 Penn. Supr. Ct. 450. Such a sale is also void if the purchaser's improper conduct prevents others from competing by their bids and raising the price. *Ingalls v. Rowell*, 149 Ill. 163, 36 N. E. 1016; *Herndon v. Gibson* (S. C.), 20 L. R. A. 545.

(y) One who makes an offer to sell property at auction, accompanied by printed

If an auctioneer does not disclose the name of the owner of the property which he sells, he is himself liable to an action by the buyer for the completion of the contract. (*w*) And it would be so if he sold or warranted without authority. (*x*) (*xx*) If he has the authority of the owner to warrant, and does so, disclosing the name of the owner, he is himself exonerated from the warranty, and the owner is liable upon it. (*y*) And he has such special

(*w*) *Hanson v. Roberdeau*, Peake, Cas. 120; *Franklyn v. Lamond*, 4 C. B. 637; *Mills v. Hunt*, 20 Wend. 481; *Jones v. Littledale*, 6 A. & E. 486.

(*x*) *Sugden*, Law of Vendors (10th ed.), vol. 1, p. 70; *Jones v. Dyke*, id. vol.

3 app. 8; *Gaby v. Driver*, 2 Y. & J. 549.

(*y*) An auctioneer in such case is like any other agent, and unless he acts beyond his authority, binds his principal, but not himself.

to a contract to put up the article with any one attending the sale; and a withdrawal of such article is not a breach of contract. *Harris v. Nickerson*, L. R. 8 Q. B. 286. See *Spencer v. Harding*, L. R. 5 C. P. 561. An auctioneer cannot buy in for any one property sold by him at auction. *Hood v. Adams*, 125 Mass. 207; *Block v. Rice*, 27 Gratt. 812. If an auctioneer delivers goods to the wrong party, he is liable. *Woolfe v. Horne*, 2 Q. B. D. 355; *Barker v. Furlong*, [1891] 2 Ch. 172. If the terms of sale require cash payment, an auctioneer has no right to receive in payment a check on a bank where the buyer has no funds. *Broughton v. Sillaway*, 114 Mass. 71. An auctioneer can deduct his commissions and expenses out of the proceeds of the sale. *Dowler's Succession*, 29 La. An. 437. — K.

conditions, is liable in damages for refusing to accept the highest bidder if the latter complies with the conditions and the vendor violates them, and the Statute of Frauds is not a defence; but, in the absence of an established custom, the vendor is not obliged to accept, in payment of a deposit, the check even of a person of credit, though such a course is usual. *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; *Johnston v. Boyes*, [1899] 2 Ch. 73; *White v. Dahlquist Manuf. Co.*, 179 Mass. 427, 60 N. E. 791. Under the Statute of Frauds the bidder may withdraw his bid after the hammer falls and before his name is written in the memorandum-book of sale. *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; *Hibernia S. & L. Society v. Behnke*, 121 Cal. 339, 53 Pac. 812; see *Quinzel v. Schmidt* (N. J.), 38 Atl. 665.

The purchaser's deposit at an auction is forfeited if he does not comply with the conditions stated, and the auctioneer makes no fraudulent representations. *Donahue v. Parkman*, 161 Mass. 412, 37 N. E. 205; *Mahon v. Liscomb*, 19 N. Y. S. 224; *Noah v. Pierce*, 85 Mich. 70, 48 N. W. 277; *Roberts v. French*, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 656. The terms of sale, when publicly announced, bind both the buyer and the seller. *Chandler v. Morey*, 96 Ill. App. 278, 195 Ill. 596, 63 N. E. 512. And if the purchaser, after making a deposit, fails to pay the balance according to the terms of the sale,

the vendor may resell the property fairly and honestly, and charge the first purchaser with the loss and damages caused by his failure to fulfil his contract, and deduct the same from the deposit. *McKiernan v. Vallean* (R. I.), 51 Atl. 102; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 82 Am. St. Rep. 723, 53 L. R. A. 867; *Lowry v. Haberlin*, 8 Penn. Dist. Rep. 382.

(*xx*) An auctioneer entrusted with chattels for sale at public auction has no implied authority from the vendor to warrant their quality. *Payne v. Leonfield*, 51 L. J. Q. B. 642, 30 W. R. 814. But his false representations may entitle the purchaser to recover his deposit. *McKeag v. Piednor*, 74 Mo. App. 593; *In re Hamilton's Estate*, 120 Cal. 421, 52 Pac. 708; *Mahon v. Liscomb*, 19 N. Y. S. 224. An auctioneer who is notified that the goods he sells at auction were obtained by fraud is liable therefor to the defrauded owner. *Morrow Shoe Manuf. Co. v. New England Shoe Co.*, 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417; see *Barker v. Furlong*, [1891] 2 Ch. 172; *Seemuller v. Fuchs*, 64 Md. 217; *Elison v. Wulff*, 26 Ill. App. 616; *Milliken v. Hatheway*, 148 Mass. 69, 19 N. E. 16. And he is so liable in trover even when he acts in good faith and without knowledge that his principal has no title. *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419; *Mohr v. Langan*, 162 Mo. 474, 63 S. W. 409.

property in the goods that he may bring an action for the price, even if the goods be sold in the house of the owner, and were known to be his. (z) But the buyer may set off a debt due to him from the owner. (a) And if the auctioneer sell the property of A as the property of B, and the buyer pay the price to B, the auctioneer cannot recover it of the buyer. (b) It is said, that after the sale is finished the auctioneer is no longer the agent of the owner, and the payment to him of the price is not a payment to the owner. (c) But where the auctioneer, * by * 498 usage, or on other evidence, can be shown to have authority to receive the money, such payment must discharge the buyer. (d) It is the duty of the auctioneer to obtain the best price he fairly can to comply with his instructions, unless they would operate as a fraud; to pursue the accustomed course of business, and to possess a competent degree of skill; and if he fail in either of these particulars, and damage ensues to the owner, he is responsible therefor. (e) (x)

In the preceding remarks we have given the rules of law applicable to auction sales of personal as well as of real property. They are the same in both cases, except so far as they are necessarily distinguished by the nature of the property sold.

(z) *Williams v. Millington*, 1 H. Bl. 81; *Coppin v. Walker*, 7 Taunt. 237. But where the person employing the auctioneer to sell has no right to do so, the auctioneer has no claim upon the property against the rightful owner, and the purchaser may refuse to pay the auctioneer. *Dickenson v. Naule*, 1 Nev. & M. 721. See *ante*, p. *132.

(a) *Coppin v. Craig*, 7 Taunt. 243.

(x) An auctioneer is such an agent that he cannot delegate his authority: *Davis v. King* (66 Conn. 465), 50 Am. St. Rep. 104, 115 n.; or grant an extension of the time

(b) *Coppin v. Walker*, 7 Taunt. 237.

(c) *Sykes v. Giles*, 5 M. & W. 645.

(d) See *Capel v. Thornton*, 3 C. & P. 352; *Bunney v. Poyntz*, 4 B. & Ad. 568. The case of *Sykes v. Giles*, above cited, does not impugn this rule, but turned upon the special conditions of the sale.

(e) See *Guerreiro v. Peile*, 3 B. & Ald. 616; *Bexwell v. Christie*, Cowp. 395; *Russell v. Palmer*, 2 Wils. 325.

stipulated for payment. *McKiernan v. Valteau* (R. I.), 51 Atl. 102. But he may reject a trifling bid. *Taylor v. Harnett*, 55 N. Y. S. 988, 26 Misc. 362.

HIRING OF REAL PROPERTY.

SECT. I. — *Of the Lease.*

THE hiring of real property is usually effected by means of a lease, which is a contract, whereby one party — the tenant — has the possession and profits of the land, and the other party — the landlord — reserves a rent, which the tenant pays him by way of compensation.

It is frequently a question whether an instrument is a lease at once, or only an agreement to make a lease hereafter; and, if it be a lease, when by its terms it is to begin, and when to end; and whether the tenancy is for years, or from year to year, or at will, or upon sufferance. But these questions are properly questions of construction, and so far as they come within the scope of this work will be considered hereafter, when we treat of Construction, and of the Statute of Frauds, in our Second Volume.

If a party accepts a lease and occupies the premises without signing the lease, he is nevertheless liable for the rent. (*aa*) (*x*)

Any general description will suffice to pass the demised premises, if it be capable of distinct ascertainment and identification. And certain words, usually employed, as house, farm, land, and

(*aa*) *Trapnall v. Merrick*, 21 Ark. 503.

(*x*) When intending lessees occupy the property with the understanding that the lease shall be signed, the law implies a verbal contract of similar import with the written lease, though it was never executed. *Emrich v. Union Stock-Yard Co.*, 86 Md. 482, 38 Atl. 943; *Bonaparte v. Thayer* (Md.), 52 Atl. 496. But when possession is not taken, an oral agreement for a lease is not a lease. *Fleming v. Ryan*, 31 N. Y. S. 129; *Billings v. Canney*, 57 Mich. 425; *Cheney v. Newberry*, 67 Cal. 125; *Laroussini v. Werlein*, 52 La. An. 424, 78 Am. St. Rep. 350.

In § 10 of the English Conveyancing Act, 1881, the word "lease" appears not to include an agreement for a lease. *Manchester Brewing Co. v. Coombs*, 82 L. T. 347.

Letting the wall of a house for bill-posting and advertising at so much a year, the rental to be payable quarterly, is not a tenancy, but a license revocable by reasonable notice. *Wilson v. Turner*, [1901] 1 Ch. 578; *Duxbury v. Sandiford*, 80 L. T. 552. See *Jordan v. Indianapolis Water Co. (Ind.)*, 64 N. E. 680. So occupation of premises as an agent or servant, in performance of his employment, is not a tenancy. *Mead v. Pollock*, 99 Ill. App. 151; *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666.

A lessor's stipulation "the rent not to be raised during my present tenancy" means in law that the lessor, being himself a lessee, will not determine the present tenancy and create a new one. *Adams v. Cairns*, 85 L. T. 10.

the like, have, if necessary, a very wide meaning. (a)¹(x) And where such general and comprehensive terms are employed, all things usually comprehended within the meaning thereof will pass, unless the circumstances of the case show very clearly that the intention of the parties was otherwise. (b)² And inaccuracies as to qualities, names, amounts, etc., will be rejected, if there is enough to make the purposes and intentions of the * parties certain. (c) So the granting for hire of a thing * 500 to be used, carries with it all proper appurtenances and accompaniments which are needed for the proper use and enjoyment of the thing. (d)

SECTION II.

OF THE GENERAL LIABILITIES OF THE LESSOR.

There is an implied covenant on the part of the lessor to put the lessee into possession,³ (y) and that he shall quietly en-

(a) Shep. Touch. 90-92.

(b) Doe v. Burt, 1 T. R. 701; Bryan v. Wetherhead, Cro. C. 17; Gennings v. Lake, id. 168; Kerslake v. White, 2 Stark. 508; Ongley v. Chambers, 1 Bing. 483, 496.

(c) Miller v. Travers, 1 M. & Scott, 342, 351; Blague v. Gold, Cro. C. 473; Mason v. Chambers, Cro. J. 34; Wrotes-

ley v. Adams, Plowd. 187, 191; Windham v. Windham, Dyer, 376 b; Goodtitle v. Southern, 1 M. & Sel. 299; Doe v. Gallo-way, 5 B. & Ad. 43; Pim v. Currell, 6 M. & W. 234, 269.

(d) Shep. Touch. 89; Morris v. Edgington, 3 Taunt. 24, 31; Kooystra v. Lucas, 5 B. & Ald. 830; Harding v. Wilson, 2 B. & C. 96.

¹ If the tract is shown with reasonable certainty, it will pass, though the description is erroneous in some respects. McLoughlin v. Bishop, 35 N. J. L. 512. — K.

² The grant of *thing* carries incident, Riddle v. Littlefield, 53 N. H. 503; as the lease of a ground floor carries the right to have windows overlooking the lessor's yard unobstructed, Doyle v. Lord, 64 N. Y. 432; of a "building" includes land under the eaves, if belonging to the lessor; and the erection by him of a wall is an eviction, Sherman v. Williams, 113 Mass. 481; of "machinery" includes a "blast" on leased premises, Thropp v. Field, 11 C. E. Green, 82; but "adjoining buildings" will not pass unless particularly described, Ogden v. Jennings, 62 N. Y. 526; nor will a lease of a single room give the exclusive right to the outer wall, Pevey v. Skinner, 116 Mass. 129. — K.

³ This is the law in England and in a few States in this country; see note (e). But generally in this country, though the landlord impliedly covenants that he has good title to lease for the term demised, and that the tenant shall quietly enjoy the premises, Stott v. Rutherford, 92 U. S. 107; Harms v. McCormick, 132 Ill. 104; Ware v. Lithgow, 71 Me. 62; Lanigan v. Kille, 97 Pa. 120, yet he is not liable for the wrongful acts of a stranger in withholding possession, Gazzolo v. Chambers, 73 Ill. 75; Field v. Herrick, 101 Ill. 110; Sigmund v. Howard Bank, 29 Md. 324; Pendergast v. Young, 21 N. H. 234, 236; Gardner v. Keteltas, 3 Hill, 330; Cozens v. Stevenson, 5 S. & R. 421, 424. — W.

(x) A lease of a flat or of the rooms on a floor is a lease of a separate dwelling, and includes the outer wall if solely appropriate to the rooms let. Carlisle Café Co. v. Muse, 67 L. J. Ch. 53. See Hudson

v. Cripps, [1896] 1 Ch. 265; Bensing v. Ramsay, 62 J. P. 613; McDowell v. Hyman, 117 Cal. 67, 43 Pac. 984.

(y) Minneapolis Co-op. Co. v. Williamson (51 Minn. 53), 38 Am. St. Rep. 473,

joy. (e)¹ But unless the demise be under seal there is no implied covenant for good title, but only for quiet enjoyment. (f) (x) And an interruption by a landlord of his tenant's occupation without evicting him, has been held not to suspend the rent, in whole or in part. (ff) He is not bound to renew, without express covenant, (g) nor are such covenants favored, if they tend to perpetuity, (h)² but where they are definite and reasonable the law sustains them. (i) A covenant to "renew under the same covenants," is

(c) *Line v. Stephenson*, 4 Bing. N. C. 678, 5 id. 183; *Holden v. Taylor*, Hob. 12; *Hacket v. Glover*, 10 Mod. 142; *Shep. Touch. 165*; *Nokes' case*, 4 Rep. 80 b. — Assumpsit lies against a landlord on his implied promise to give possession. *Coe v. Clay*, 3 Mo. & P. 57, 5 Bing. 440; *Hughes v. Hood*, 50 Mo. 350. And in the absence of any proof to the contrary, the tenancy under a written agreement begins from the day on which the agreement professes to have been executed. *Bishop v. Wraith*, 26 E. L. & E. 568; *Hale v. City of London, &c. Co.*, 2 B. & S. 737; *Steel v. Frick*, 56 Pa. 172.

(f) *Bandy v. Cartwright*, 20 E. L. & E. 374; s. c. 8 Exch. 913.

(ff) *Fuller v. Ruby*, 10 Gray, 285; *Bartlett v. Farrington*, 120 Mass. 284; *Walker v. Shoemaker*, 4 Hun, 579.

(g) *Lee v. Vernon*, 7 Bro. P. C. 432; *Robertson v. St. John*, 2 Bro. Ch. 140.

(h) *Baynham v. Guy's Hospital*, 3 Ves. 295; *Attorney-General v. Brooke*, 18 id. 319, 326.

(i) *Furnival v. Crew*, 3 Atk. 83; *Cooke v. Booth*, Cowp. 819; *Willan v. Willan*, 16 Ves. 72, 84; *Sadlier v. Biggs*, 27 E. L. & E. 74.

¹ *Mack v. Patchin*, 42 N. Y. 167. See *Milliken v. Thorndike*, 103 Mass. 382. Such an implied covenant means that the lessee shall not be disturbed rightfully in his possession. *Underwood v. Birchard*, 47 Vt. 305. Where an express covenant was for quiet enjoyment free from disturbance by the "lessor, his successors, or assigns," no further covenant as to enjoyment will be implied. *Burr v. Stenton*, 42 N. Y. 462. If the lessor's covenant applies to acts of "himself and his heirs and all others claiming under him," the lessor will not be liable for a disturbance by the paramount title. *Dennett v. Atherton*, L. R. 7 Q. B. 316. If ousted by a stranger, the tenant's only remedy is against such stranger. *Moore v. Weber*, 71 Penn. St. 429. — K.

² *Cunningham v. Pattee*, 99 Mass. 248. "To renew and to continue to renew" is a perpetual covenant, *Page v. Esty*, 54 Me. 319; which equity will enforce, *Banks v. Haskie*, 45 Md. 207. See *Boyle v. Peabody Heights Co.*, 46 Md. 623; *Blackmore v. Boardman*, 28 Mo. 420. — K.

481 n. An oral lease for less than a year of land not in the lessor's possession may bind him by estoppel. *Lewis v. Brandle*, 107 Mich. 7, 64 N. W. 734. It is sufficient as to title, if the lessor's title, though not in fee, is strong enough to repel trespassers. *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166.

As to the "usual covenants" in leases, see *In re Anderton & Milner's Contract*, 45 Ch. D. 476; *Bishop v. Taylor*, 60 L. J. Q. B. 556; *In re Lander & Bagley's Contract*, [1892] 3 Ch. 41; 50 Albany L. J. 366.

(x) A covenant for title or quiet enjoyment is implied from the word "demise," if not modified by any express covenant, but not from the words "I agree to let," or from the mere relation of landlord and tenant. *Baynes v. Lloyd*, [1895] 2 Q. B. 610. Quiet enjoyment is also an implied

term of the letting of a house for a year. *Dudd-Scott v. Daniell*, [1902] 2 K. B. 351; *Chestnut v. Tyson* (105 Ala. 149), 50 Am. St. Rep. 101, 114 n.

The covenant for quiet enjoyment is broken by any substantial physical interference by the lessor with the enjoyment, as when he erects a much higher building on the adjoining land causing the smoke to drive down the chimneys of the leased house. *Tebb v. Cave*, [1900] 1 Ch. 642. See *Cohen v. Tanner*, [1900] 2 Q. B. 609; *Kelly v. Rogers*, [1892] 1 Q. B. 910; *Minneapolis Co-op. Co. v. Williamson* (51 Minn. 53), 38 Am. St. Rep. 473, 490 n.; *Case v. Minot*, 158 Mass. 577, 585, 33 N. E. 700. This covenant is to be construed with regard to the circumstances existing at the date of the lease. *Davis v. Town Properties Inv. Corp. Lim'd*, [1902] W. N. 164.

satisfied by a renewal which omits the covenant to renew. (*j*) But a covenant to *renew* implies a renewal for the same term and rent, and, probably, on the same conditions as before, except only the covenant to renew; and if it be "to renew on such terms as may be agreed upon," this is void for uncertainty. (*k*) If there be a covenant to renew at the election of the lessee, he must make that election before the lease terminates; (*kk*) and a mere continuance in possession will not operate as an election to renew. (*kl*) (*x*)

* A landlord is under no implied legal obligation to repair, * 501 and it seems to be law on the weight of authority, that the uninhabiteness of a house is not a good defence to an action for rent. (*l*)¹ (*y*) And if he expressly covenanted to repair, the tenant cannot quit and discharge himself of the rent because the repairs are not made, unless there is a provision to that effect. (*m*) And if a landlord is bound by custom or by express agreement to repair, this obligation, and the obligation of the tenant to pay rent, are, it seems, independent of each other, so that the refusal or neglect of the landlord to repair is no answer to a

(*j*) Carr v. Ellison, 20 Wend. 178. See also Abeel v. Radcliff, 13 Johns. 297; Brand v. Frumveller, 32 Mich. 215. But see *contra*, Bridges v. Hitchcock, 1 Bro. P. C. 522.

(*k*) Rutgers v. Hunter, 6 Johns. Ch. 215; Whitlock v. Duffield, 1 Hoff. Ch. 110; Tracy v. Albany Exch. Co., 3 Seld. 472; Pray v. Clark, 113 Mass. 283; Western, &c. Co. v. Lansing, 49 N. Y. 499.

(*kk*) Renoud v. Daskam, 34 Conn. 512.

(*kl*) Falley v. Giles, 29 Ind. 114; Bradford v. Patten, 108 Mass. 153.

(*l*) Arden v. Pullen, 10 M. & W. 321; Hart v. Windsor, 12 id. 68; Izon v. Gorton, 5 Bing. N. C. 501; Gott v. Gandy, 22 E. L. & E. 173; Moffatt v. Smith, 4 Comst. 126; Banks v. White, 1 Sneed, 613; Howard v. Doolittle, 3 Duer, 464;

Clenes v. Willoughby, 7 Hill (N. Y.), 83; Estep v. Estep, 22 Ind. 114; Robbins v. Mount, 4 Rob. 553; Royce v. Guggenheim, 106 Mass. 201; Coe v. Vogdes, 71 Pa. 383. But see Bissell v. Lloyd, 100 Ill. 214. But where a house had been used as a house of ill-fame, and this was concealed by the lessor and unknown to the lessee, it was *held* to be a defence or a counter-claim to an action for rent. (*z*) Staples v. Anderson, 3 Rob. 327. See *post* ch., on Warranty, p. * 574, n. (*d*). The cases *contra*, as Collins v. Barrow, 1 Mo. & Rob. 112; Edwards v. Etherington, 7 Dow. & R. 117; Salisbury v. Marshall, 4 C. & P. 65, seemed to be overruled.

(*m*) Surplice v. Farnsworth, 7 Man. & G. 576.

¹ This rule applies to a shop or store, Lucas v. Coulter, 104 Ind. 81; Libbey v. Tolford, 48 Me. 316; or warehouse, Manchester Warehouse Co. v. Carr, 5 C. P. D. 507. So in letting land there is no covenant implied that noxious plants are not growing upon it. Erskine v. Adeane, L. R. 8 Ch. 756. But in case of a furnished house the law is generally otherwise. See *post*, * 589, note 1. — W.

(*x*) A definite "option of renewal" may be specifically enforced. Lewis v. Stephenson, 67 L. J. Q. B. 296; Miller & Aldworth, Lim'd v. Sharp, [1899] 1 Ch. 622. And it is assignable. McClintock v. Joyner, 77 Miss. 678, 27 So. 641, 78

Am. St. Rep. 541. As to "costs of renewal," see Mostyn v. Fitzsimmons, [1902] 1 K. B. 512.

(*y*) See *infra*, p. * 589 and notes.

(*z*) Mound v. Barker (71 Vt. 253), 76 Am. St. Rep. 767.

demand for rent. (n)¹ It would seem from the authorities above cited, to be the law in England, that a tenant is justified in avoiding his lease, only by a positive wrong on the part of his landlord; as by erroneous or fraudulent misdescription of the premises, or their being made uninhabitable by the landlord. (o) It is there held, that if the lessor knows that his house is in a ruinous condition, and that the lessee is ignorant of this, he is not bound to declare its condition to the lessee. It is said, however, that he must do this if he knows that the lessee takes the house because he believes it to be sound and habitable, or if the concealment will amount to a deceit. (p) (x) But it would be difficult to suppose a case to which these exceptions, at least in their substance, are not applicable.²

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* SECTION III.

OF THE GENERAL LIABILITY AND OBLIGATION OF THE TENANT.

The words "reserving," or "yielding," or "paying," a rent, or any phraseology distinctly showing the intention of the parties that rent should be paid, imply a covenant or a promise on the part of the lessee to pay the same, although the words import no

(n) Bro. Abr. *Dette*, pl. 18; 27 H. 6, 68; Sutton v. Temple, id. 52; Arden v. 10 a, pl. 6. See also the reporter's note to Pullen, 10 id. 321.
Surplice v. Farnsworth, 7 Man. & G. 576. (p) *Keates v. Earl Cadogan*, 10 C. B. 591.
 (o) See *Surplice v. Farnsworth*, 7 Man. & G. 576; *Hart v. Windsor*, 12 N. & W.

¹ If the landlord retains possession of part of the premises, he is liable for damage caused by the defective condition of such part. Thus, where the rooms of a building were leased by the defendant to various tenants and the hallways remained in his possession, he was held liable for an injury arising from their defective condition. *Gordon v. Cummings*, 152 Mass. 513; *Marwedel v. Cook*, 154 Mass. 235; *Peil v. Reinhart*, 127 N. Y. 387. So if goods of a tenant of part of a building are injured by water escaping from a waste pipe through the negligence of the landlord who occupies the remainder of the building and has charge of the pipe, the landlord is liable. *Priest v. Nichols*, 116 Mass. 401. So where the injury was caused by negligence in allowing a water-closet used by all the tenants of the building, and also outsiders, to overflow. *Marshall v. Cohen*, 44 Ga. 489. So where the goods of a tenant of the basement were injured by the fall of a chimney which the landlord negligently suffered to remain out of repair. *Eagle v. Swayze*, 2 Daly, 140. See also *Jones v. Freidenberg*, 66 Ga. 505; *Glickauf v. Maurer*, 75 Ill. 289; *Bernauer v. Hartman Steel Co.*, 33 Ill. App. 491; *Toole v. Beckett*, 67 Me. 544. — W.

² If premises which are dangerous from some cause not to be detected by observation, are leased by one who knows the danger without disclosing the facts, he is liable for the damage caused thereby. As where premises infected with small-pox, scarlet fever, or diphtheria are leased. *Minor v. Sharon*, 112 Mass. 477; *Cutter v. Hamlen*, 147 Mass. 471; *Cesar v. Karutz*, 60 N. Y. 229; *Snyder v. Gorden*, 46 Hun, 533. Or a well is polluted. *Maywood v. Logan*, 78 Mich. 135. Or where other concealed and dangerous defects existed. *Coven v. Sunderland*, 145 Mass. 363; *Timlin v. Standard Oil Co.*, 126 N. Y. 514. — W.

(x) See *Willcox v. Hines* (100 Tenn. 524), 66 Am. St. Rep. 761, 769, 785 n.

promise. And he is liable for an action either for non-payment of rent, or for refusing to take possession. (*r*) But a failure to pay rent does not forfeit the lease, without express agreement to that effect. (*rr*). He is not bound to pay the taxes, unless he agrees to; but the agreement may be indirect and constructive, as if he agrees to pay the rent "free from all taxes, charges, or impositions," (*s*) or even to pay a "net rent;" (*t*) or any other language is used distinctly showing that this burden was to be cast upon the tenant. And where a lessee of a part of a building covenanted to pay taxes, he was held to pay his proportion of the taxes assessed on the whole building, a usage to that effect being shown to exist in that locality. (*tt*)

The time when the rent is due depends upon the terms of the contract; and, if this were silent, the time would depend upon statutory provision, if any there were, and in the absence of such provision, upon the usage of the country. Whenever it is due, if no place of payment is fixed by the contract, and there is a clause of re-entry and forfeiture in case of non-payment, a readiness to pay upon the land would be necessary to prevent a forfeiture, and as the law could not in such a case compel a tenant to seek the landlord off the land to pay the rent, and at the same time be ready upon the land with the money to prevent a forfeiture, it would seem that a readiness to pay upon the land would also be a good plea of tender in an action for the rent, (*u*) although the tenant might, if he chose, make a personal tender which would be good. (*v*) But we hold, with the latest *English authority, that if there be no clause of forfeit- * 503 ure in the lease, the tenant must seek the landlord and tender the rent, as in other cases, in order to prevent the landlord from recovering the costs of an action; (*w*) although the American cases lead to a different conclusion. (*x*) And a tender of rent on the day it fell due, although at a late hour in the evening, has been held good. (*y*) Most leases now made in this country contain

(*r*) *De Lancey v. Ganong*, 9 N. Y. 9; *Brand v. Frumveller*, 32 Mich. 215. See *Platt on Covenants*, 50. The learned author of this treatise maintains, however, with great ability and learning, that an action of *covenant* will lie in such case only when the lease is made by indenture executed by the lessee.

(*rr*) *Brown v. Bragg*, 22 Ind. 122.

(*s*) *Bradbury v. Wright*, Dougl. 624. But see *contra*, *Cranston v. Clarke*, Sayer, 78.

(*t*) *Bennett v. Womack*, 3 C. & P. 96; s. c. 7 B. & C. 627.

(*tt*) *Codman v. Hall*, 9 Allen, 335; *Amory v. Melvin*, 112 Mass. 83.

(*u*) *Haldane v. Johnson*, 20 E. L. & E. 498; s. c. 8 Exch. 689.

(*v*) *Hunter v. Le Conte*, 6 Cowen, 728.

(*w*) *Haldane v. Johnson*, 20 E. L. & E. 498; s. c. 8 Exch. 689.

(*x*) *Hunter v. Le Conte*, 6 Cowen, 728; *Walter v. Dewey*, 16 Johns. 222.

(*y*) *Thomas v. Hayden*, cited in *Perkins v. Dana*, 19 Vt. 589.

a clause of forfeiture for non-payment, giving to the lessor the right to re-enter thereupon, and to repossess himself absolutely of the premises. This provision is expressed in various ways, but it is substantially the same everywhere. It must be remembered, however, that the law is exact, and indeed punctilious, as to the exercise of this right of re-entry. It may be said, in general, that a demand must be made for the rent due, and of the precise sum, on the very day on which it becomes due, and at a convenient time before sunset, and at the very place where it is payable, if one be prescribed, and otherwise at the most conspicuous or notorious place on the premises leased. (z)

A landlord who, without demanding rent the day it is due, or then entering, and without giving due notice, subsequently enters upon land held by a tenant at will, is a trespasser. (zz)

A lessee for years holding over though only to remove his goods, is held to become thereby a tenant from year to year, and must give six months' notice to determine his tenancy. (za)¹(x)

A tenant is not bound to make repairs without an express agreement. Such is the general rule, sometimes asserted quite strongly. (zb) But, from the weight of authority, and the prevailing usage, we should say that the tenant must make such repairs as are made necessary by his use of the house, and are required to keep the premises in tenantable condition. And even if an accident occur without his having anything to do with it, as if a window were broken, or slates cast from the roof, he must repair, if serious injury will obviously result in case the accident be left

(z) *Van Rensselaer v. Jewett*, 2 Comst. 135, 141; *Jones v. Reed*, 15 N. H. 68. In the latter case it is said that the demand must be made in the afternoon.

(zz) *Cunningham v. Holton*, 53 Me. 33.

(za) *Witt v. Mayor, &c. of New York*, 6 Rob. 441.

(zb) *Brewster v. De Fremery*, 33 Cal. 341.

¹ A lessee from year to year holding over becomes a trespasser or continues to be a tenant, as the landlord elects. *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151. — K.

(x) A holding over by a general consent therefor creates a tenancy from year to year according to the terms of the old lease other than that as to time. *Ridgeway v. Hannum* (Ind. App.), 64 N. E. 44; *Campau v. Michell*, 103 Mich. 617, 61 N. W. 890; *Kuhn v. Smith*, 125 Cal. 615, 73 Am. St. Rep. 79; *Byxbee v. Blake* (Conn.), 51 Atl. 535, 57 L. R. A. 222. If there is no agreement, the landlord has an option to treat the lessee holding over as a tenant or a trespasser, and this right is not limited by the fact that the lessee did not intend to renew the lease. *Mason v. Wierengo's Es-*

tate, 113 Mich. 151, 71 N. W. 489; *Pattison v. Dryer*, 98 Mich. 564, 57 N. W. 814; *School District v. Batsche*, 106 Mich. 330, 64 N. W. 196; *Haynes v. Aldrich* (133 N. Y. 287), 28 Am. St. Rep. 636, 639; *Herter v. Mullen* (159 N. Y. 28), 70 id. 516, 533 n.

If the holding over is agreed to be conditional upon the landlord making necessary repairs, and such repairs are not made, the tenant may leave without notice. *Fisher v. Nergararian*, 112 Mich. 327, 70 N. W. 1009.

without repair. (a) In general, an outgoing tenant must leave the premises wind and water tight, but is not bound to any ornamental repair, as painting, papering, etc., although so broad a covenant on his part as "to leave the premises in good and sufficient repair, order, and condition," might cover these repairs. (b)¹ But if he expressly agrees to keep the premises * in repair, and to deliver them up in good repair, he * 504 is not justified in permitting them to remain out of repair by the fact that they were so when he received them. (c)² If the landlord is under no obligation to repair, and the tenant voluntarily makes them, the landlord is not bound to repay him the expense. (d) If there be an express and unconditional agreement to repair, or to redeliver in good order, or to keep in good repair, the tenant is bound to do this, even though the premises are destroyed by fire, so that he is in fact compelled to rebuild them; (e) but not if destroyed by the act of God or the public enemies. (f) It is, therefore, now usual, in well-drawn leases, to add to the covenant obliging the tenant to repair and redeliver in good order, an exception, "unless the premises are injured or destroyed by fire or inevitable accident." It is held that where the lease stipulates that if the house be burned down the rent shall cease, such a contingency determines the lease, and the landlord may take possession. (ff) Where the tenant contracts to repair, there is no implied promise to use premises in a tenant-like manner, (g) but such tenant is liable to third parties for

(a) *Ferguson v. —*, 2 Esp. 590; *Gibson v. Wells*, 4 B. & P. 290; *Pomfret v. Ricroft*, 1 Wms. Saund. 323 b, n. (7); *Horsefall v. Mather*, Holt, 7; *Auworth v. Johnson*, 5 C. & P. 239; *Torriano v. Young*, 6 id. 8; *Libbey v. Tolford*, 48 Me. 316; *U. S. v. Bostwick*, 94 U. S. 53; *Miller v. Shields*, 55 Ind. 71.

(b) *Wise v. Metcalf*, 10 B. & C. 312. See *Brown v. Crump*, 1 Marsh. 567; *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 id. 790.

(c) *Payne v. Haine*, 16 M. & W. 541. But the age and character of the premises must be considered in determining the proper extent of the repairs. Id. See also *Mantz v. Goring*, 4 Bing. N. C. 451; *Burdett v. Withers*, 7 A. & E. 36; *Belcher v. McIntosh*, 2 Man. & R. 186.

(d) *Mumford v. Bowen*, 6 Cowen, 475;

Witty v. Matthews, 52 N. Y. 512; *Colbeck v. Girdlers Co.*, 1 Q. B. D. 234; as on a hotel, *Morris v. Tillson*, 81 Ill. 607; waterworks, *Skillen v. Waterworks*, 49 Ind. 193; or salt-works, *Clark v. Babcock*, 23 Mich. 164.

(e) 40 Ed. 3, 6, pl. 11; *Paradine v. Jane*, Aleyn, 27; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock Canal Co. v. Pritchard*, 6 T. R. 750. *In re Skingley*, 3 E. L. & E. 91; *Allen v. Culver*, 3 Denio, 284; *Spence v. Chadwick*, 10 Q. B. 517, 530; *Phillips v. Stevens*, 16 Mass. 238; *Fowler v. Bott*, 6 Mass. 63.

(f) *Bayley v. Lawrence*, 1 Bay, 499; *Pollard v. Shaffer*, 1 Dallas, 210. See *Proctor v. Keith*, 12 B. Mon. 252.

(ff) *Buschman v. Wilson*, 29 Md. 553.

(g) *Standen v. Christen*, 10 Q. B. 35.

¹ As to leaving rubbish on the premises, see *Thorndike v. Burrage*, 111 Mass. 531. — W.

² He must leave in as good condition as can be done without changing form or material. *Ardesco Oil Co. v. Richardson*, 63 Penn. St. 162. — W.

damages resulting from the ruinous state of the premises; and the landlord is not, if the premises were in good order when leased. (*h*) But the tenant is not made liable by this agreement for acts done before the execution of the indenture, although its *habendum* states that the premises are to be held from a day prior to the day of the execution. (*i*) And an underlessee, with covenants to repair, is liable to his immediate landlord only for such damages as result directly from the breach of his * 505 * own contract; and not for such as the owner may recover from the mesne landlord. (*j*)

The tenant of a farm is bound, without express covenants, to manage and cultivate the same in such manner as may be required by good husbandry and the usual course of management of such farms in that vicinity. And if he fails to do so, *assumpsit* may be maintained on the breach of the implied promise. (*k*) If he be tenant for years, he may cut on the land a reasonable quantity of wood for fires and repairs. (*kk*)

It is no answer to a demand for rent that the premises are not in a fit and proper state and condition for the purposes for which they are hired. (*l*)¹ If, therefore, the premises are burned down, and the tenant is under no obligation to rebuild (not having agreed to keep in repair), or are destroyed by the act of God or the public enemies, yet he is bound to pay rent thereafter, (*m*) unless, as is now frequently done in this country, the lease contains a provision, that the rent shall cease or proportionally abate while the premises remain wholly or in part unfit for use.²

(*h*) *Bears v. Ambler*, 9 Penn. St. 193; *Hoy v. Holt*, 91 Penn. St. 88; *Ely v. Ely*, 80 Ill. 532.

(*i*) *Shaw v. Kay*, 1 Exch. 412.

(*j*) *Logan v. Hall*, 4 C. B. 598; *Walker v. Hutton*, 10 M. & W. 249; *Penley v. Watts*, 7 id. 601. See *Williams v. Williams*, L. R. 9 C. P. 659. But see *contra*, *Neale v. Wyllie*, 3 B. & C. 533.

(*k*) *Powley v. Walker*, 5 T. R. 373; *Beale v. Sanders*, 3 Bing. N. C. 850; *Brown v. Crump*, 1 Marsh. 567. See also *Wigglesworth v. Dallison*, Dougl. 201; *Legh v. Hewitt*, 4 East, 154; *Senior v. Armytage*, Holt, 197; *Gough v. Howard*, Peake, Ad. Cas. 197; *Dalby v. Hirst*, 1 Br. & B. 224, 3 Moore, 536; *Angerstein*

v. Hanson, 1 C. M. & R. 789; *Hutton v. Warren*, 1 M. & W. 466; *Halifax v. Chambers*, 4 id. 663; *Lewis v. Jones*, 17 Penn. St. 262.

(*kk*) *Hubbard v. Shaw*, 12 Allen, 120.

(*l*) *Hart v. Windsor*, 12 M. & W. 68; *Surplice v. Farnsworth*, 7 Man. & G. 576; *Harrison v. Lord North*, 1 Ch. Cas. 83.

(*m*) *Pollard v. Shaffer*, 1 Dallas, 210; *Niedelet v. Wales*, 16 Mo. 214; *Fowler v. Bott*, 6 Mass. 62; *Lemott v. Skerrett*, 1 Har. & J. 42; *Wagner v. White*, 4 Har. & J. 546; *Redding v. Hall*, 1 Bibb. 536. But see *Wood v. Hubbell*, 5 Barb. 601; *Warner v. Hitchins*, 5 Barb. 66; *Graves v. Berden*, 26 N. Y. 498.

¹ A tenant is still liable on an express covenant, though the lessor has collected insurance money and refuses to rebuild, *Lofft v. Dennis*, 1 E. & E. 474; *Bussman v. Ganster*, 72 Penn. St. 285; and his guarantor is equally bound, *Kingsbury v. Westfall*, 61 N. Y. 356; and rent paid in advance cannot be recovered back, *Diamond v. Harris*, 33 Tex. 634. — K.

² A tenant should provide for suspension of rent during the time premises are unin-

In the absence of express agreement to repair, the lessee is not bound to rebuild a house, which has been burned through the negligence and folly of his own servants. (n)

A lessee may assign over the whole or a part of his term in the premises.¹ If he parts with the whole of his interest it is an assignment; if with less than the whole it is an underleasing, leaving a reversion in the original lessee. (x) An underlease is not * a breach of a covenant "not to assign, transfer, or * 506 set over" the premises, or the lease, or the interest or estate of the lessee; (o) but if there be added to the covenant the words "or any part thereof," it is equally a breach, to underlet or to assign. The assignment must be of the whole term, to make the assignee tenant of the lessor; hence where the last day of the term

(n) *McKenzie v. McLeod*, 10 Bing. 385.

(o) *Crusoe v. Bugby*, 2 W. Bl. 766; s. c. 3 Wils. 234; *Kinnersley v. Orpe*, Dougl. 56; *Church v. Brown*, 15 Ves. 258, 265; *Eten v. Luyster*, 60 N. Y. 252; *Shaw v. Farnsworth*, 108 Mass. 357. — But a covenant against *underletting* will restrain the alienation by *assignment*. *Greenway v. Adams*, 12 Ves. 395. But see *contra*, *Field v. Mills*, 4 Vroom, 254; *Bemis v. Wilder*, 100 Mass. 446. — Letting lodgings is not a breach of covenant not to underlet. *Doe v. Laming*, 4 Camp. 73. — An assignment by operation of law is no breach of a covenant not to assign;

as in a case of bankruptcy, or where the term is taken on execution by a creditor. *Doe v. Carter*, 8 T. R. 57. But it is otherwise if the assignment is the *voluntary* act of the tenant. *Doe v. Carter*, 8 T. R. 57, 300; *Doe v. Hawke*, 2 East. 481. It would seem, therefore, that taking the benefit of an insolvent law would be a breach of the covenant. See *Shee v. Hale*, 13 Ves. 404. A lease made subject to a condition that the premises shall be actually occupied by the lessee, determines whenever the condition is broken, whether it be by the voluntary act of the party or by operation of law. *Doe v. Clarke*, 8 East, 185.

habitable by fire or other casualty, *Minot v. Joy*, 118 Mass. 308; and it will apply to rent paid in advance, *Rich v. Smith*, 121 Mass. 328, but not to gradual decay, *Hatch v. Stamper*, 42 Conn. 28; unless the result of fire, *Cary v. Whiting*, 118 Mass. 363. An oral stipulation is insufficient. *Martin v. Berens*, 67 Pa. 459; but see *Phyfe v. Elmer*, 45 N. Y. 102. The bursting of boiler is such a casualty. *Phillips v. Sun, & Co.*, 10 R. I. 458. — K.

¹ If consent to assign is not to be arbitrarily withheld, an unreasonable refusal gives the lessee such a right. *Treloar v. Bigge*, L. R. 9 Ex. 151. — K.

(x) An underlease of the whole term amounts to an assignment. *Beardman v. Wilson* (L. R. 4 C. P. 57), 15 English Ruling Cas. 497, 499, 500 n.

The lessee's assignment of the lease as collateral security does not violate a stipulation thereof against its assignment. *Crouse v. Michel* (Mich.), 90 N. W. 32. Stipulations against assigning or subletting are construed strictly. *Presby v. Benjamin*, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317.

➤ The lessee of a person bound by a restrictive trade covenant may be sued whether assigns are mentioned or not. *Holloway Brothers, Lim'd v. Hill*, [1902] W. N. 149. And, in general, in the absence of any restriction against assigning

or subletting, a lease which does not mention heirs or assigns is assignable. *Rickard v. Dana* (Vt.), 52 Atl. 113; *Washington Natural Gas Co. v. Johnson* (123 Penn. St. 576), 10 Am. St. Rep. 553, 557 n.; *Goldsmith v. Wilson*, 68 Iowa, 685.

Under the written assignment of a lease, the lessee is a surety for the rent, and the assignee the principal, as between themselves. *Collins v. Pratt*, 181 Mass. 345, 63 N. E. 946. When the lessor assigns, the lessee is bound to pay the rent to the assignee without attornment. *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836; *David Bradley & Co. v. Peabody Coal Co.*, 99 Ill. App. 427.

was reserved by the lessee, the assignee was liable to him and not to the lessor. (oo) By such breach the original lessee becomes liable for damages; but the lease is not terminated, or the interest of the sub-lessee destroyed, unless the original lease is made *on condition* that there shall be no assignment, nor underleasing; or provides that the original lessor may, upon any assignment or underleasing, enter and expel the lessee or his assigns, and terminate the lease. If the lessees be a copartnership, a change in the partners by withdrawal or addition is not a breach of the covenant not to underlet. (op)¹ In a recent English case the underlessee of a tenant who had covenanted not to carry on a certain trade, was restrained from carrying on that trade. (og)

A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event and a proviso enabling the lessor to determine it by re-entry; and it was held, that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent, or other act of intended confirmation; while in the latter, some act, such as entry or claim, must have been performed by the lessor to manifest his intention to end the demise, which was voidable in the interval, and consequently confirmable. This distinction, however, is now exploded; and it is held that the lease is voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declare that it shall be void. (p)² (x) And any act will be a waiver of the forfeiture which is a distinct and voluntary recognition of the lease by the lessor, with a full knowledge of the forfeiture; as by taking rent, etc. (q)

(oo) *Davis v. Morris*, 36 N. Y. 569.

(op) *Rossvelt v. Hopkins*, 33 N. Y. 81.

(og) *Clements v. Wells*, Law Rep. 1 Eq. 403.

(p) See *Platt on Leases*, vol. ii, p. 327; 1 *Smith, Lead. Cas.* 19; and *Taylor, Landlord and Tenant* (7th ed.), § 492, where this point is fully considered, and cases cited.

(q) *Roe v. Harrison*, 2 T. R. 425; *Doe v. Birch*, 1 M. & W. 402; *Doe v. Rees*, 4 Bing. N. C. 384; *Arnshy v. Woodward*, 6 B. & C. 509; *Harvie v. Oswel*, Cro. E. 572; *Goodright v. Davids*, 2 Cowp. 803; *Garnham v. Finney*, 40 Mo. 449. But see *Importer's Ins. Co. v. Christie*, 5 Rob. 169.

¹ See *Varley v. Coppard*, L. R. 7 C. P. 505, to the effect that an express assignment, on dissolution, by a partner to his copartner was a breach. — W.

² But where a lease to terminate on a sale by the lessor, it becomes absolutely void thereby. *Morton v. Weir*, 70 N. Y. 247. See *Rogers v. Snow*, 118 Mass. 118. — W.

(x) A condition for re-entry in case the lessee enters into liquidation runs with the land. *Horsey Estate, Lim'd v. Steiger*, [1892] 2 Q. B. 79. See *Fryer v. Ewart*, [1902] A. C. 187, [1901] 2 Ch. 499. The tenancy is not terminated if a receiver of the tenant's estate is appointed in bankruptcy who occupies the leased premises

and pays the rent. *Woodworth v. Harding*, 77 N. Y. S. 969.

In England the giving of the statutory notice provided for in § 14 of the Conveyancing Act, 1881, is a necessary prerequisite to peaceable re-entry on the lessor's part as well as to re-entry by process of court. *In re Riggs*, [1901] 2 K. B. 16.

Whether a mere demand of * subsequent rent is a waiver * 507 is not so certain. (r) A waiver of the forfeiture for one breach does not prevent the lessor from insisting on the forfeiture for another. (s) The sub-lessee is not liable to the original lessor, there being no privity between them. But if the whole term and interest be assigned by the termor, the assignee — who is not a sub-lessee, as there is no reversion in the termor — is now liable to the original lessor for rent, by reason of his privity of estate. (t)

Where the letting is in the alternative, as for two, four, or eight years, the tenant may determine the tenancy at either of these periods by a proper notice, unless it be expressly agreed otherwise. (u)

A tenant may not dispute his landlord's title; for he is estopped from changing, by his own act, the character and effect of his tenure. (v) And wherever a tenant disclaims his tenure, or denies his landlord's title, or claims adversely to him, or attorns to another as having title against him, he forfeits his estate. But where the lease was obtained by the fraud of the landlord, the tenant may now defend against an action brought on the lease, by impeaching the landlord's title. (w) It has been held, however, that this fraud must be practised directly against the tenant; and is not enough that the landlord's title is fraudulent as against other parties, — against the creditors of the actual owner, for example. The landlord may enter at once, and bring ejectment for the forfeiture. But this is a disclaimer * of the lease by the landlord, who cannot thereafter take * 508 any advantage from the tenancy. (x) But a disclaimer by a

(r) *Doe v. Birch*, 1 M. & W. 406; *Walrond v. Hawkins*, L. R. 10 C. P. 342; *Murray v. Harway*, 56 N. Y. 337; *Clifford v. Reilly*, Ir. R. 4 C. L. 218.

(s) *Doe v. Bliss*, 4 Taunt. 735; *Doe v. Woodbridge*, 9 B. & C. 376.

(t) *Stevenson v. Lambard*, 2 East, 575. See also *ante*, p. * 231, and note (s).

(u) *Dann v. Spurrier*, 3 B. & P. 399; *Goodright v. Richardson*, 3 T. R. 462. See *Mallam v. Arden*, 10 Bing. 299.

(v) *Doe v. Barton*, 11 A. & E. 307; *Fleming v. Gooding*, 10 Bing. 549; *Doe v. Smythe*, 4 M. & Sel. 347; *Alchorne v. Gomme*, 2 Bing. 54; *Gravenor v. Woodhouse*, 7 J. B. Moore, 289; *Parry v. House*, Holt, 489, and the learned note by the reporter; *Willison v. Watkins*, 3 Pet. 43; *Doe v. Heath*, 13 Ired. L. 498; *Fusselman v. Worthington*, 14 Ill. 135; *Pierce v. Minturn*, 1 Cal. 470. But see *Mountney v. Collier*, 16 E. L. & E. 232; s. c. 1

E. & B. 630; *Den v. Ashmore*, 2 N. J. 261; *Shultz v. Elliott*, 11 Humph. 183; *Funk's Lessee v. Kincaid*, 5 Md. 404. See *Ryerson v. Eldred*, 18 Mich. 12; *Ronaldson v. Tabor*, 43 Ga. 230; *Bonney v. Foss*, 62 Me. 248; *Hardin v. Forsythe*, 99 Ill. 312; *Stagg v. Eureka Co.*, 56 Mo. 317; *Campbell v. Shipley*, 41 Md. 81; *Lucas v. Brooks*, 18 Wall. 436; *Prevot v. Lawrence*, 51 N. Y. 219.

(w) *Hamilton v. Marsden*, 6 Binn. 45; *Baskin v. Seechrist*, 6 Penn. St. 154; *Brown v. Dysinger*, 1 Rawle, 408; *Miller v. McBrier*, 14 S. & R. 382. See *Wyoming Co. v. Price*, 81 Penn. St. 156; *Wilborn v. Whitfield*, 44 Ga. 51; *Camarillo v. Fenlon*, 49 Cal. 202; *Jenckes v. Cook*, 9 R. I. 520; *Evans v. Bidwell*, 76 Penn. St. 497; *Higgins v. Turner*, 61 Mo. 249.

(x) *Greeno v. Munson*, 9 Vt. 83; *Hall v. Dewey*, 10 id. 593; *Carpenter v. Thomp-*

tenant will work a forfeiture only when it amounts to a renunciation of his character as a tenant, which may be either by setting up a title in another or claiming title in himself. (*y*) A refusal to pay rent, together with a request for further information as to the landlord's title, or a delay until conflicting claims are settled, seem not to be sufficient to work a forfeiture. (*z*) And while a tenant may not dispute his landlord's title, he may show that it has terminated; (*zz*)¹ and eviction under paramount title is a defence to the tenant. (*za*) Nor is a tenant estopped from denying his landlord's title after he has surrendered his possession. (*zb*) And he must make this surrender before he can assert rights against the landlord, acquired by the tenant after his tenancy began. (*zc*)

The payment of rent admits, *prima facie*, a tenancy, by implication; (*a*) but this influence may be prevented and the evidence rebutted by showing that the payment was made under a mistake. (*b*)

It was always admitted, that an actual expulsion of the tenant, by the lessor, suspended the rent; (*c*)² but it was also held, that no conduct of the lessor, however offensive, if it were less than expulsion, affected the obligation of rent. (*d*) But this rule of law has been essentially modified. It seems to be now settled, at least in this country, that a lessor, by conduct of extreme outrage and indecency, is barred from his action for rent. (*e*) And if the

son, 3 N. H. 204; *Blake v. Howe*, 1 Aik. 306; *Lord v. Bigelow*, 8 Vt. 445; *Doe v. Whittick, Gow*, 195; *Doe v. Frowd*, 4 Bing. 567; *Doe v. Grubb*, 10 B. & C. 816; *Doe v. Pittman*, 2 Nev. & M. 673; *Doe v. Long*, 9 C. & P. 773; *Doe v. Evans*, 9 M. & W. 48.

(*y*) *Doe v. Cooper*, 1 Man. & G. 135. And see *Elliott v. Smith*, 23 Penn. St. 131.

(*z*) *Doe v. Cawdor*, 1 C. M. & R. 398; *Doe v. Stanion*, 1 M. & W. 695; *Doe v. Pasquali, Peake*, Cas. 196.

(*zz*) 18 N. H. 222.

(*za*) *Moffat v. Strong*, 9 Bosw. 57.

(*zb*) *Zimmerman v. Marchland*, 23 Ind. 474.

(*zc*) *Brown v. Keller*, 32 Ill. 151.

(*a*) *Gouldsworth v. Knights*, 11 M. & W. 337; *Fonner v. Duplock*, 2 Bing. 10.

(*b*) *Claridge v. Mackenzie*, 4 Man. & G. 143; *Doe v. Barton*, 11 A. & E. 307; *Doe v. Brown*, 7 A. & E. 447; *Anderson v. Smith*, 63 Ill. 126.

(*c*) *Salmon v. Smith*, 1 Wms. Saund. 202, 204, n. (2), Co. Litt. 148 b; *Ascough's case*, 9 Rep. 135; *Pendleton v. Dyett*, 4 Cowen, 581; *Bennett v. Bittle*, 4 Rawle, 339; *Page v. Parr, Styles*, 432.

(*d*) See the cases in the last note.

(*e*) *Ogilvie v. Hull*, 5 Hill (N. Y.), 52; *Pendleton v. Dyett*, 8 Cowen, 727, reversing the same case in 4 Cowen, 581; *Crommelin v. Thiess*, 31 Ala. 412; *Jackson v. Eddy*, 12 Mo. 209. See *Hilliard v. Coal Co.*, 41 Ohio St. 662.

¹ As by eviction or judicial sale, *Duff v. Wilson*, 69 Penn. St. 316; *Lancashire v. Mason*, 75 N. C. 455; or by mortgage foreclosure, *Ryder v. Mansell*, 66 Me. 167; *Ramsdell v. Maxwell*, 32 Mich. 235; as then the lesser's right to sue him ceases, *St. John v. Quitzlow*, 72 Ill. 334; *Silvey v. Sumner*, 61 Mo. 253; or if the lessor's wife, in whose right he was seized, dies, *Lamson v. Clarkson*, 113 Mass. 348. A tenant may also show that the purport and effect of the lease was entirely misapprehended. *Wiggin v. Wiggin*, 58 N. H. 235. — K.

² An entry without eviction is a mere trespass. *Bartlett v. Farrington*, 120 Mass. 284. So an entry to put up a sign "to let." *Oastler v. Henderson*, 2 Q. B. D. 575; *Pier v. Carr*, 69 Pa. 326. See *Colburn v. Morrill*, 117 Mass. 262. — W.

lessee proves an interference with his beneficial enjoyment of the premises, which is material, and intentional, this would be a defence against such an action. (f)¹ But the interference must be deliberate and intentional, and only by the landlord himself, and not by another tenant, or other person. (g)

* If a landlord oust his tenant from any part of the demised premises, the tenant may surrender to him the rest, and be no further liable for rent. (h)²

As it is the duty of the tenant to surrender the premises to his landlord when the tenancy expires, if a stranger intrude the tenant should take legal means to recover possession, that he may at the proper time surrender the premises. And until the tenant restores full and complete possession to the landlord he is liable for his rent. (hh)³

It has been held in England that when on a regular notice to quit, the tenant duly quitted the premises and removed his goods, his accidental retaining of the key for a few days will not make him liable for the rent of another quarter. (hi)

If a landlord has gained peaceable possession of a part of the premises on the termination of the lease, he may use necessary force for acquiring possession of the remainder. (hj)

To effect a surrender before the lease terminates, there must be a mutual agreement between lessor and lessee; but this agreement need not be express, and may be inferred from the conduct of the parties. (hk)

(f) *Cohn v. Dupont*, 1 Sandf. 260; *Gilhooley v. Washington*, 4 Comst. 217; *Jackson v. Eddy*, 12 Mo. 209; *Christopher v. Austin*, 1 Kern. 216. (hh) *Schilling v. Holmes*, 23 Cal. 227. (hi) *Gray v. Bompas*, 11 C. B. (N. S.) 520.

(g) *Gilhooley v. Washington*, 4 Comst. 217. (hj) *Mugford v. Richardson*, 6 Allen, 76. See *Stearns v. Sampson*, 59 Me. 568.

(h) *Smith v. Raleigh*, 3 Camp. 513; *Briggs v. Hall*, 4 Leigh, 484. (hk) *Bedford v. Terhune*, 3 N. Y. 453; *Kneeland v. Schmidt*, 78 Wis. 345.

¹ If a lessor's acts merely diminish the beneficial enjoyment, the tenant must abandon or continue to pay rent, *De Witt v. Pierson*, 112 Mass. 8; as where the lessor of a distillery refused to give the lessee a United States certificate, *Grabenhorst v. Nicodemus*, 42 Md. 236; or the lessor's adjoining cellar was a nuisance, *Alger v. Kennedy*, 49 Vt. 109. See *Scott v. Simons*, 54 N. H. 426. — K.

² Rent is merely suspended until restoration of that part. *Colburn v. Morrill*, 117 Mass. 262; *Hayner v. Smith*, 63 Ill. 430; *Skaggs v. Emerson*, 50 Cal. 3. If the lessor uses unreserved privileges he cannot collect rent therefor. *Townsend v. Nickerson, &c. Co.* 117 Mass. 501. — K.

³ Where a statutory notice of intention to quit is required, and the landlord refuses to accept possession after the tenant's abandonment, the tenant continues to be liable for rent until such notice is given. *Rollins v. Moody*, 72 Me. 135. — K.

SECTION IV.

OF SURRENDER OF LEASES BY OPERATION OF LAW.

Such surrender takes place when the lessee does something incompatible with the lease, and the lessor assents or co-operates,¹—as if the lessor gives and the lessee accepts a new valid lease. (*i*) There is, perhaps, no better definition of the acts which make a surrender in law than to say, that they are such acts as in contemplation of law are acts of notoriety; as formal and solemn as the execution of a deed, or livery, entry, and acceptance of an estate. (*j*) (*x*) The surrender may be by substituting a new lease between the same parties, as we have seen, or a new lessee instead of the old one. (*k*) But the mere agreement for substitution is not enough; there must be an actual change

(*i*) *Lyon v. Reed*, 13 M. & W. 285; *Doe v. Pole*, 11 Q. B. 713.

(*j*) *Parke, B.*, *Lyon v. Reed*, 13 M. & W. 309; Co. Lit. 352 a. See also *Crowley v. Vitty*, 9 E. L. & E. 501; s. c. 7 Exch. 319.

(*k*) *Stone v. Whiting*, 2 Stark. 235; *Thomas v. Cook*, 2 Stark. 508; s. c. 2 B. & Ald. 119; *Lyon v. Reed*, 13 M. & W. 285; *Doe v. Wood*, 14 M. & W. 682; *Nickells v. Atherstone*, 10 Q. B. 944; *Whitney v. Meyers*, 1 Duer, 266.

¹ A written lease may be surrendered by abandonment with the landlord's assent and reletting, *Stobie v. Dills*, 62 Ill. 432; so by an underletting and acceptance of the sub-tenant by the landlord, and the collecting of rent from the latter, *Amory v. Kannoffsky*, 117 Mass. 357; so the receiving the key of the premises and the putting another tenant in, *Hanham v. Sherman*, 114 Mass. 19; so where the tenant surrenders, and a sub-tenant, who had offered to surrender, quits the premises, *Pratt v. Richards, &c. Co.*, 69 Pa. St. 53. The delivery of the keys to, and negotiations by the lessor with, a third party are evidence of surrender, *Hill v. Robinson*, 23 Mich. 244; but if the tenant abandons and hands the key to the landlord, who puts up a notice "to let" and makes repairs, it is no surrender, *Oastler v. Henderson*, 2 Q. B. D. 575; *Pier v. Carr*, 69 Pa. St. 326. And see *Milling v. Becker*, 96 Pa. 182; *Auer v. Auer*, 99 Pa. 370. As to the liability of retiring partner, see *Beall v. White*, 94 U. S. 382. In *Kinsey v. Minnick*, 43 Md. 112, *held*, that after a change of partners, surrender at the term end is presumed. See *Mellor v. Watkins*, L. R. 9 Q. B. 400, as to surrender affecting third persons. A surety for rent is not discharged by a surrender. *Kingsbury v. Westfall*, 61 N. Y. 356. — K.

(*x*) A surrender of a lease by operation of law must be based on an agreement express or implied. *In re Panther Lead Co.*, [1896] L. Ch. 978. See *Nickells v. Atherstone* (10 Q. B. 944), 15 English Ruling Cas. 512, 522, 524 n.; *Worrall v. Wilson*, 101 Iowa, 475, 70 N. W. 619; *Adams v. Weaver*, 117 Cal. 42, 48 Pac. 972; *White v. Berry* (R. I.), 52 Atl. 682; *Requa v. Domestic Pub. Co.*, 32 N. Y. S. 125; *Wallace v. Dinning*, 35 id. 69; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597; *Mitchell v. Blossom*, 24 Mo. App. 48; *Gray v. Kaufman Dairy Co.*, 162 N. Y. 388, 56 N. E. 903, 49 L. R. A.

580, 76 Am. St. Rep. 327. A lessee, who surrenders his term by operation of law, still retains an interest in the lease; he is entitled, on being granted a new lease, to retain the old one, the surrender of which, implied from the acceptance of a new lease, is subject to the implied condition that the new lease is valid. *Knight v. Williams*, [1901] 1 Ch. 256; *Bowman v. Wright* (Neb.), 91 N. W. 580. A surrender of a tenancy from year to year may be worked by estoppel. *Fenner v. Blake*, [1900] 1 Q. B. 426; *Jump v. Payne*, 68 L. J. Q. B. 607.

of possession, and an actual reception by the lessor of the new tenant in the stead of the old one; (*l*) otherwise the new tenant is but the assignee or sub-lessee of the old one. Or it may be a surrender and abandonment of the premises to the landlord, he accepting the same, and no new contract substituted. (*m*)

An acceptance of rent, by the lessor from a third *party, *510 is *primâ facie* only an acceptance of rent paid by the lessee through an agent; (*n*) but if this presumption be rebutted by facts going to show that the landlord had given up the lessee, and had nothing more to do with him, and treated the new occupant as his lessee, this will amount to a surrender. For the landlord cannot hold both as his lessees. (*o*)

SECTION V.

OF AWAY-GOING CROPS.

A tenant whose estate is terminated by an uncertain event which he could neither foresee nor control, is entitled to the annual crop which he sowed while his estate continued, by the law of emblements. But a tenant for years knows when his lease will expire. Nevertheless he has usually some right to the crop he sowed, and to so much possession of the land as may be necessary to getting in the crop; but this right must depend either on agreement or on usage. At common law he has no such right. (*p*)¹ The local usages of this country, in this respect, vary very much, and are not often distinctly defined or well established. Thus,

(*l*) *Graham v. Whichelow*, 1 Cr. & M. 188; *Taylor v. Chapman*, Peake, Ad. Cas. 19. See also *McDonnell v. Pope*, 13 E. L. & E. 11; *Barlow v. Wainwright*, 22 Vt. 88.

(*m*) *Reeve v. Bird*, 1 C. M. & R. 31. See *Grimman v. Legge*, 8 B. & C. 324; *Dodd v. Acklom*, 6 Man. & G. 672.

(*n*) *Copeland v. Watts*, 1 Stark. 95.

(*o*) *Reeve v. Bird*, 1 C. M. & R. 31; *Walls v. Atcheson*, 11 J. B. Moore, 379; *Woodcock v. Nuth*, 8 Bing. 170; *Thomas v. Cooke*, 2 B. & Ald. 119; *Johnstone v. Hindlestone*, 4 B. & C. 922.

(*p*) *Caldecott v. Smythies*, 7 C. & P. 808; *Wigglesworth v. Dallison*, Dougl. 201. See also *Griffiths v. Puleston*, 13 M. & W. 358; *Strickland v. Maxwell*, 2 Cr.

& M. 539; *Boraston v. Green*, 16 East, 71; *Davis v. Cannop*, 1 Price, 53; *Beavan v. Delahay*, 1 H. Bl. 5; *Knight v. Banett*, 3 Bing. 364; *Hutton v. Warren*, 1 M. & W. 466; *Senior v. Armytage*, Holt, 197; *Webb v. Plummer*, 2 B. & Ald. 746; *Holding v. Pigott*, 7 Bing. 465. By the custom of Pennsylvania, the right of the tenant for a definite term to his away-going crops, seems to be well established. *Diffendorffer v. Jones*, cited in *Carson v. Blazer*, 2 Binn. 487, and in *Stultz v. Dickey*, 5 Binn. 289; *Comfort v. Duncan*, 1 Miles, 229; *Demi v. Bossler*, 1 Penn. 224. Such is the case also in New Jersey. *Van Doren v. Everitt*, 2 Southard, 460; *Templeman v. Bidle*, 1 Harring. (Del.) 522.

¹ Under a five years' lease, ending July 18, the tenant was allowed to take hay maturing a week earlier, if good farming, though he had the hay ripening in first year of lease. *Willey v. Connor*, 44 Vt. 68. — K.

there is some uncertainty as to the property in the manure of a farm. Generally, in this country, the outgoing tenant cannot sell or take away the manure, (q)¹ although it would seem that in England he can. (r)

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* SECTION VI.

OF FIXTURES.

The tenant may annex some things to the freehold, and yet retain the right to remove them. These things are called Fixtures. (s)² There is no precise and certain rules, by which we can always determine what are and what are not removable. The method of affixing is a useful criterion, but not a certain one. For doors, windows, blinds, and shutters, although capable of removal without injury to the house, and in fact detached at the

(q) *Lassell v. Reed*, 6 Greenl. 222; *Staples v. Emery*, 7 Greenl. 201; *Daniels v. Pond*, 21 Pick. 367, 371; *Lewis v. Lyman*, 22 Pick. 437, 442; *Middlebrook v. Corwin*, 15 Wend. 169; *Lewis v. Jones*, 17 Penn. St. 262. See also *Kittredge v. Woods*, 3 N. H. 503.

(r) See *Roberts v. Barker*, 1 Cr. & M. 808. In New Hampshire it has been held, that where land is sold and conveyed, manure lying about a barn upon the land will pass to the grantee, as an incident to the land, unless there be a reversion

of it in the deed. *Kittredge v. Woods*, 3 N. H. 503; *Conner v. Coffin*, 2 Foster (N. H.), 539. See also *Parson v. Camp*, 11 Conn. 525; *Goodrich v. Jones*, 2 Hill (N. Y.), 142.

(s) See *Hallen v. Runder*, 1 C. M. & R. 266, 276; *Elliott v. Bishop*, 28 E. L. & E. 484; s. c. 10 Exch. 496; and *Anos and Ferrard on Fixtures*, p. 2, for this definition. But the word is, perhaps, quite as often used to denote those things which, being added, cannot be removed.

¹ A covenant by a lessee not to carry away manure, &c., is a reservation to the lessor. *Heald v. Builders' Ins. Co.* 111 Mass. 38. If manure is a tenant's personal property, he does not lose his title by leaving it on the farm when he quits. *Fletcher v. Herring*, 112 Mass. 382. If a dairy farm is also cultivated, the manure belongs to the lessor. *Bonnell v. Allen*, 53 Ind. 130. A tenant for two years cannot take manure under a provision that he shall substitute dressing for hay removed. *Hill v. De Rochemont*, 48 N. H. 87. — K.

² The character of the thing attached, not the mode of annexation, determines whether it is a fixture. *Seeger v. Pettit*, 77 Penn. St. 437. The premises must be left in as good condition after removal as before. *Turner v. Cameron*, L. R. 5 Q. B. 306. Fixtures must be removed before the end of term or possession, or they become the landlord's, even as against a judgment creditor with an incomplete levy, *Thropp's Appeal*, 70 Penn. St. 395; but not against a purchaser of the same, *Saint v. Pilley*, L. R. 10 Ex. 137. A tenant renewing must reserve right anew to remove fixtures or lose it. *Watriss v. Cambridge Bank*, 124 Mass. 571; *Loughran v. Ross*, 45 N. Y. 792. So a tenant holding over, *Dingley v. Buffum*, 57 Me. 381; unless the term is uncertain, *Northern, &c. R. Co. v. Canton Co.*, 30 Md. 347; or by fault of the landlord, *Goodman v. Hannibal, &c. R. Co.*, 45 Mo. 33; *Ex parte Hemenway*, 2 Lowell, 496; *Thorn v. Sutherland*, 123 N. Y. 236; *Lewis v. Ocean Navigation Co.*, 125 N. Y. 341. Where fixtures are to be the landlord's at the end of the lease, he may sell at any time. *Thrall v. Hill*, 110 Mass. 328. A tenant cannot, after his term ends, re-enter to remove fixtures as against a purchaser without notice of his claim. *Dostal v. McCaddon*, 35 Iowa, 318. And see *Friedlander v. Rider*, 30 Neb. 783. See, generally, as to fixtures and requisites, *McRea v. Central Bank*, 66 N. Y. 489. — K.

time of transfer, nevertheless pass with the house; while mirrors, wardrobes, etc., although far more strongly fastened, would still be chattels. (t) In modern times, this rule is construed much more strongly in favor of the tenant, and against the landlord, than formerly; (u) and more so in respect to things put up for purposes of trade or manufacture than for other things. (x) As between the seller and purchaser it is construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed. In general, it may be said, that what a tenant has added he may remove, if he can do so without any injury to the premises, unless he has actually built it in, so as to make it an integral part of what was there originally. (v)¹

(t) *Winslow v. Merchants' Ins. Co.*,
4 Met. 306, 314.

(u) *Dubois v. Kelly*, 10 Barb. 496.

(v) We give below a statement of all the things which have been held removable, and of those which have been held

¹ As between mortgagor and mortgagee the following are removable: Portable furnace, resting by its own weight on the ground, and gas fixtures, *Towne v. Fiske*, 127 Mass. 125; *Rahway Sav. Inst. v. Irving St. Church*, 9 Stewart, 61; gas fixtures screwed on and mirrors on supports, *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; rolling-stock of railroad, *Williamson v. N. J. S. R. Co.*, 2 Stewart, 311; *Speiden v. Parker*, 46 N. J. Eq. 292; certain machines, *Keve v. Paxton*, 11 C. E. Green, 107; *Case v. Arnett*, id. 459. As to mirrors in niches for the purpose, see *Ward v. Kilpatrick*, 85 N. Y. 413. The following are not removable: Looms affixed to the floor by nails which may be drawn without any serious damage to the floor, *Holland v. Holgson*, L. R. 7 C. P. 328; *Ottumwa Woollen Co. v. Hawley*, 44 Iowa, 57; a factory bell in its tower, and a blower pipe for taking air from a blower to a forge, *Alvord Carriage Co. v. Gleason*, 36 Conn. 86; platform scales, for permanently weighing stock and grain, *Arnold v. Crowder*, 81 Ill. 56; an iron table weighing thirty-three tons, on brick foundations, and adapted only for use in a glass factory, where placed, *Smith Paper Co. v. Servin*, 130 Mass. 511; an embossing-press, *Pope v. Jackson*, 65 Maine, 162; manure, *Chase v. Wingate*, 68 Maine, 204. A railroad track put down as a permanency is not removable as between seller and buyer. *Van Keuren v. Central Railroad*, 9 Vroom, 165. Trade fixtures may be removed, as steam engines and boilers, *Holbrook v. Chamberlin*, 116 Mass. 155; an ice-house, *Antoni v. Belknap*, 102 Mass. 193; *Crowie v. Hoover*, 40 Ind. 49; counters or counting-rooms nailed to the floor, *Guthrie v. Jones*, 108 Mass. 191; *Brown v. Wallis*, 115 Mass. 156; heavy machinery, as a trip hammer, *Hoffner v. Lewis*, 73 Penn. St. 302. For other cases as to machinery see *Rosewell Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Col. 29; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519; *Manwaring v. Jenison*, 61 Mich. 117; *Cavis v. Bickford*, 62 N. H. 229; *Langdon v. Buchanan*, id. 657; *Helms v. Gilroy*, 26 Pacific Rep. 851 (Ore.); *Vail v. Weaver*, 132 Pa. 363; *Padgett v. Cleveland*, 33 S. C. 339; *Phelan v. Boyd*, 14 Southwestern Rep. (Tex.). — K.

(x) See *Elwes v. Maw* (3 East, 38), 12 English Ruling Cas. 193, 220, 223 n.; *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; *Anderson v. Creamery Package Manuf. Co.* (Idaho), 56 L. R. A. 554; *Union Central L. Ins. Co. v. Tillery*, 152 Mo. 421, 54 S. W. 220, 75 Am. St. Rep. 480. A market gardener's glass houses erected by him with the landlord's knowledge are trade fixtures which he may remove during the tenancy, though attached to the freehold. *Mears v. Cal-*

lender, [1901] 2 Ch. 388. The question whether fixtures become a part of the realty is not altogether matter of agreement between the lessor and lessee. The latter's intention that the fixture remain his personal property is material, and if that is made known, and his acts are consistent therewith, it may remain his property without any agreement therefor. *Ryder v. Faxon*, 171 Mass. 206, 50 N. E. 631; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 877 n.; 53 L. R. A. 603.

OF NOTICE TO QUIT.

A tenant whose tenancy may be determined by the will of the landlord, is entitled to notice of that determination, nor

not removable. But it must be remembered, that each decision rested more or less upon the peculiar circumstances of the case, and may fail as authority when applied to another case which apparently resembles it. — 1. List of things held not to be removable: Agricultural erections, *Elwes v. Maw*, 3 East, 38; *Contra*, *Dubois v. Kelly*, 10 Barb. 496; Ale-house bar, *Kinlyside v. Thornton*, 2 W. Bl. 1111; Barns fixed in the ground, *Elwes v. Maw*, *supra*; Beast-house, *id.*; Benches affixed to the house, Co. Lit. 53 a; Box-borders, not belonging to a gardener by trade, *Empson v. Soden*, 4 B. & Ad. 655; Statue erected as an ornament to grounds, and a sun-dial, *Suedecker v. Warring*, 2 Kern. 110; Carpenter's shop, *Elwes v. Maw*, *supra*; Cart-house, *id.*; Chimney-piece, not ornamental, *Leach v. Thomas*, 7 C. & P. 327; Closets affixed to the house, *Kimpton v. Eve*, 2 Ves. & B. 349; Conduits, *Nicholas v. Chamberlain*, Cro. J. 121; Conservatory, substantially affixed, *Buckland v. Butterfield*, 2 Br. & R. 54; Doors, *Cooke's case*, Moore, 177; Dressers, *Kinlyside v. Thornton*, *supra*; Flowers, *Littledale, J.*, in *Empson v. Soden*, *supra*; Fold-yard walls, *Elwes v. Maw*, *supra*; Fruit-trees, if tenant be not a nursery-man by trade, *Wyndham v. Way*, 4 Taunt. 316; Fuel-house, *Elwes v. Maw*, *supra*; Glass Windows, Co. Lit. 53 a; Herlakenden's case, 4 Rep. 63; Hearths, *Poole's case*, 1 Salk. 368; *Hedges, Parke, J.*, in *Empson v. Soden*, *supra*; Locks and keys, *Liford's case*, 11 Rep. 50; *Coven, J.*, in *Walker v. Sherman*, 20 Wend. 636, 639; Millstones, 14 H. 8, 25 b, pl. 6, *Liford's case*, *supra*; The Queen v. Wheeler, 6 Mod. 187; Shep. Touch. 90; Looms substantially affixed to the floor of a factory, *Murdock v. Harris*, 20 Barb. 407; Manure, *Daniels v. Pond*, 21 Pick. 367; *Middlebrook v. Corwin*, 15 Wend. 169; *Lassell v. Reed*, 6 Greenl. 222; *Sawyer v. Twiss*, 6 Foster (N. H.), 345. But see *Staples v. Emery*, 7 Greenl. 201; Partitions, *Kinlyside v. Thornton*, *supra*; Pigeon-house, *Elwes v. Maw*, *supra*; Pineries, substantially affixed, *Buckland v. Butterfield*, *supra*; Pump-house, *Elwes v. Maw*, *supra*; Trees, *Empson v. Soden*, *supra*; Wagon-house, *Elwes v. Maw*, *supra*; Poles used neces-

sarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop raising, *Bishop v. Bishop*, 1 Kern. 123, Threshing-machines, fixed by bolts and screws to posts let into the ground, *Wiltshear v. Cottrell*, 18 E. L. & E. 142; s. c. 1 E. B. 674. — 2. Things held to be removable, though not coming within the class of trade fixtures. Arras-hanging, *Bridgeman's case*, 1 Rolle, 216; Barns, resting by weight alone upon foundations let into the ground, or upon blocks, *Wansborough v. Maton*, 4 A. & E. 884, Bul. N. P. 34; Granaries, resting by weight alone, *Wiltshear v. Cottrell*, 18 E. L. & E. 142; s. c. 1 E. & B. 674; Stables and outhouses, *Dubois v. Kelly*, 10 Barb. 496; Gas fixtures, *Lawrence v. Kemp*, 1 Duer, 363; beds fastened to the ceiling, *Ex parte Quincy*, 1 Atk. 477; Carding machines, *Walker v. Sherman*, 20 Wend. 636; Taffe v. Warnick, 3 Blackf. 111; *Cresson v. Stout*, 17 Johns. 116; *Gale v. Ward*, 14 Mass. 352; *Tobias v. Francis*, 3 Vt. 425; Machinery, *Vanderpoel v. Van Allen*, 10 Barb. 157; *Teaff v. Hewett*, 1 Ohio St. 511, 541; Cotton-spinning machines, screwed to the floor, *Hellawell v. Eastwood*, 3 E. L. & E. 562; s. c. 6 Exch. 309; Ornamental chimney-pieces, *Tindal, C. J.*, in *Grymes v. Boweren*, 6 Bing. 437; *Bishop v. Elliott*, 30 E. L. & E. 595; s. c. 11 Exch. 113; Coffee-mills, *Rex v. Londonthorpe*, 6 T. R. 379; Ornamental cornices, *Avery v. Cheslyn*, 3 A. & E. 75; Fire-frame, *Gaffield v. Hapgood*, 17 Pick. 192; Furnaces, *Squier v. Mayer*, Freem. Ch. 249; Gates (if removable without injury to the premises), *Tindal, C. J.*, in *Grymes v. Boweren*, *supra*; *Amos and Ferard on Fixtures*, p. 278; Iron backs to chimneys, *Harvey v. Harvey*, Stra. 1141; Looking-glasses, *Beck v. Rebow*, 1 P. Wms. 94; Malt-mills, *Lord Kenyon*, in *Rex v. Londonthorpe*, *supra*; Movable boards, fitted and used for putting up corn in bins, *Whitting v. Brastow*, 4 Pick. 310; Mills on posts, *Ward's case*, 4 Leon. 241; Ornamental Fixtures, *Amos and Ferard on Fixtures*, p. 67; *Beck v. Rebow*, *supra*; Padlock for a corn-house, *Whitting v. Brastow*, *supra*; Pumps slightly attached,

can * he be disposed of by process of law, without that * 513 previous notice.¹ In England, this notice, in the case of a tenant from year to year, is one half of a year, which is distinguished from six months' notice. (w)² In this country there is no uniform rule. In some of the States the English rule seems to have been adopted. (x) In others it is regulated by statute. (y) (xx)

Grymes v. Boweren, *supra*; Rails and posts, Fitzherbert v. Shaw, 1 H. Bl. 258; A ladder fixed to the ground and to a beam above, and which was the only means of access to a room above; a crane nailed at top and bottom to keep it in its place, and a bench nailed to the wall, Wilde v. Waters, 32 E. L. & E. 422; s. c. 16 C. B. 637; Staples on rollers, id.; Stoves, *Smith, J.*, in Gray v. Holdship, 17 S. & R. 413; *Tindal, C. J.*, in Grymes v. Boweren, *supra*; Greene v. First Parish in Malden, 10 Pick. 500, 504; Tapestry, Harvey v. Harvey, *supra*; Windmill on posts, Rex v. Loundonthorpe, *supra*; Window-blinds, Greene v. First Parish in Malden, *supra*. — 3. Trade fixtures held to be removable: Brewing vessels, Lawton v. Lawton, 3 Atk. 13; Buildings accessory to removable trade fixtures, Dudley v. Warde, Amb. 113; Cider-mills, Lawton v. Lawton, *supra*; Holmes, v. Tremper, 20 Johns. 29; Colliery machines, Lawton v. Lawton, *supra*; Cop-pers, Poole's case, 1 Salk. 368; Lawton

v. Lawton, *supra*; Dutch Barns, Dean v. Allalley, 3 Esp. 11; Engines, Lawton v. Lawton, *supra*; Dudley v. Warde, *supra*; Jibs, Davis v. Jones, 2 B. & Ald. 165; Salt-pans, Lawton v. Salmon, 1 H. Bl. 259, n.; Shrubs planted for sale, Penton v. Robart, 2 East, 88; Miller v. Baker, 1 Met. 27; Soap Works, Poole's case, *supra*; Steam-engine, Pemberton v. King, 2 Dev. L. 376; Lemar v. Miles, 4 Watts, 830; Stills, Reynolds v. Shuler, 5 Cowen, 323; Burk v. Baxter, 3 Mo. 207; Trees planted for sale, Penton v. Robart, *supra*; Miller v. Baker, 1 Met. 27; Varnish house, Penton v. Robart, *supra*; Vats, Poole's case, *supra*.

(w) Doe v. Smith, 5 A. & E. 350; Johnstone v. Hudlestone, 4 B. & C. 922. See also Roe v. Doe, 6 Bing. 574; Doe v. Green, 4 Esp. 198.

(x) Jackson v. Bryan, 1 Johns. 322; Hanchett v. Whitney, 1 Vt. 311; Trousdale v. Darnell, 6 Yerg. 431.

(y) In Massachusetts, three months' notice is enough in all cases of tenancy

¹ A sub-lessee is entitled to a proper notice to quit, although the lessee voluntarily surrenders. Mellor v. Watkins, L. R. 9 Q. B. 400. See Waters v. Roberts, 89 N. C. 145. Notice by a lesser will enure to the benefit of his assignee. Glenn v. Thompson, 75 Penn. St. 389. Payment of rent in advance does not dispense with notice. Sprague v. Quinn, 108 Mass. 553. If a tenant holds over, no notice is necessary. Knecht v. Mitchell, 67 Ill. 86; unless so long continued that the landlord's assent will be presumed, Smith v. Littlefield, 51 N. Y. 539; nor where a tenant is to remain only while in the landlord's employ, Grosvenor v. Henry, 27 Iowa, 269; or on condition of running a saw-mill which he abandons, Crawley v. Mullins, 48 Mo. 517; or his term is to end on notice of a sale, Miller v. Levi, 44 N. Y. 489; or "if he suited the landlord," Whetstone v. Davis, 34 Ind. 510; or as long as the tenant pays rent and the landlord can let, Wood v. Beard, 2 Ex. D. 30. But if the act or condition is within the landlord's control, the tenant must have reasonable notice. Shaw v. Hoffman, 25 Mich. 162. Notice by an unauthorized agent cannot be ratified after the proper time has expired. Brahn v. Jersey City, &c. Co., 9 Vroom, 74. A notice from one to whom lessor agrees to convey is not good. Reeder v. Sayre, 70 N. Y. 180. An error in the address does not vitiate, if it is received by the one intended, Clark v. Keliher, 107 Mass. 406; as to a married woman as "*Mr. C.*," Cook v. Creswell, 44 Md. 581. Defects in a notice may be waived by the party receiving it. Boynton v. Bodwell, 113 Mass. 531. The owner of land, who forcibly enters thereon and ejects without unnecessary force a tenant at sufferance, who has had reasonable notice to quit, is not liable to an action for an assault. Low v. Elwell, 121 Mass. 309, where Gray, C. J., elaborately reviews all the authorities. — K.

² In England, such a notice must run from one quarterly feast day to the next, though more or less than six months, Morgan v. Davies, 3 C. P. D. 260; but the parties may agree on any period, as one week, Cornish v. Stubbs, L. R. 5. C. 334. — K.

(xx) See Wride v. Dyer, [1900] 1 Q. B. Travers v. Mason, 45 W. R. 77; Soames v. 23; Simmons v. Underwood, 76 L. T. 777; Nicholson, [1902] Q. B. 157; Fratcher

* 514 * A notice to quit is necessary in all those cases in which the implication of law creates a tenancy from year to year, or one determinable by the landlord. (z) But a notice to quit is not necessary where the relation of landlord and tenant does not subsist, (a) or where the tenant distinctly *disclaims* the title of his landlord. (b)

As the tenant is to act upon the notice when he receives it, it should be such a notice as he may act upon safely; and therefore it must be one which is binding upon all parties concerned at the time it is given, and needs no recognition by any one of them subsequently; (c) nor will such recognition make it sufficient. (d) But a notice by one joint-tenant for himself and the

at will, and if the rent be payable at shorter periods, then the notice need only equal one of those periods. Pub. Stats. c. 121, § 12. See Prescott v. Elms, 7 Cush. 346, adopting the rule of the common law, as to which see 13 H. 8, 15 b; Right v. Darby, 1 T. R. 159; Doe v. Porter, 3 T. R. 13; Richardson v. Langridge, 4 Taunt. 128; Doe v. Johnston, McClel. & Y. 141. The English rule applies only where there is a yearly tenancy expressly or impliedly created, and there is no agreement between the parties in relation to the termination of the tenancy; but where the parties agree that the tenancy shall expire upon the giving of a notice for a certain time, the notice may be given at any time. Doe v. Grafton, 11 E. L. & E. 488; s. c. 18 Q. B. 496. See, however, Baker v. Adams, 5 Cush. 89, and also Doe v. Cox, 11 Q. B. 122; Post v. Post, 14 Barb. 253. In Massachusetts a tenant at sufferance is not entitled to notice. Benedict v. Morse, 10 Met. 223; Kinsley v. Ames, 2 Met. 29; Hollis v. Pool, 3 Met. 350. See also Ellis v. Paige, 1 Pick. 43; Coffin v. Lunt, 2 Pick. 70.

(z) Doe v. Watts, 2 Esp. 501; s. c. 7 T. R. 83; Denn v. Rawlins, 10 East (Day's ed.), 261, n. 2.

(a) Right v. Bawden, 3 East, 260; Roe

v. Smith, 104 Mich. 537, 62 N. W. 832; Smith v. Detroit Loan Ass'n, 115 Mich. 340, 73 N. W. 395; Whicher v. Cottrell, 165 Mass. 351, 43 N. E. 413; Taylor v. Tuson, 172 Mass. 145, 51 N. E. 462; Lantmann v. Miller (Ind.), 63 N. E. 761; Bromley v. Aday (Ark.), 68 S. W. 32. The common-law rule requiring six months' notice to determine a tenancy from year to year in a corporeal hereditament does not apply in the case of such an incorporeal hereditament as shooting rights. Lowe v. Adams, [1901] 2 Ch.

v. Prideaux, 10 East, 158. Therefore, if a man gets into possession of a house to be let, without the privity of the landlord, and they afterwards enter into a negotiation for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without giving any notice to quit. Doe v. Quigley, 2 Camp. 505. So a member of a firm, occupying a house of one of his copartners, during the partnership, is not entitled to notice at its close. Waithman v. Miles, 1 Stark, 181. So of a vendee in possession, who has not paid the price, nor been recognized as a tenant. Doe v. Lawder, 1 Stark. 308; Doe v. Sayer, 3 Camp. 8. See also Doe v. Chamberlaine, 5 M. & W. 14.

(b) Doe v. Evans, 9 M. & W. 48. Doe v. Pasquali, Peake, Cas. 196; Bower v. Major, 1 Br. & B. 4; Doe v. Frowd, 4 Bing. 557; Doe v. Rollings, 4 C. B. 188; Doe v. Clarke, Peake, Ad. Cas. 239.

(c) Doe v. Cuthell, 5 East, 491; Doe v. Goldwin, 2 Q. B. 143. And see Currier v. Barker, 2 Gray, 224; Steward v. Harding, id. 335.

(d) Parke, B., in Buron v. Denman, 2 Exch. 167, 188; Doe v. Goldwin, *supra*; Doe v. Walters, 10 B. & C. 626.

598. See Reynolds v. Moore, [1898] 2 Ir. R. 641.

There is an eviction when the tenant leaves the leased premises during the term because of a notice to quit, or of any act of the lessor which deprives him of the beneficial enjoyment of the premises, Tarpv v. Blume, 101 Iowa, 469, 70 N. W. 620; Case v. Minot, 158 Mass. 577, 585, 33 N. E. 700; Agar v. Winslow, 123 Cal. 537, 56 Pac. 422.

A tenant who denies the landlord's title is not entitled to notice to quit. McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14.

others is sufficient; (e) and so is a notice by one copartner for the firm. (f)

No particular form of the notice is necessary; but there must be a reasonable certainty in the description of the premises; and we think there should be a reasonably certain statement of the time when the tenant must quit; but this has been denied in New York. (ff) It seems that the notice need state no reason for terminating the tenancy. (fg) The notice may be oral, unless there be an express agreement that it should be in writing. (g) It should be served upon the tenant personally, or by leaving it with the tenant's wife, or servant, at * the usual * 515 place of abode of the tenant; (h) and if so left it is sufficient, although it never reach the tenant. (i) If there is more than one tenant, the notice should be addressed to all, but it may be served on either one. (j)

A valid notice, properly served, vests the premises in the landlord, and absolutely terminates the tenant's right of possession at the time stated. (k)¹ But this and all other effects of the notice may be waived by the landlord, and is so waived by his receiving subsequent rent from the tenant. (l)

SECTION VIII.

OF APPORTIONMENT OF RENT.

The lessor holds only the reversion, the lessee having the land. It is common to speak of the lessor who makes a sale of the premises, as selling the land; but in law, all he can sell is his right to the land, and this means the reversion. If he sells the whole of this to one buyer, the buyer takes his place, acquires

- (e) *Doe v. Summersett*, 1 B. & Ad. 135; *Taunton v. Costar*, 7 T. R. 431; *Lacey v. Doe v. Hughes*, 7 M. & W. 139. *Lear, Peake, Ad. Cas.* 210. Whether a tenant in possession, who, after a good notice has expired, has been assaulted and forcibly expelled from the premises, may have his action against the landlord, seems to be doubtful. See *Newton v. Harland*, 1 Man. & G. 644; *Harvey v. Brydges*, 14 M. & W. 437; *Wright v. Burroughes*, 3 C. B. 685.
- (f) *Doe v. Hulme*, 2 Man. & R. 483.
- (ff) *Burns v. Bryant*, 31 N. Y. 453.
- (fg) *Russell v. Allard*, 18 N. H. 222.
- (g) *Doe v. Crick*, 5 Esp. 196; *Doe v. Pierce*, 2 Camp. 96; *Legg v. Benion*, Willes, 43.
- (h) *Jones v. Marsh*, 2 T. R. 404; *Doe v. Lucas*, 5 Esp. 183.
- (i) *Doe v. Dunbar*, Mood. & M. 10.
- (j) *Doe v. Watkins*, 7 East, 551; *Doe v. Crick*, 5 Esp. 196.
- (k) *Turner v. Meymott*, 1 Bing. 153; *Collins v. Canty*, 6 Cush. 415; *Blythe v. Dennett*, 6 E. L. & E. 424; s. c. 13 C. B. 178. See also *Hunter v. Osterhondt*, 11 Barb. 33.

¹ But if the tenancy is terminated between stated pay-days, no rent is recoverable after the last preceding pay-day. *Cameron v. Little*, 62 Me. 550. And see *Emmes v. Feeley*, 132 Mass. 346.—K.

his rights, and is subject to all of his obligations which run with the land. (*m*) But if he sells a part only of the reversion, or if he sells the whole in parcels to different purchasers, this does not extinguish the obligations of the lessee, nor does it transfer them all to the purchaser. There must now be an *apportionment* of the rent. And this may arise also if the lessor, retaining the reversion, assigns a portion of the rent to one assignee and another part to another person. (*n*) The common-law doctrine of entirety of contract forbade this apportionment. But it was long ago permitted from obvious necessity.

* 516 * Where the transfer of the land or premises is by aliquot parts, as half, or one-third, to one transferee, and the residue to another, there is no difficulty in apportioning the rent in the same way. But if the owner of a house under lease sells so many rooms, or the owner of a farm sells so many fields, the question will arise, in what manner the apportionment is to be made; that is, whether in the ratio of *quantity*, or in that of *value*. And it is now settled, that it must be in proportion to value, and not quantity; and that this is a question of fact, for the jury to settle upon the evidence offered them. (*o*)

If the owner and the buyer or buyers of the reversion agree together as to the apportionment of rent, the lessee is bound by this, because it is of no importance to him to whom he pays the rent.

The rent must be apportioned also, if the reversion is divided among many persons, by act of law; as by descent, or sale on execution, or by decree. (*p*)

The lessor cannot himself apportion it by his own wrong. If he enters on a part with the consent of the tenant, the rent is proportionally abated; but if he enters wrongfully and ousts the lessee from a part of the premises, the whole rent is suspended until the lessee is restored. (*q*) (*x*)

There may also be an apportionment by time; as if the lessor dies in the middle of the term. At common law there could be

(*m*) See *ante*, pp. *231, *232.

(*n*) Bliss v. Collins, 5 B. & Ald. 876.

(*o*) Croshy v. Loop, 13 Ill. 625; Van Rensselaer v. Gallup, 5 Denio, 454; Reed v. Ward, 22 Pa. St. 144.

(*p*) 1 Roll. Abr. tit. *Apportionment*, D.

pl. 3, 4, 5; Wotton v. Shirt, Cro. E. 742.

(*q*) Smith v. Raleigh, 3 Camp. 513; Briggs v. Hall, 4 Leigh, 484. See Mayor v. Thomas, 10 Q. B. D. 48; Fillebrown v. Hoar, 124 Mass. 580; Tunis v. Grandy, 22 Gratt. 109.

(*x*) The rule appears to be now settled that the rent may be apportioned by any lawful act of the parties or by operation

of law. See Cheairs v. Conits, 77 Miss. 846, 28 So. 728, 78 Am. St. Rep. 546.

no apportionment of rent in this case, and the lessee is free from the rent to the death of the lessor. But by statutes in England, (*r*) and by similar statutory provisions or usage in this country, there is always an apportionment in such case, the lessee being liable to the representatives of the deceased for the rent until he died, and to the heir afterwards. (*s*)

* SECTION IX.

* 517

OF REMEDY FOR NON-PAYMENT OF RENT.

We have already spoken of the right of re-entry, which only prevents the accruing of further rent. For rents due and unpaid the common law provided what Chancellor *Kent* calls the "summary and somewhat perilous authority of distress." This word is derived through the secondary form "distrein," from the law-latin verb "distringo." The power of distress, under the feudal law, was simply the power to take all the personal property or chattels of the tenant on the premises, and hold them as security for the unpaid rent. What it was, in its exercise, may be inferred from the fact, that this law word came, in course of time, to be used as an expression of the extremest suffering. In Massachusetts and the New England States generally, in New York since 1846, and in many of the other States, the lessor has no power of distress, and no other remedy for rent due, than the same actions of covenant, debt, or assumpsit for use and occupation, (*t*) and the same attachment he would have for other debts. In others of the States, (*u*)¹ it is retained, but greatly and variously modified.

(*r*) 11 Geo. II. ch. 19, § 15, and 4 Wm. IV. ch. 22.

(*s*) *Gheen v. Osborn*, 17 S. & R. 171; *Ex parte Smyth*, 1 Swanst. 338; New York Rev. Statutes.

(*t*) For cases on the action of assumpsit for rent, see *Hall v. Southmayd*, 15 Barb. 32; *Scales v. Anderson*, 26 Miss. 94; *Greenup v. Vernon*, 16 Ill. 26; *Newby*

v. Vestal, 6 Port. (Ind.) 412; *Long v. Bonner*, 11 Ired. L. 27; *Smith v. Wooding*, 20 Ala. 324; *Weaver v. Jones*, 24 Ala. 420.

(*u*) New Jersey, Delaware, Indiana, Illinois, Virginia, Maryland, Kentucky, Mississippi, Georgia, South Carolina, Pennsylvania, and perhaps some others.

¹ A landlord has a lien on the crop for rent and on the tenant's personal property, the former of which he may follow into hands of a purchaser or attaching creditor, *Prettyman v. Unland*, 77 Ill. 206; *Mead v. Thompson*, 78 Ill. 62; but not the latter, *Hadden v. Knickerbocker*, 70 Ill. 677; *Morgan v. Campbell*, 22 Wall. 381. — There can be no distress unless the rent is fixed, or capable of being fixed, as by arbitration, *Myers v. Mayfield*, 7 Bush, 212; or in proportionate profits of thing let, *Wilkins v. Taliaferro*, 52 Ga. 208; or proportioned to lessor's improvements, *Detwiler v. Cox*, 75 Penn. St. 200. An undisclosed principal of an agent, letting in his own name, cannot distrain. *Seyfert v. Bean*, 83 Penn. St. 450. The mere taking a note for rent will not prevent distraining, unless so agreed. *Atkins v. Byrnes*, 71 Ill. 326. A stipula-

Nor would it be possible for us to give a detailed view of the various provisions which exist in relation to this power, except by reference to the State statutes. We will, however, endeavor to exhibit such more general rules on the subject as seem to rest on adjudication.

Originally, the lessor might enter upon the premises and distrain any chattels he might find there; but now, and in * 518 this * country generally, distress may be made only on the goods of the tenant. (*v*)

The distress must be reasonable in amount, and the property distrained cannot be carried out of the county; and the distress must not be made at night. (*w*)

Implements and beasts of husbandry, tools of trade, household goods to a certain amount, and a great variety of things, deemed by the several legislatures essential to the subsistence or comfort of a family, are exempted from distress, or attachment, or levy by the several State statutes. (*x*)

The goods may be replevied by the owner, at any time within a certain number of days, and the question of indebtedness, or any other which affects the right of distress, may be tried; but if not replevied, they may be sold, and the proceeds applied to the payment of the rent due.

The landlord is punishable for unlawful distress, by double damages, or otherwise; and the tenant, for unlawful rescue of the goods or prevention of distress, by treble damages, or otherwise.

The landlord's power of distress does not extend to goods sold in good faith and for a valuable consideration before the

(*v*) *Hoskins v. Paul*, 4 Halst. 110; *blood v. Lowry*, 2 McCord, 39; *Riddle v. Stone v. Matthews*, 7 Hill (N. Y.), 429; *Welden*, 5 Whart. 1.
Brown v. Sims, 17 S. & R. 138; *Young-* (*w*) *Sherman v. Dutch*, 16 Ill. 283.

tion in a lease giving landlord "lien" will prevail over a purchaser, attaching creditor, assignee in bankruptcy, mechanic's lien, and follow goods though removed from the premises. *Hale v. Omaha Bank*, 49 N. Y. 626; *Groton Co. v. Gardner*, 11 R. I. 626; *Dalton v. Laudahn*, 27 Mich. 529; *McCaffrey v. Woodin*, 65 N. Y. 459; *Schenley's Appeal*, 70 Penn. St. 98. After distress and before sale, a landlord cannot sue for rent. *Lehain v. Philpott*, L. R. 10 Ex. 242. In Illinois, a tenant may recover damages resulting from the impairment in value of the use of the premises by the landlord's act. *Lynch v. Baldwin*, 69 Ill. 210. — K.

(*x*) Accepting a bill of exchange from the tenant for rent already due is evidence of an agreement by the landlord to suspend his right of distress for that rent until the bill becomes payable. *Palmer v. Bramley*, [1895] 2 Q. B. 405.

When the tenant is in possession making payments from month to month, the landlord can distrain for rent due on an oral lease, though within the Statute of Frauds. *Marr v. Ray*, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799.

seizure; (x) nor to goods in the custody of the law; (y) but it has been held in New York, that goods mortgaged by the tenant, even if taken possession of by the mortgagee, and removed from the premises, may be followed by the landlord, and be distrained upon. (z) And the distinction has been taken, that while the goods of an assignee of the tenant are liable to distress for rent, those of a mere *under-tenant* are not so liable. (a) But the process of distress has been abolished in New York. (b)

(x) Craddock v. Riddlesbarger, 2 Dana, 205; Neale v. Clautice, 7 Har. & J. 372.

(y) Craddock v. Riddlesbarger, 2 Dana, 205.

(z) Reynolds v. Shuler, 5 Cowen, 323.

(a) Acher v. Witherell, 4 Hill (N. Y.), 112.

(b) Gen. St. p. 429. And this law has been held to be constitutional. Guild v. Rogers, 8 Barb. 502.

PURCHASE AND SALE OF PERSONAL PROPERTY.

SECT. I. — *Essentials of a Sale.*

ALL that is essential to the sale of a chattel, at common law, is the agreement of the parties that the property in the subject-matter should pass from the vendor to the vendee for a consideration given, or promised to be given, by the vendee. Yet where the parties have not explicitly manifested their meaning, the law makes some important inferences. There is a presumption that every sale is to be consummated at once; that the chattel is to be delivered, and the price paid, without delay. If, therefore, nothing appears but an offer and an acceptance, and the vendee goes his way without making payment, it is held to be a breach of the contract (which is presumed to have contemplated payment on the spot), and the vendor is not bound by the sale. But if there was a delivery of the chattel, or the receipt of earnest, or of part payment, either of these is evidence of an understanding that something should remain to be performed *in futuro*; and the legal presumption is rebutted. (x) Where the terms of the contract

(x) Whenever there are concurrent obligations, either express or implied, the party who brings an action cannot recover unless he avers and proves that he was ready and willing to perform his part of the concurrent acts. Per Halsbury, L. C., in *Forrest & Son, Ltd. v. Aramayo*, 83 L. T. 335.

The title passes by a sale, but not by an executory contract under which the goods must be separated or identified, or the price fixed, by determining their quantity or quality. *Upson v. Holmes*, 51 Conn. 500; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Warten v. Strane*, 82 Ala. 311; *Foley v. Fehrath*, 98 Ala. 176; *Bertelson v. Bower*, 81 Ind. 512; 30 Cent. L. J. 81, note; *Wager v. Detroit, L. & N. R. Co.*, 79 Mich. 648; *Pierson v. Crooks*, 115 N. Y. 539; *König v. Brandt*, 84 L. T. 748. If the goods are part of a larger quantity, all in marked bags in a warehouse, which are readily identified, and the only thing necessary to be done

is to weigh them in order to fix the price, the buyer takes title by the sale. *Sanger v. Waterbury*, 116 N. Y. 371; *Mackellar v. Pillsbury*, 48 Minn. 396; *Jennison v. Thompson*, 68 Minn. 333, 71 N. W. 381; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112. But a contract may clearly be so made as subsequently to pass the title, as between the parties, to goods unascertained at the time when the contract is made, without a subsequent acceptance by the buyer, if the contract commits the buyer in advance to the acceptance of goods determined by marks, &c. *Smith v. Edwards*, 156 Mass. 221, 30 N. E. 1017. See *White v. Wilks* (5 Taunt. 176), 23 English Ruling Cas. 252, 255 n.; *Rugg v. Minett* (11 East, 210), id. 295.

An accepted offer to supply all such goods as shall be needed or consumed in

expressly postpone delivery, or payment, or both, to a future day, here also the sale is valid, and no legal presumption obstructs the intention of the parties, but the property in the chattel sold passes immediately. In this case no earnest is necessary, to bind the bargain. (a) The *effect of the Statute of * 520 Frauds, in modifying the principles of the common law in relation to sales, will be considered hereafter.

It must be remembered, that no one can give what he has not himself; and therefore no one can give good title who has no good title.¹ (x) If a mere finder, and still more if a thief, sells what

(a) The law of sales, as it stands at this moment at the common law, is at least as old as the Year-books. In 14 H. 8, 17 b, 21 b in the Common Pleas, the law upon this subject is thus stated by Pollard, J.: "Bargains and sales all depend upon communication and words between the parties; for all bargains can be to take effect instantly, or upon a thing to be done thereafter. They can be upon condition, and they can also be perfect; and yet no *quid pro quo* immediately. And all this depends upon the communication between you and me; as that I shall have £20 for my horse, and I agree; now if you do not pay the money immediately, this is not a bargain; for my agreement is for the £20, and if you do not pay the money straightway, you do not act according to my agreement. I ought, however, in this case, to wait convenient leisure, to wit, until you have counted your money. But if you go to your house for the money, am I obliged to wait? No, truly; for I would be in no certainty of my money or of your return; and therefore it is no contract unless this [delay] be agreed at the communication. But if I sell my horse to you for so much as J. at S. shall say, this

is good if he does say, and if not, void; and thus a contract can be good or void, depending upon matter subsequent. Likewise if I sell my horse for £10 to be paid on a day, now this is good; and yet there is no *quid pro quo* immediately." In the same case, Brudnel, C. J., said: "As has been said, bargains and sales are as is concluded and agreed among the parties, — as their intentions can be gathered. For if I sell my horse to you for £10, and we both are agreed, and I accept a penny *in earnest*, this is a perfect contract; you shall have the horse, and I shall have an action for the money. But if I wish to sell my horse to you for £10, and you say that you will give £10 for him, and I say that I am content; still, if you do not pay the money now, but depart from the place, this is no bargain, for I am only content that you should have my horse for £10, and notwithstanding you say you are content, the transaction is yet not perfect; for you do not pay the money, and so do not perform the agreement." See also Shep. Touch. p. 224. And also Noy, Maxims, p. 88. And see Duncan v. Lewis, 1 Duvall, 183; Martin v. Hurlbut, 9 Minn. 142.

¹ Bearce v. Bowker, 115 Mass. 129; Moody v. Blake, 117 Mass. 23, 26; Prime v. Cobb, 63 Me. 200; Bryant v. Witcher, 52 N. H. 158, 161; Klein v. Seibold, 89 Ill.

the acceptor's business during a limited time is binding; but an accepted offer to sell or deliver articles at specified prices during a limited time in such quantities as the acceptor may want in his business, without indicating the quantity, is void for want of consideration and mutuality. Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 145, 15 L. R. A. 218; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 81, 57 L. R. A. 696; Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; Missouri, &c. Ry. Co. v. Bagley, 60 Kan. 424, 56 Pac. 759.

Under a covenant to supply such goods as barrels, to meet the requirements of the other party's business, there is an implied covenant on the part of the latter to order only such goods as are necessary for that purpose; which covenants are dependent so that a breach of the latter covenant discharges the other party from his obligation to make future deliveries. Anvil Mining Co. v. Humble, 153 U. S. 340, 14 S. Ct. 876, 38 L. Ed. 814; H. D. Williams Cooperage Co. v. Schofield, 115 Fed. 119.

(x) In England, when a hirer of goods, in possession under a hire-and-purchase

he has found or stolen, to A, and A buys in good faith, and so sells to B, and B to C, and C to D, etc., the original owner may reclaim his property wherever it may be, and take it without any payment to the holder, any more than if that holder were the thief himself. (b) In England, a sale in market overt changes the property and divests the owner of his rights; but we have no market overt in this country. (c)¹ It has even been held, that an auctioneer selling stolen goods, and paying over the money to the thief in good faith, is liable in trover to the true owner of the goods; (d) but this is certainly very severe. It has also been held that one who innocently buys a stolen horse, and sells him for value, is liable to the owner for his value. (dd) If the owner has been deceived and defrauded into parting with his property, so that he could claim it from the taker, yet if he voluntarily parted with the property, he cannot reclaim it from one who in good faith buys it of the fraudulent party; and not even if the fraud amounted to felony. (e) And this rule has been applied

(b) *McGrew v. Browder*, 14 Mart. (La.) 17; *Roland v. Gundy*, 5 Ohio, 202; *Browning v. Magill*, 2 Har. & J. 308; *Dame v. Baldwin*, 8 Mass. 518; *Wheelwright v. Depeyster*, 1 Johns. 479; *Hosack v. Weaver*, 1 Yeates, 478; *Easton v. Worthington*, 5 S. & R. 130; *Lance v. Cowan*, 1 Dana, 195; *Ventress v. Smith*, 10 Pet. 161; *Nixon v. Brown*, 57 N. H. 34; *Coombs v. Gorden*, 59 Me. 111; *Barker v. Dinsmore*, 72 Pa. 427; *Quinn v. Davis*, 78 Pa. 15; *Mechanics' &c. Bank v. Farmers', &c. Bank*, 60 N. Y. 40.

(c) See the cases cited in the last note. Also *Hargreave v. Spink*, [1892] 1 Q. B. 25.

(d) *Hills v. Snell*, 104 Mass. 173; *Pease v. Smith*, 61 N. Y. 477; *Hoffman v. Car-*

row, 22 Wend. 285; *Consolidated Company v. Curtis*, [1892] 1 Q. B. 495.

(dd) *Robinson v. Skipworth*, 23 Ind. 311; *Sharp v. Parks*, 48 Ill. 511.

(e) *Malcom v. Loveridge*, 13 Barb. 372; *Hall v. Hinks*, 21 Md. 406; *Keyser v. Harbeck*, 3 Duer, 373. See also *Williams v. Given*, 6 Gratt. 263; *Jennings v. Gage*, 13 Ill. 610; *Titcomb v. Wood*, 38 Me. 561; *Caldwell v. Bartlett*, 3 Duer, 341; *Smith v. Lynes*, 1 Seld. 41; *Crocker v. Crocker*, 31 N. Y. 507; *Hutchinson v. Watkins*, 17 Iowa, 475; *Shufeldt v. Pease*, 16 Wis. 659. So in England, *Kingsford v. Merry*, 34 E. L. & E. 607; s.c. 11 Exch. 577. *Mich., &c. R. Co. v. Phillips*, 60 Ill. 190; *Young v. Bradley*, 68 Ill. 553. This is doubted, however, in *Sawyer v. Fisher*, 32 Me. 28.

540. See *Nixon v. Brown*, 57 N. H. 34; *West. Un. R. Co. v. Wagner*, 65 Ill. 197. — K.

¹ But such a sale does not protect the seller. *Ganly v. Ledwidge*, Ir. R. 10 C. L. 33. — K.

agreement, sells them to a *bona fide* purchaser without notice before all the instalments agreed upon are paid, and is prosecuted to conviction for larceny as a bailee, the owner can recover for a conversion against the purchaser. *Payne v. Wilson*, [1895] 2 Q. B. 537. The owners of goods who have given their clerk authority to make limited sales to their known customers, are not, if the clerk under an assumed name fraudulently sells and delivers the goods to an innocent stranger, estopped from denying his au-

thority to sell, as they have not held him out as their agent to sell to the purchaser; his act passes no title, and the owners can recover the value of the goods from the purchaser. *Farquharson Bros. & Co. v. King & Co.*, [1902] A. C. 325.

When a person deals with another's property by exercising acts of ownership over it, there is an implied contract to pay for the property as on a contract of sale, and to pay a reasonable price. *Nicol v. Hennessey*, 44 W. R. 584.

where it was not a buyer, but a creditor who took the goods in payment of a debt. (*ce*) But we think this may be questioned. But it is said that a vendee with possession and a right to acquire title by a subsequent act cannot before that act give title against his vendor to a *bonâ fide* purchaser. (*ef*)

* It should also be stated that no one can be made to * 521 buy of another without his own assent. Thus if A sends an order to B for goods and C sends the goods he cannot sue for the price if A repudiates the sale, although C had bought B's business. (*f*)

We will now proceed to treat of an absolute sale, and then of a conditional sale of a chattel.

SECTION II.

ABSOLUTE SALE OF CHATTELS.

A sale of a chattel is an exchange thereof for money; but a sale is distinctly discriminated in many respects from an exchange in law; an exchange being the giving of one thing and the receiving of another thing; while a sale is the giving of one thing for that which is the representative of all values. (*g*)¹

(*ce*) *Butters v. Haughwout*, 42 Ill. 9.

(*ef*) *Ballard v. Burgett*, 47 Barb. 646.

(*f*) *Boulton v. Jones*, 2 Hurl. & Norm. Exch. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28.

(*g*) The distinction between sales and exchanges is well pointed out in an anonymous case in 3 Salk. 157, where it is said: "*Permutatio vicina est emptioni*, but exchanges were the original and natural way of commerce precedent to buying, for there was no buying till money was invented; now, in exchanging, both parties are buyers and sellers, and both equally warrant; and this is a *natural* rather than a *civil contract*, so by the *civil law*, upon a bare agreement to exchange, without a delivery on both sides, neither of the parties could have an action upon such agreement, as they may in cases of selling; but if there was a delivery on one side, and not of the other, in such case the deliverer might have an action

to recover the thing which he delivered, but he could have no action to enforce the other to deliver what he had agreed to deliver, and which the deliverer was to have *in lieu* of that thing which he delivered to the other."—If goods have been delivered by one party, and the other party agrees to deliver other goods of a similar quality on demand, the transaction is not a sale, but an agreement to exchange. *Mitchell v. Gile*, 12 N. H. 390. — And proof of an *exchange* will not support an averment of a *sale* of goods. *Vail v. Strong*, 10 Vt. 457. — But in *Sheldon v. Cox*, 3 B. & C. 420, where A agreed to give a horse, warranted sound, in exchange for a horse of B, and a sum of money; and the horses were exchanged, but B refused to pay the money, pretending that A's horse was unsound; it was *held*, that it might be recovered on an *indebitatus* count for horses sold and delivered.

¹ For breach of agreement to exchange, the declaration should be special. *Stevenson v. State*, 65 Ind. 409; *Edwards v. Cottrell*, 43 Iowa, 194. When the same thing, though changed in form, is to be returned, it is bailment; when another thing of equal value may be returned, it is a sale. *Loneragan v. Stewart*, 55 Ill. 44; *Rahilly v. Wilson*, 3 Dillon, 420; *Schlesinger v. Stratton*, 9 R. I. 578; *Hughes v. Stanley*, 45

For a sale to be valid in law there must be parties, a consideration, and a thing to be sold. All persons may be parties to a sale, unless they labor under the disabilities or restraints which have been spoken of in reference to contracts generally.

Of the consideration we have spoken already.

The existence of the thing to be sold, or the subject-matter of the contract, is essential to the validity of the contract. (*h*) If a horse sold be dead before the sale, or merchandise be destroyed by fire, both parties being ignorant thereof, the sale is wholly void. If a substantial part of the thing sold be non-existent, it is said, (*i*) that the buyer has his option to rescind the sale, or take the remainder with a reasonable abatement of the price. But where the parties are equally innocent, we think the meaning and effect of this rule is, that the buyer should have only his choice between enforcing or rescinding the contract; and if he enforces the contract and claims the remainder, he should pay for it the price of the whole. For if the remainder is to be taken at a proportionate reduction, or any reduction, from the whole original price, it should be by a new bargain. Perhaps, however, he may take the remainder, if he will pay for it the original price, with an abatement which can be made exact by a mere numerical proportion; as where the goods were all of one quality, and a certain part was wholly destroyed, and the residue left wholly uninjured. But if a new price is to be made for the remainder, by a new estimate of its value, it must be certain that this can be done only by mutual consent. (*j*)

The thing sold need not be in the possession of the vendor, and if it has been tortiously converted, the owner may sell it, and give

(*h*) Wood & Foster's case, 1 Leon. 42; 5 Q. B. 429; L. R. 7 Q. B. 139; Dexter Grantham v. Hawley, Hob. 132; Strickland v. Turner, 14 E. L. & E. 471; s. c. 7 Exch. 208; Robinson v. Macdonnel, 5 M. & Sel. 228; Couturier v. Hastie, 8 Exch. 40; s. c. *sub nom.* Hastie v. Couturier, reversed in 9 Exch. 102; s. c. 5 H. L. Cas. 673. See also Smith v. Myers, L. R.

(*i*) 2 Kent Com. 469. — The same rule exists in the French law. Code Napoleon, No. 1601.

(*j*) See also Farrer v. Nightingal, 2 Esp. 639.

Iowa, 622; Marsh v. Titus, 3 Hun, 550; Frazer v. Boss, 66 Ind. 1; Dittmar v. Norman, 118 Mass. 319; Powder Co. v. Burkhardt, 97 U. S. 110. Johnston v. Browne, 37 Iowa, 200. Where one is to furnish another a certain line of goods and receive monthly accounts of sales, it is consignment. Walker v. Butterick, 105 Mass. 237; Converseville Co. v. Chambersburg Co., 14 Hun, 609; Williams Bros. v. Davis, 47 Iowa, 363; Albert v. Lindau, 46 Md. 334; *Ex parte* White, L. R. 6 Ch. App. 397; *In re* Linforth, 4 Sawyer, 370. As to sale with right to repurchase, see Slutz v. Deseuberg, 23 Ohio St. 371. — K.

title, and the purchaser may after demand and refusal maintain trover for it. (*jj*)

A mere contingent possibility, not coupled with an interest, is no subject of sale; as all the wool one shall ever have; (*k*)¹ or the sheep which a lessee has covenanted to leave at the end of an existing term. If rights are vested, or possibilities are distinctly connected with interest or property, they may be sold. (*l*) But if one sells what he has not now, and has made no contract for purchasing, and has no definite right to expect, as by consignment, but intends to go into the market and buy, it has been held that he cannot enforce this contract; (*m*) and * although this is questioned, such a contract if enforce- * 524 able, as by the later authority and the better reason it seems to be, must certainly be regarded as a contract for a future sale, and not as a present contract of sale; and therefore the property in the thing when it is acquired by the proposed vendor, does not pass at once to the proposed vendee until the actual sale be made. (*n*)² (*x*)

(*jj*) *Tome v. Dubois*, 6 Wall. 548; *Webber v. Davis*, 44 Me. 147; *Hubbard v. Bliss*, 12 Allen, 590; *McKee v. Judd*, 12 N. Y. 622.

(*k*) See *Graham v. Hawley*, Hob. 132. See *Langton v. Horton*, 1 Hare, 556. But a valid sale may be made of the wine that a vineyard is expected to produce; or the grain that a field is expected to grow; or the milk that a cow may yield during the coming year, or the future young born of a female animal then owned by the vendor, *Hull v. Hull*, 48 Conn. 250; *Sawyer v. Gerrish*, 70 Me. 254; *McCarty v. Blevins*, 5 Yerg. 195; *Congreve v. Evetts*, 26 E. L. & E. 493; s. c. 10 Exch. 298; *Wilkinson v. Ketter*, 69 Ala. 435; *Stephens v. Tucker*, 55 Ga. 543; *Arques v. Wasson*, 51 Cal. 620; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574; *Sanborn v. Benedict*, 78 Ill. 309; *Cotten v. Willoughby*, 83 N. C. 75; *Rawlings v. Hunt*, 90 N. C. 270; *Heald v. Builders' Ins. Co.*, 111 Mass. 38; *Headrick v. Brat-tain*, 63 Ind. 438; or the wool that shall hereafter grow upon his sheep. But see *Screws v. Roach*, 22 Ala. 675; *Collier v. Faulk*, 69 Ala. 58; *Redd v. Burrus*, 58 Ga.

574; *Gittings v. Nelson*, 86 Ill. 591; *Hutchinson v. Ford*, 9 Bush, 318; *Pennington v. Jones*, 57 Iowa, 37.

(*l*) See *Jones v. Roe*, 3 T. R. 88; *Thrall v. Hill*, 110 Mass. 323, and cases cited in note (*k*) *supra*. But the expectancy of an heir presumptive, or apparent (the fee-simple being in the ancestor), is not an interest or a possibility capable of being the subject of a contract. *Carleton v. Leighton*, 3 Meriv. 667.

(*m*) *Bryan v. Lewis*, Ry. & M. 386. And see *Lorymer v. Smith*, B. & C. 1; s. c. 2 Dow. & R. 23, *Abbott*, C. J.; *Head v. Goodwin*, 37 Me. 187; *Stanton v. Small*, 3 Sandf. 230; *Noyes v. Jenkins*, 55 Ga. 586; *Brown v. Combs*, 63 N. Y. 598. But this doctrine was directly overruled in the case of *Hibblewhite v. McMorine*, 5 M. & W. 462. See also *Wells v. Porter*, 2 Bing. N. C. 722, *Bosanquet*, J.; *Mortimer v. McCallan*, 6 M. & W. 58; *Stanton v. Small*, 3 Sandf. 230.

(*n*) *Black v. Webb*, 20 Ohio, 304; *Stanton v. Small*, 3 Sandf. 230; *Lunn v. Thornton*, 1 C. B. 385; *Langton v. Higgins*, 4 H. & N. 402.

¹ So a sale of fish to be caught passes no title to the fish when caught. *Low v. Pew*, 108 Mass. 347. — W.

² Equity, however, will give effect to a conveyance of property not yet acquired or

(*x*) The rule in the cited case of *Blanchard v. Cooke* that the title under a con-

tract for replenishing a stock of goods may pass as soon as the goods are received, is

A sale may be good in part, and void as to the residue; good as between the parties, but void as to creditors, good as to some of the creditors, but void as to others. (o)

SECTION III.

PRICE AND AGREEMENT OF PARTIES.

The price to be paid must be certain, or so referred to a definite standard that it may be made certain; (*p*)¹ as what

(o) *Bradford v. Tappan*, 11 Pick. 76, 79.

(*p*) *Brown v. Bellows*, 4 Pick. 189. "It is said in Ayliffe, Civ. Law, b. 4, tit. 4: 'The price agreed on between the parties ought to be certain; wherefore a purchase is not valid if it depends on the will of the buyer or seller; though such price may be well enough referred to the arbitration of a third person to adjudge and determine

the value of the thing sold.' 'And thus the certainty of a price may be had, either by the determination of the contracting parties themselves, or else by relation had to some person or thing.' In the case at bar, the referees have fixed the price, and according to these authorities, and the reason of the thing, the sale should be carried into effect, unless for some other objection which has been made by

even in existence, potentially or otherwise. *Holroyd v. Marshall*, 10 H. L. C. 193; *Lazarus v. Andrade*, 5 C. P. D. 318; *Pennock v. Coe*, 23 How. 117; *Brett v. Carter*, 2 Low. 458; *Apperson v. Moore*, 30 Ark. 56; *Phillips v. Winslow*, 18 B. Monroe, 431; *Morrill v. Noyes*, 56 Me. 458; *Sillers v. Lester*, 48 Miss. 513; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *McCaffrey v. Woodin*, 65 N. Y. 459; *Kribbs v. Alford*, 120 N. Y. 519; *Philadelphia, &c. Co. v. Woelpper*, 64 Penn. 366; *Williams v. Winsor*, 12 R. I. 9. But see *Moody v. Wright*, 13 Met. 17; *Blanchard v. Cooke*, 144 Mass. 207; *Bennett v. Bailey*, 150 Mass. 257; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Hunter v. Bosworth*, 43 Wis. 583; *Case v. Fish*, 58 Wis. 56.

Equity will not give effect to such a conveyance unless the property be described with sufficient particularity for identification. *Belding v. Reed*, 3 H. & C. 955; *In re Count D'Epineuil*, 20 Ch. D. 758.

Most of the cases referred to above relate to mortgages, but the question seems to be the same in the case of a mortgage as of a sale. — W.

¹ If not fixed, a reasonable price is implied, *James v. Muir*, 33 Mich. 223, 227,

not to be extended to cases where the intention to pass the title is doubtful. *Harding v. Lewenberg*, 174 Mass. 394, 54 N. E. 870. See *Nicholas v. Ashton*, 155 Mass. 205, 29 N. E. 519.

In general, one may sell, at any price, goods which he does not own, but which he hopes or expects to acquire. *Ajello v. Worsley*, [1898] 1 Ch. 274. But property not in existence, or potentially in possession, as fish afterwards to be caught in the sea, or a lost vessel, is not the subject of a sale or of a larceny. *Thomas v. Knowles*, 128 Mass. 22; *State v. Krider*, 78 N. C. 481; *Ghen v. Rich*, 8 Fed. 159. A sale of crops afterwards to be grown, even though the seed is not yet planted, is an exception to this rule. *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608;

Briggs v. United States, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *McCaffrey v. Woodin*, 65 N. Y. 464.

An attempt to assign a mere possibility of future earnings, not an existing chose in action, is ineffectual. *Lightbody v. Smith*, 125 Mass. 51. An assignment of wages to secure to the assignee an existing debt, and also to secure his future advances of goods, is good as to both the debt and the goods already supplied when a writ of garnishment is served; but it is not valid as against creditors if it goes further and provides for paying to the assignor his earnings. *Robinson v. McKenna*, 21 R. I. 117, 42 Atl. 510; *Stevens v. Hargraves*, 22 R. I. 235, 47 Atl. 311. See *Schofield v. McConnell*, 119 Mass. 368.

another * man has given; or what another man shall say * 525 should be the price; but if this third party refuse to fix the price, the sale is void. (q) And the thing sold must be specific, and capable of certain identification. There must be an agreement of mind as to this; and if there be an honest error as to the price, or as to the substantial and essential qualities of the thing sold (not as to its mere worth or condition), the sale may be treated as null; (r) but this perhaps should be confined to cases where the difference between the thing bought and the thing supposed to be bought, is sufficient to affect its identity. For anything less than this the parties must be left to the law of warranty. (s) This agreement of mind may be expressed orally or by letter; but we have already considered these questions fully, when treating of assent; and we would refer in this connection to what we there said, (t) adding here, that where a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State, and if it is valid by the laws of the latter State, it will be enforced in the State whence the letter is sent, although it would have been invalid if made there. (u)

the counsel for the defendant, it should be differently determined." See also *Flagg v. Mann*, 2 Sumner, 539; *Cunningham v. Ashbrook*, 20 Mo. 553; *McCandlish v. Newman*, 22 Penn. St. 460.

(q) Story on Sales, § 220. A sale may be made of an article for what it is worth, for that can be ascertained by experts. See *Hoodley v. McLaine*, 10 Bing. 437; *Acebal v. Levy*, id. 382. See also *Dickson v. Jordan*, 12 Ired. L. 79, and 11 Ired. L. 166.

(r) See *Kelly v. Solari*, 9 M. & W. 54; *Lucas v. Worswick*, 1 Mo. & Rob. 293; *Webb v. Odell*, 49 N. Y. 583; *Bowen v. Sullivan*, 62 Ind. 231; *Kyle v. Kavanagh*,

103 Mass. 356; *Harvey v. Harris*, 112 Mass. 32. See *Hills v. Snell*, 104 Mass. 173. As to the sale being controlled by the intention of the parties, see *Hutbacher v. Harris's Adm'r*, 38 Penn. St. 491.

(s) See *post*, p. *540, and ch. v. on Warranty.

(t) See *ante*, p. *479 *et seq.* See also *Routledge v. Grant*, 4 Bing. 653; *Bean v. Burbank*, 16 Me. 458.

(u) *McIntyre v. Parks*, 3 Met. 207; *Frank v. Hoey*, 128 Mass. 263; *Arnold v. Prout*, 51 N. H. 587; *Sarbecker v. State*, 65 Wis. 171, 175.

as the market price at the time and place of delivery. *McEwen v. Morey*, 60 Ill. 32. See *Callaghan v. Myers*, 89 Ill. 566. The price may be fixed by valuers, *Newlan v. Dunham*, 60 Ill. 233; but if they refuse to act, there is no contract in the case of an executory sale. *Wittkowsky v. Wasson*, 71 N. C. 451. If by a referee, there is no sale until he fixes the price. *Hutton v. Moore*, 26 Ark. 382; *Vickers v. Vickers*, L. R. 4 Eq. 529. See *Brown v. Cole*, 45 Iowa, 601. Where the price of wheat was to be fixed by the seller by a certain standard, and it was destroyed before so fixed, it was held to be the buyer's loss. *McConnell v. Hughes*, 29 Wis. 537; *Easterlin v. Rylander*, 59 Ga. 292; *Ames v. Quimby*, 96 U. S. 324. — K.

SECTION IV.

THE EFFECT OF A SALE.

Upon a completed sale the property in the thing sold passes to the purchaser; one of these things implies the other; if * 526 the * property passes then it is a completed sale; and if a completed sale then the property passes. (*v*) And no bill or memorandum subsequently sent in, can by its terms vary the contract. (*vv*) If it be sold for cash and the price be not paid, or if it be sold on a credit, but by the terms of the bargain is to remain in the hands of the vendor, the vendor has a lien on it for the price; (*w*) and only payment or tender gives the vendée a right to possession. And if it be sold on credit, and the buyer by the terms of the bargain has the right of immediate possession without payment, but the thing sold actually remains in the possession of the seller until the credit has expired, and the price is still unpaid, it seems that the seller then has a lien for the price. (*x*) If it be sold on credit, and there is no agreement in respect to the delivery or possession of the goods, the prevailing but not quite universal rule gives to the purchaser at once a complete right not only of property but of possession, (*y*) subject only to defeasance under the law of stoppage *in transitu*.¹

(*v*) *Bayley, J.*, in *Simmons v. Swift*, 5 B. & C. 862; *Dixon v. Yates*, 2 Nev. & M. 202, *Parke, J.*; *Atkin v. Barwick*, 1 Stra. 167. See 1 Bell, Com. 166 *et seq.* But for the common-law rule, see the cases cited in the next note; also *Noy, Maxims*, p. 88; *Hinde v. Whitehouse*, 7 East, 558, *Lord Ellenborough*; Com. Dig. *Agreement*, B. 3; *Tarling v. Baxter*, 6 B. & C. 362; *Sweeting v. Turner*, L. R. 7 Q. B. 310; *Tome v. Dubois*, 6 Wall. 548; *Crill v. Doyle*, 53 Cal. 713; *Webber v. Davis*, 44 Me. 147; *Bailey v. Smith*, 43 N. H. 141. See *Morse v. Sherman*, 106 Mass. 430; *Foster v. Ropes*, 111 Mass. 10; *Haskins v. Warren*, 115 Mass. 514; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Lester v. East*, 49 Ind. 588; *Jenkins v. Jarrett*, 70 N. C. 255; *Hanauer v. Bartels*, 2 Col. 514; *Felton v. Fuller*, 9 Foster (N. H.), 121.—See, however, *Baley v. Culverwell*, 2 Mood. & R. 566; *Langfort v. Tiler*, 1 Salk. 113.

(*vv*) *Shucardt v. Allens*, 1 Wall. 359.

(*w*) *Bloxam v. Sanders*, 4 B. & C. 948; *Cornwall v. Haight*, 8 Barb. 328; *Bowen v. Burk*, 13 Penn. St. 146. See also *Dixon v. Yates*, 5 B. & Ad. 313; *Withers v. Lyss*, 4 Camp. 237; *Bush v. Davies*, 2 M. & Sel. 397; *Langfort v. Tiler*, 1 Salk. 113. And see *Foley v. Mason*, 6 Md. 37; *Henderson v. Lauck*, 21 Penn. St. 359; *Sweeney v. Owsley*, 14 B. Mon. 413.

(*x*) *New v. Swain*, Dan. & L. 193; *Lewis v. Covilland*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227; *Owens v. Weedman*, 82 Ill. 409; *Milliken v. Warren*, 57 Me. 46; *Re Batchelder*, 2 Low. 245.

(*y*) *Cartland v. Morison*, 32 Me. 191; *Kimbro v. Hamilton*, 2 Swan. 190; *Hall v. Robinson*, 2 Comst. 293. But *Magoon v. Ankeny*, 11 Ill. 558, and *O'Keefe v. Kellogg*, 15 Ill. 347, may be considered as denying, or at least as qualifying, this rule.

¹ If a buyer agrees to remove the goods within a certain time, failure so to do may justify the seller in repudiating the sale. *Kellam v. McKinstry*, 69 N. Y. 264; *Bolton v. Riddle*, 35 Mich. 13. A sale is complete when the thing sold is so situated that the

If the property passes, though not the right of possession, and the thing sold perish, the loss falls on the purchaser. (z) The vendor's lien is destroyed by a delivery of the goods, or by a delivery of a part, without intention to separate it from the rest, but * with an intention thereby to give possession * 527 of the whole. (a) If sold for cash, and the money be not paid within a reasonable time, the vendor may treat the sale as null. (b) There may, however, be a delay in the payment justified by the terms or the nature of the contract.

The property does not pass absolutely unless the sale be completed; and it is not completed until the happening of any event expressly provided for, or so long as anything remains to be done to the thing sold, to put it into a condition for sale, or to identify it, or discriminate it from other things. (c)¹ Thus if one buys one

(z) *Tarling v. Baxter*, 6 B. & C. 362; *Goddard v. Binney*, 115 Mass. 450; *Smith v. Dallas*, 35 Ind. 255; *Whitcomb v. Whitney*, 24 Mich. 486; *Powers v. Dellinger*, 54 Wis. 389. See also *Willis v. Willis*, 6 Dana, 48; *Macomber v. Parker*, 13 Pick. 183; *Farnum v. Perry*, 4 Law Rep. 276; *Crawford v. Smith*, 7 Dana, 61.

(a) *Blackshear v. Burke*, 74 Ala. 239; *Obermeier v. Core*, 25 Ark. 562; *McNail v. Ziegler*, 68 Ill. 224; *Freeman v. Nichols*, 116 Mass. 309; *Mackanness v. Long*, 85 Pa. 158. Mere delivery of part will not, however, divest the vendor of his lien, as to the whole, if anything remains to be done by the vendor to the part undelivered. *Simmons v. Swift*, 5 B. & C. 857. See on this subject *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 4 B. & P. 69; *Hanson v. Meyer*, 6 East, 614;

Ward v. Shaw, 7 Wend. 404; *Payne v. Shadbolt*, 1 Camp. 427; *Brewer v. Salisbury*, 9 Barb. 511; *Weld v. Cutler*, 2 Gray, 195; *Haskall v. Rice*, S. J. Ct. Mass. 1858, 11 Law Rep. 561. Of course if the vendee obtains possession by fraud, he can derive no rights, and the vendor can lose none by such a delivery. *Earl of Bristol v. Willsmore*, 1 B. & C. 514. See also *Hussey v. Thornton*, 4 Mass. 405; *Donahue v. Cromartie*, 21 Cal. 80.

(b) *Anonymous*, Dyer, 30 a. See also *Langfort v. Tiler*, 1 Salk. 113. But see *Greaves v. Ashlin*, 3 Camp. 426, *contra*. See also *Blackburn on Contract of Sale*, p. 328, *et seq.*

(c) *Bailey v. Smith*, 43 N. H. 141; *Gardner v. Lane*, 9 Allen, 492; *Strauss v. Ross*, 25 Ind. 300; *McClung v. Kelley*, 21 Iowa, 508.

buyer can take it at his pleasure. *Turner v. Langdon*, 112 Mass. 265; *Marsh v. Rouse*, 44 N. Y. 643; *Rattary v. Cook*, 50 Ala. 352; *Partridge v. Wooding*, 44 Conn. 277; *Sibley v. Tie*, 88 Ill. 287. — K.

¹ Where anything remains to be done, as weighing, measuring, or testing to determine the price, property does not pass although goods be ascertained and they are in a state for acceptance. *Johnson v. Lancashire R. Co.*, 3 C. P. D. 499; *Foster v. Ropes*, 111 Mass. 10; *Gibbs v. Benjamin*, 45 Vt. 124; *Lingham v. Eggleston*, 27 Mich. 324; *Dyer v. Libby*, 61 Me. 45; *Smart v. Batchelder*, 57 N. H. 140; *Southwestern Co. v. Stanard*, 44 Mo. 71; *Ormsbee v. Machir*, 20 Ohio St. 295; *Lester v. East*, 49 Ind. 588; *Morrison v. Dingley*, 63 Me. 553; *Leigh v. Mobile, &c. R. Co.*, 58 Ala. 165; *Gravett v. Mugge*, 89 Ill. 218; *Burrows v. Whitaker*, 71 N. Y. 291. — But the title to specific goods passes before delivery, if such intent is expressed or implied, although the seller has to do something more to the property, *Marble v. Moore*, 102 Mass. 443; as to test or to count, *Russell v. Carrington*, 42 N. Y. 118; *Watts v. Hendry*, 13 Fla. 523; *Wilkinson v. Holiday*, 33 Mich. 386; *Straus v. Minzesheimer*, 78 Ill. 492; *Groat v. Gile*, 51 N. Y. 431; *Morrow v. Reed*, 30 Wis. 81; but if the intention is that something be done before completion, whether by the seller, buyer, or a third person, the title does not pass, *Foster v. Ropes*, 111 Mass. 10; *Prescott v. Locke*, 51 N. H. 94; *Pike v. Vaughn*, 39 Wis. 499; *Darden v. Lovelace*, 52 Ala. 289; *Flanders v. Maynard*, 58 Ga. 56; although placed in the buyer's hands. *Kein v. Tupper*, 52 N. Y. 550. To pass

hundred bushels of wheat out of two hundred, and is to send bags or boxes for them which the seller is to fill; and the buyer sends bags enough for twenty bushels which the seller fills, and afterwards the seller refuses to send any wheat whatever, it is held, that the property in the twenty bushels put into the bags passes to the buyer; but not so of the other eighty. (*d*) Where several parties store grain in an elevator, in one mass, they are tenants in common of the mass; and if an order of the vendor on the owners of the elevator, to deliver to a purchaser a certain quantity, is accepted by the owners in their customary manner, that quantity passes to the purchaser. (*dd*)¹ It has been held, that where articles in process of manufacture under an agreement to make and deliver to the vendee, he supplying certain specified parts necessary to their completion, are lost by fire, while in possession of the maker, their completion and delivery being delayed solely by the neglect of the vendee to furnish the parts specified, the loss must fall upon the maker, and not upon the vendee. (*e*) Nor is the sale completed while anything remains to be done to determine its quantity, if the price depends on this; unless

(*d*) *Aldridge v. Johnson*, 7 E. & B. 885. See also *Langhton v. Higgins*, 4 H. & N. 402, for a direct authority upon this point.

(*dd*) *Cushing v. Breed*, 14 Allen, 376. See *post*, vol. 2, p. *137, note (*bb*).

(*e*) *McConike v. N. Y. & E. R. R. Co.*, 20 N. Y. 495. See *post*, chapter on Liens.

title to an unfinished specific chattel, an express intent must appear, *Thorndike v. Bath*, 114 Mass. 116; with express or implied acceptance, *Brown v. Foster*, 113 Mass. 136; *Higgins v. Murray*, 73 N. Y. 252; *Zaleski v. Clark*, 44 Conn. 218. See *Goddard v. Binney*, 115 Mass. 450; *Pratt v. Maynard*, 116 Mass. 388; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Seckel v. Scott*, 66 Ill. 106. *Morrow v. Delaney*, 41 Wis. 149, decided that under a contract declaring that the plaintiff "has this day sold" certain specified logs lying in a certain place, "which are to be scaled where they now lie," the title passed to the buyer and the logs were at his risk. See *Hahn v. Fredericks*, 30 Mich. 223, as to the title of hard wood mixed with soft in piles passing before separation. — The title to goods not specified will not pass until appropriation. *Indianapolis R. Co. v. Maguire*, 62 Ind. 140; *Smyth v. Ward*, 46 Iowa, 339. See *Chapman v. Shepard*, 39 Conn. 413; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Morrison v. Dingley*, 63 Me. 553; *Cumberland, & Co. v. Andes Ins. Co.*, 64 Me. 466; *Kein v. Tupper*, 52 N. Y. 550; *Hurff v. Hires*, 40 N. J. L. 581; *Ferguson v. Northern Bank*, 14 Bush, 555; *Southwell v. Beezley*, 5 Oreg. 143; *Keeler v. Goodwin*, 111 Mass. 490; *Home Ins. Co. v. Heck*, 65 Ill. 111. As to election, see *Lynch v. O'Donnell*, 127 Mass. 311. A delivery by the vendor to a carrier by the buyer's order is an appropriation, *Krulder v. Ellison*, 47 N. Y. 36; *Odell v. B. & M. R. Co.*, 109 Mass. 50; *Sneathen v. Grubbs*, 83 Pa. 147; *Green Bay Bank v. Dearborn*, 115 Mass. 219; *Groff v. Belche*, 62 Mo. 400; as well as a discount of bill of lading is such of goods named therein. *Holmes v. German Sec. Bank*, 87 Pa. 525; *First National Bank v. Pettit*, 9 Heiskell, 447. A vendor cannot send in excess of an order and make the buyer select. *Rommel v. Wingate*, 103 Mass. 327; *Borrowman v. Free*, 4 Q. B. D. 500; *Tarling v. O'Riordan*, 2 L. R. Ir. 82. — K.

¹ Subject, however, to the seller's lien until the delivery is absolute. *Keeler v. Goodwin*, 111 Mass. 490. Usage makes the possession of warehouse receipts of grain equivalent to its possession. *Broadwell v. Howard*, 77 Ill. 305. See *Keeler v. Goodwin*, 111 Mass. 490; *Bailey v. Bensley*, 87 Ill. 556. — K.

this is to be done by the buyer alone. (*f*) (*x*) And even if earnest, or a part of * the price be paid, the sale is not com- * 528 plete under these circumstances, and if it finally fail, the money paid may be recovered back. (*g*) But if on a sale of goods, anything remains to be done by the buyer, and it nevertheless appears by the terms of the contract that the parties intend that the property should pass at once by the bargain from the seller to the buyer, it will so pass. (*gg*) Upon a sale of goods in bond, the property passes to the purchaser, upon delivery to a carrier

(*f*) *Tarling v. Baxter*, 6 B. & C. 360; *Gillet v. Hill*, 2 Cr. & M. 535; *Zagury v. Furnell*, 2 Camp. 240; *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & Sel. 397; *Shepley v. Davis*, 5 Taunt. 617; *Rhodes v. Thuaites*, 6 B. & C. 388; *Alexander v. Gardner*, 1 Bing. N. C. 676. But where the thing to be done by the vendor is but trifling, or is but a mathematical computation, this rule will not apply. Thus, where there was a sale of certain trees at a fixed price per cubic foot, and all the trees had been marked, and the cubical contents of each tree ascertained, it was *held*, that the property passed to the purchaser, although the sum total of the cubical contents had not been ascertained. *Tansley v. Turner*, 2 Bing. N. C. 151; s. c. 2 Scott, 238; and see *Cunningham v. Ashbrook*, 20 Mo. 553. The general principle stated in the text is recognized in the following American cases: *Dixon v. Myers*, 7 Gratt. 240; *Ward v. Shaw*, 7 Wend. 404; *McDonald v. Hewett*, 15 Johns. 349; *Barrett v. Goddard*, 3 Mason, 112; *Rapelye v. Mackie*, 6 Cowen, 250; *Russell v. Nicoll*, 3 Wend. 112; *Outwater v. Dodge*, 7 Cowen, 85; *Stevens v. Eno*, 10 Barb. 95; *Damon v. Osborne*, 1 Pick. 476; *Macomber v. Parker*, 13 id. 175; *Houdlette v. Tallman*, 14

Me. 400; *Cushman v. Holyoke*, 34 id. 289; *Stone v. Peacock*, 35 id. 385; *Golder v. Ogden*, 15 Penn. St. 528; *Lester v. McDowell*, 18 Penn. St. 91; *Nesbit v. Burry*, 25 Penn. St. 208; *Riddle v. Varnum*, 20 Pick. 280; *Davis v. Hill*, 3 N. H. 382; *Messer v. Woodman*, 2 Foster (N. H.), 172; *Warren v. Buckminster*, 4 Foster (N. H.), 337; *Crawford v. Smith*, 7 Dana, 61. — But it is *held*, that if the parties intended that the sale should be complete before the article sold is weighed or measured, the property will pass before this is done. *Riddle v. Varnum*, 20 Pick. 280. See also *Butterworth v. McKinly*, 11 Humph. 206; *Waldron v. Chase*, 37 Me. 414; *Moody v. Brown*, 34 id. 107; *Olyphant v. Baker*, 5 Denio, 379; *Dennis v. Alexander*, 3 Barr, 50; *Crofoot v. Bennett*, 2 Comst. 258; *Brewer v. Salisbury*, 9 Barb. 511; *Cushman v. Holyoke*, id. 289. But see *Waldo v. Belcher*, 11 Ired. L. 609.

(*g*) *Nesbit v. Burry*, 25 Penn. St. 208; *Joyce v. Adams*, 4 Seld. 291.

(*gg*) *Turley v. Bates*, 2 Hurl. & Colt. 200; *Ford v. Chambers*, 28 Cal. 13; *Fitch v. Burk*, 38 Vt. 683; *Young v. Matthews*, L. R. 2 C. P. 127; *Cummings v. Griggs*, 2 Duvall, 87; *Burr v. Williams*, 23 Ark. 244.

(*x*) When a contract contains clear and definite provisions as to the quantity of goods to be sold and supplied, a clause by which the purchasers are "bound to take only such goods as they themselves shall select," gives them the right only to select up to the required quantity, and not an option to take any or none of the goods. *Jacobson v. Sullivan*, 152 Mass. 480, 25 N. E. 973. Upon an option to purchase goods if satisfactory, the title does not pass until the option is exercised or ended; *contra*, of an option to return if not satisfactory. *Wind v. Iler* (Iowa), 61 N. W. 1001. The fact that the seller's only title is an option to buy which he cannot enforce does not avoid the contract. *Wamsley*

v. Horton, 77 Hun, 317. If the manifest object of the transaction is security, it is a trust or pledge, and not a sale. *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326; 12 S. Ct. 277, 35 L. Ed. 1029; *Union Stock-yards & T. Co. v. Western Land & C. Co.*, 59 Fed. 49.

An agreement for a deed after monthly payments, by which the purchaser agrees that, in case of default in payment for four weeks, "this agreement shall become null and void," means that it shall be void at the vendor's option, and that the vendee cannot, by making default, avoid payment of the price. *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. 347.

selected by him (although they remain subject to lien for duties, and to the custody of the customs officers), during their overland transit to the port of exportation and delay there until authority to pass them is received; and although the vendor volunteers to take the necessary steps for obtaining the authority. (*h*)

An agreement to sell is a different thing from a sale, and therefore no mere promise to sell hereafter amounts to a present sale; so, an acceptance of a specific order for certain chattels is not itself a sale of those chattels, either to the drawer or to the party in whose favor the order is drawn. (*i*) And it is always a question of fact for the jury, whether a sale has been completed or not. (*j*) The frequent importance of this question arises from the rule, which we repeat, that if a sale be complete, the property in the thing sold passes to the buyer; and if the sale is not complete, it remains with the original owner.¹

We are aware of no difference between the Roman civil * 529 * and the common law, in regard to any part of the law of contracts, greater or more definite in principle and theory than that which relates to this subject. But in practice the result was not so different. By the Roman law, the sale without delivery did not pass the property. It gave to the buyer a *jus ad rem*, but not a *jus in re* until possession. Leaving the property in the hands of the seller, it created two obligations, — one on the part of the buyer to pay the price, and, for this debt, the thing sold was a *pignus* in the hands of the seller; the other on the part of the seller to deliver the thing so pledged on payment of the debt. But if the pledge perished without the fault of the seller, he could not be called on to return the pledge, but might still call on the buyer to pay his debt, — that is, the price. (*k*) In Louisiana, it is held, that if by the terms announced

(*h*) *Waldron v. Romain*, 22 N. Y. 368; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Burrows v. Whitaker*, 71 N. Y. 201; *Hurff v. Hires*, 46 N. J. L. 581; *Carpenter v. Graham*, 42 Mich. 191; or if something is to be done by the vendor but at the vendee's direction and for his convenience. *Whitcomb v. Whitney*, 24 Mich. 486.

(*i*) *Burrall v. Jacob*, 1 Barb. 165.

(*j*) *De Ridder v. McKnight*, 13 Johns. 294; *Marble v. Moore*, 102 Mass. 443; *Kelsea v. Haines*, 41 N. H. 246, 253; *Dyer v. Libby*, 61 Me. 45.

(*k*) This whole subject is well illustrated in *Bell's Commentaries on the Law of Scotland*.

¹ *Lester v. East*, 49 Ind. 588, 592; *The Elgee Cotton Cases*, 22 Wall. 180; *Leigh v. Mobile, &c. R. Co*, 58 Ala. 165; *Cardinell v. Bennett*, 52 Cal. 476; *Olney v. Howe*, 89 Ill. 556. Whether, upon an agreement to sell, the title passes, depends upon the intention of the parties. *Bethel, &c. Co. v. Brown*, 57 Me. 9, 18; *Prescott v. Locke*, 51 N. H. 94, 101; *Russell v. Carrington*, 42 N. Y. 118; *Fitch v. Burk*, 38 Vt. 683, 689; *Dugan v. Nichols*, 125 Mass. 43; *Hurd v. Cook*, 75 N. Y. 454; *Dyer v. Libby*, 61 Me. 45; *Lester v. East*, 49 Ind. 588; *Wilkinson v. Holiday*, 33 Mich. 386; *Ogg v. Shuter*, L. R. 10 C. P. 159, 162. And such intention must be manifest when the bargain is made. *Foster v. Ropes*, 111 Mass. 10; *Lingham v. Eggleston*, 27 Mich. 324. — K.

at a public sale, the purchaser has a certain time to remove the goods, during the whole of that time they are at the risk of the seller. (*kk*)

SECTION V.

OF POSSESSION AND DELIVERY.

While, as between the parties, the property passes by a sale without delivery, if such is the intention, (*kl*) it is not valid, in general, as against a third party without notice, without delivery. For if the same thing be sold by the vendor to two parties, by conveyances equally valid, he who first gets possession will hold it. (*l*)¹ In general, where there is a completed sale, and no change of possession, this retention of possession by the vendor is a badge of fraud, and will avoid the sale in favor of a party who subsequently acquires title to the property in good faith, either by transfer or by attachment, and with no knowledge of the sale. In the days of *Mansfield* and *Buller*, possession retained by the seller or mortgagor of chattels gave rise to an *inference of law* of fraud. This severe doctrine has certainly been held in many cases down to the present day, both in England and in this country. But the rule has been much modified * in other * 530 cases. And there seems now to be a tendency to consider the question of fraud in all such cases as a question of fact, in

(*kk*) *Gleason v. Sykes*, 18 La. Ann. 4 Binn. 258; *Babb v. Clemson*, 10 S. & R. 627. 419; *Fletcher v. Howard*, 2 Aik. 115;

(*kl*) *Burt v. Dutcher*, 34 N. Y. 493; *Bay v. Cook*, 31 Ill. 336; *Cullam v. Guil-*
lot, 18 La. Ann. 608.

(*l*) 2 Kent Com. 522; *Dawes v. Cope*,

¹ In a few States of this country it is held that apart from any question of fraud a sale does not pass title to the purchaser without delivery as against a subsequent purchaser or attaching creditor ignorant of the sale. *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Reed v. Reed*, 70 Me. 504; *Lanfear v. Sumner*, 17 Mass. 110; *Shumway v. Rutter*, 7 Pick. 56; *Dempsey v. Gardner*, 127 Mass. 381; *Harlow v. Hall*, 132 Mass. 232; *Hallgarten v. Oldham*, 135 Mass. 1, 8; *Crawford v. Forristall*, 58 N. H. 114; *Morgan v. Taylor*, 32 Tex. 363. But of these States, in New Hampshire, at least, delivery is not essential if the goods sold are at a distance so that delivery is impossible. *Ricker v. Cross*, 5 N. H. 570.

In England, and in other States of this country, the only importance of non-delivery is as evidence of fraud. If no fraud is charged or made out, a purchaser without delivery may enforce his title against a subsequent purchaser or attaching creditor who obtains possession. *Blackburn on Sales*, 260; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51; *Meade v. Smith*, 16 Conn. 346.

It should be noticed, however, that in many States retention of possession by the vendor is held to be not only *prima facie* evidence of fraud but conclusive proof. So that on the ground of fraud the subsequent purchaser or attaching creditor obtaining possession may enforce his right against the prior purchaser. But this doctrine also is contrary to the English law and the weight of authority in this country. See the following note. — W.

relation to which the circumstance of possession is of great weight, though not absolutely conclusive. The question is thus taken from the court who should infer it from a single fact, and is left to the jury, who may consider all the facts, and determine how far the fact of possession is explained, and made consistent with an honest purpose.¹ And it is said that where the contract is *bonâ fide* and otherwise completed, slight acts suffice to prove a delivery as against the claims of third parties.(*mm*) It is held in California, that where cattle roaming with those of other owners were sold, the purchaser will not be affected by want of delivery, until he has had a reasonable time for selecting and branding them.(*mn*) Goods are fraudulently purchased, if the buyer intends not to pay for them, and the seller may recover possession of them from the purchaser or one who buys from him with knowledge of the fraud.(*mo*) If one resists the payment of the price on the ground of fraud in the seller, he must prove not only that the seller made false statements, but that he knew them to be false.(*mp*) If a vendor proceeds to judgment for the

- (*mm*) *Stinson v. Clark*, 6 Allen, 340. *Oswego Starch Factory v. Lendrum*, 57 See also *Burge v. Cone*, 6 Allen, 412; *Iowa*, 573; and see *Rateau v. Bernard*, 3 *Dewart v. Clement*, 48 Penn. St. 413; *Blatch. C. C.* 244, and *Anderson v. Nicholas*, 28 N. Y. 600.
Miles v. Edelen, 1 Duvall, 270; *State v. Rosenfeld*, 35 Mo. 472.
(*mn*) *Walden v. Murdock*, 23 Cal. 540. (*mp*) *King v. Eagle Mills*, 10 Allen, 548.
(*mo*) *King v. Phillips*, 8 Bosw. 603;

¹ In the following cases it was held that retention of possession by the vendor is conclusive proof of fraud. *Twyne's Case*, 3 Rep. 87; *Edwards v. Harben*, 2 T. R. 587; *Paget v. Perchard*, 1 Esp. 205; *Grun v. Bainey*, 55 Cal. 254; *Kelly v. Murphy*, 70 Cal. 560; *Bassinger v. Spangler*, 9 Col. 175; *Finding v. Hartman*, 14 Col. 596; *Mead v. Noyes*, 44 Conn. 487; *Taylor v. Richardson*, 4 Houst. 300; *Smith v. Hines*, 10 Fla. 258, 295; *Dunning v. Mead*, 90 Ill. 376; *Huschle v. Morris*, 131 Ill. 587; *Hickok v. Buell*, 51 Iowa, 655; *Seavey v. Walker*, 108 Ind. 78; *Vanmeter v. Estill*, 78 Ky. 456; *Bruce v. Smith*, 3 H. & J. 499; *Stern v. Henley*, 68 Mo. 262; *Mills v. Thompson*, 72 Mo. 367; *Gray v. Sullivan*, 10 Nev. 416; *Plaisted v. Holmes*, 58 N. H. 293; *Crawford v. Davis*, 99 Pa. 576; *Stephens v. Gifford*, 137 Pa. 219; *Rothchild v. Rowe*, 44 Vt. 389; *Bowen v. Amsden*, 47 Vt. 569.

But the doctrine supported by the later English decisions and perhaps by the weight of authority in this country, is that such retention of possession, though evidence of fraud, is not conclusive. *Latimer v. Batson*, 4 B. & C. 652; *Martindale v. Booth*, 3 B. & Ad. 498; *Lady Arundel v. Phipps*, 10 Vesey, 145; *Pennell v. Davidson*, 18 C. B. 355; *Warner v. Norton*, 20 How. 448; *Crawford v. Kirksey*, 50 Ala. 590; 55 Ala. 282, 285; *George v. Norris*, 23 Ark. 121; *Collins v. Taggart*, 57 Ga. 355; *Rose v. Colter*, 76 Ind. 590 (now changed by statute, *Seavey v. Walker*, 108 Ind. 78); *Frankhouser v. Ellett*, 22 Kan. 127; *Whitson v. Griffis*, 39 Kan. 211; *Devonshire v. Gathreaux*, 32 La. An. 1132; *Wagar v. Detroit, &c. R. R. Co.*, 79 Mich. 648; *Vose v. Stickney*, 19 Minn. 367; *Lathrop v. Clayton*, 45 Minn. 124; *Ketchum v. Brennan*, 53 Miss. 596; *Miller v. Morgan*, 11 Neb. 121; *Parr v. Brady*, 37 N. J. L. 201; *Stanley v. Nat. Union Bank*, 115 N. Y. 122; *Boone v. Hardie*, 83 N. C. 470; *Collins v. Meyers*, 16 Ohio, 547, 552; *Kleine v. Katzenberger*, 20 Ohio St. 110; *McCully v. Swackhamer*, 6 Ore. 438; *Meade v. Gardnier*, 13 R. I. 257; *Pregnall v. Miller*, 21 S. C. 385; *Casey v. Casey*, 7 Baxt. 204; *Edwards v. Dickson*, 66 Tex. 613; *Lipe v. Earman*, 26 Gratt. 563; *Williams v. Porter*, 41 Wis. 422; *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529. In many States the matter is regulated by statute. — W.

price after knowing the fraud, he loses his right to retake the goods. (mq) But a mere demand of payment does not defeat the vendor's right. (mr)

The delivery may be symbolical, or of a part for the whole; (n)¹ and a delivery of the key, the property being * locked up, is so far a delivery of the goods, that it will * 531 support an action of trespass against a subsequent purchaser who gets possession of them. (o) If the goods are in possession of another than the vendor, an order to him, with payment of the price by the buyer, completes the sale. (oo) A sale of cotton may be evidenced by a delivery of the ginner's receipts. (op) The intent to deliver must accompany the act, whatever that is, to give it the legal effect of delivery. (oq) (x)

(mq) *Bank of Beloit v. Beale*, 24 N. Y. 473.

(mr) *Manning v. Albee*, 11 Allen, 520.

(n) See *Chamberlain v. Farr*, 23 Vt. 265; *Brewer v. Salisbury*, 9 Barb. 511; *Evans v. Harris*, 19 id. 416; *Packard v. Dunsmore*, 11 Cush. 282; *Vining v. Gil-*

breth, 39 Me. 496; *Hobbs v. Carr*, 127 Mass. 532.

(o) *Chappel v. Marvine*, 2 Aik. 79; *Benford v. Schell*, 55 Penn. St. 393.

(oo) *M'Cormick v. Hadden*, 37 Ill. 370.

(op) *Waller v. Parker*, 5 Cold. 476.

(oq) *Susquehanna, &c. Co. v. Finney*, 58 Penn. St. 200.

¹ As by a tender of warehouse receipts. *Gregory v. Wendell*, 39 Mich. 337; 40 Mich. 432. The delivery of a common carrier's receipt by an owner of goods, as security for an advance of money, with the intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin. *Green Bay Bank v. Dearborn*, 115 Mass. 219; *Stollenwerck v. Thacher*, id. 224; *Fifth National Bank of Chicago v. Bayley*, id. 228; *Newcomb v. Boston, &c. R. Co.*, id. 230; *Alderman v. Eastern R. Co.*, id. 233. Of ponderous or intangible articles a constructive delivery is sufficient. *Audenried v. Randall*, 3 Cliff. 99; *Puckett v. Reed*, 31 Ark. 181; *People's Bank v. Gridley*, 91 Ill. 457; *Newcomb v. Cabell*, 10 Bush, 460; *Hayden v. Demets*, 53 N. Y. 426. — W.

(x) The question whether title passed by the delivery of the goods depends upon the parties' intention as inferred from the terms of sale and the circumstances surrounding it. *Beardsley v. Beardsley*, 138 U. S. 262, 11 S. Ct. 318, 34 L. Ed. 928; *Van Winkle v. Crowell*, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880; *Woodward v. Boone*, 126 Ind. 122, 25 N. E. 812; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112; *Schreyer v. Kimball L. Co.*, 54 Fed. 653; *H. B. Claffin Co. v. Karn*, 55 id. 578. If the sale is expressly or impliedly for cash, the seller may within a reasonable time treat their delivery as conditional and reclaim the goods, if payment is not promptly made. *Paul v. Reed*, 52 N. H. 136; *Cole v. Berry*, 42 N. J. L. 308; *Merchants' Exchange Bank v. McGraw*, 59 Fed. 972; *Hall v. Mo. Pac. Ry. Co.*, 50 Mo. App.

179; *Lamont v. Le Fevre*, 96 Mich. 175, 55 N. W. 687; *Leatherbury v. Connor*, 54 N. J. L. 172, 23 Atl. 684.

Delivery of goods to an agent for sale, or a consignment, or a bailment, is *prima facie* not a sale so as to pass title. *Met'n Nat. Bank v. Benedict*, 74 Fed. 182, 20 C. C. A. 377; *Gilman v. Gilby* (8 No. Dak. 627), 73 Am. St. Rep. 791; *Yoder v. Haworth* (57 Neb. 150,) id. 496; *Ætna Powder Co. v. Hilderbrand* (137 Ind. 462), 45 id. 194, 203 n.

Delivery to a carrier usually employed, or to one designated by the purchaser, is delivery to the latter, and the sale cannot afterwards be revoked beyond the right of stoppage in transit. *Whitman Agr. Co. v. Strand*, 8 Wash. 647, 36 Pac. 682; *Kelsea v. Ramsey & G. M. Co.*, 55 N. J. L. 320; *Liggett & M. T. Co. v. Collier* (Iowa), 56 N. W. 417; *Meyer B. D. Co. v. McMahan*, 50 Mo. App. 18; *Barr v.*

Marking timber on a wharf, or goods in a warehouse, operates as a delivery; goods bought in a shop, weighed or measured, and separated, and left by the owner until called for, are sufficiently delivered; (p)¹ and horses bought at livery, and remaining at livery with the seller at his request, are said to be delivered to the buyer. (q) This last case has been questioned, but it seems to come under the general analogy, for the purchaser incurs at once a liability for their keeping. It is true, however, that later cases apply a stricter rule than formerly to constructive delivery; and the presumption of delivery is not to be favored, because it deprives the seller of his lien without payment. (r) But if goods are sent, even under a contract of sale, to be applied by the receiver (who was to be the buyer) to a particular purpose (as to take up certain bills of exchange) to which purpose they were not and could not be applied, the sender does not lose his property in them by the delivery, but may recover them back. (s) And if property be awarded to one by arbitrators, at a certain price, the

(p) So selecting and marking sheep, then in the possession of one who was requested by the vendee to retain possession of them for him, is a sufficient delivery. *Barney v. Brown*, 2 Vt. 374. For other instances of constructive delivery, see *Hatch v. Bayley*, 12 Cush. 27; and *Hatch v. Lincoln*, 12 Cush. 31.

(q) *Elmore v. Stone*, 1 Taunt. 458. But see the subsequent case of *Carter v. Toussaint*, 5 B. & Ald. 855; *Smith v. Surman*, 9 B. & C. 570, *Bayley*, J.

(r) *Dole v. Stimpson*, 21 Pick. 384. See also *Tempest v. Fitzgerald*, 3 B. &

Ald. 680; *Baldey v. Parker*, 2 B. & C. 37. These cases arose under the Statute of Frauds, and turned upon what was a sufficient acceptance within that act. But there may be, perhaps, a delivery good at common law, which would not amount to an acceptance within the Statute of Frauds.

(s) *Moore v. Barthop*, 1 B. & C. 5; *Thompson v. Tiles*, 2 B. & C. 422; *Giles v. Perkins*, 9 East, 12; *Bent v. Fuller*, 5 T. R. 294; *Zinck v. Walker*, 2 W. Bl. 1154; *Parke v. Eliason*, 1 East, 554.

¹ That hauling certain lumber, after the buyer's inspector has passed it, to a wharf ready for shipment "on rail of vessel," passes the title, see *Whitcomb v. Whitney*, 24 Mich. 486. A bill of sale of a horse, continued to be kept in the seller's stable, is insufficient against his creditors. *Dempsey v. Gardner*, 127 Mass. 381. An accepted offer to buy a piano, when finished, the making a bill of sale of it and payment of the price at a subsequent day, is enough for a jury to find a delivery and passage of title against a subsequent purchaser. *Thorndike v. Bath*, 114 Mass. 116. A written transfer and delivery of a stock certificate to a *bona fide* purchaser is valid against the seller's attaching creditor. *Boston Music Hall Ass. v. Cory*, 129 Mass. 435. If the thing sold is in a third person's hands, notice to him is a delivery against a subsequent attaching creditor. *Dempsey v. Gardner*, 127 Mass. 381, 383; *Russell v. O'Brien*, 127 Mass. 349; *Puckett v. Reed*, 31 Ark. 131; *Cofield v. Clark*, 2 Col. 101. A survey of logs by a mutually agreed on person, and putting on them the purchaser's mark, is sufficient delivery even against subsequent purchasers, although the vendor was bound to deliver the logs farther down the stream. *Bethel, &c. Co. v. Brown*, 57 Me. 9. See *Thorndike v. Bath*, 114 Mass. 116. — K.

Borthwick, 19 Oregon, 578, 25 Pac. 360; *Foley v. Feirath*, 98 Ala. 176.

A contract of sale, though indefinite as to quantity and time, is binding as to the

goods which are delivered and accepted. *McColl v. Jackson Iron Co.*, 98 Mich. 482, 57 N. W. 578; *Neal v. Shewalter*, 5 Ind. App. 147.

tender of the price does not pass the property unless the other party accept the price. (*t*)

Where goods to be delivered, in payment of a debt, are in readiness for delivery, and the buyer requests the seller to keep them for him, this is a delivery which vests the property in the creditor. (*tt*)

* It is sometimes a question of interest what is the duty * 532 of the seller as to delivery of the articles sold, and as to keeping them until delivery; and also what is the duty of the vendee as to receiving them. Usage determines this in a considerable degree; but from the general usage and the adjudications some rules may be deduced.

If no time be appointed for delivery, or for payment, these acts must be done within a reasonable time; and if neither party does anything within that period, the contract is deemed to be dissolved. (*u*)¹ If the goods are to be delivered when requested, the purchaser may sue for non-delivery without proving a request, provided the seller has incapacitated himself from delivering them, as by resale or the like; (*v*) but in general a request must be made before the seller can be sued for non-delivery. (*w*) And if the vendee, either by the express terms of the contract or from its nature, is to designate the manner or place of delivery, he must do this before he can maintain his action. (*x*)

If a day be fixed either for delivery, or payment, the seller has the whole of it; and if any one of several days, the whole of all of them. It is said he must endeavor to do the needful act at

(*t*) *Hunter v. Rice*, 15 East, 100.

(*tt*) *Wheelock v. Tanner*, 39 N. Y. 481.

(*u*) *Langfort v. Tiler*, 1 Salk. 113; and see *Lanyon v. Toogood*, 13 M. & W. 27; *Fletcher v. Cole*, 23 Vt. 114. On the subject of constructive or symbolic delivery, see *Dixon v. Buck*, 42 Barb. 70; *Sansee v. Wilson*, 17 Iowa, 582; *Stone v. King*, 7 R. I. 358; *Bolton v. Riddle*, 35 Mich. 13; *Tufts v. McClure*, 40 Iowa, 317.

(*v*) *Bowdell v. Parsons*, 10 East, 359;

Amory v. Brodrick, 5 B. & Ald. 712.

(*w*) *Bach v. Owen*, 5 T. R. 409. See *Radford v. Smith*, 3 M. & W. 254; *Benners v. Howard*, 1 Taylor, 149. — As to a demand by a servant, see *Squier v. Hunt*, 3 Price, 68.

(*x*) See *West v. Newton*, 1 Duer, 277; *Armitage v. Insole*, 14 Q. B. 728.

¹ If a note is given in consideration of the delivery of flour on the day of its date, a failure so to deliver is a failure of consideration. *Corwith v. Colter*, 82 Ill. 585. The seller must not tender or deliver more or less than the exact quantity contracted for. *Reuter v. Sala*, 4 C. P. D. 239; *Croninger v. Crocker*, 62 N. Y. 151; *Highland, & Co. v. Matthews*, 76 N. Y. 145. When goods are ordered from a correspondent who is agent for buying them, the rule is less rigid. See *Ireland v. Livingston*, L. R. 2 Q. B. 99; L. R. 5 Q. B. 516; L. R. 5 H. L. 395. Where, as a general rule, no action is on the part of a vendor upon a contract for the sale and delivery of a specified quantity of goods until the whole quantity is delivered, yet where the whole delivery is to be at one and the same time, and the vendee elects to receive a portion and appropriates the same to his own use and by his acts evinces that he waives the condition precedent to a complete delivery, the vendor may recover for the portion delivered. *Avery v. Willson*, 81 N. Y. 341. — K.

a convenient hour before midnight; early enough, for instance, for the buyer to count the money, or examine the goods, and give a receipt; but this very general rule does not seem anywhere defined. (x) If on a certain day, at a certain place, then it must be done at a convenient time before sunset, because the presence of the other party is necessary, and the law does not require him to be there through the twenty-four hours. (y)¹

The seller is to keep the thing sold until the time for delivery, with ordinary care, and is liable for the want of that care, or of good faith; but if he does so keep it, he is not liable *533 for its *loss, (z) unless it perish through a defect against which he has warranted. If the parties are distant from each other, the seller must follow the directions of the buyer as to the way of sending the thing sold to him, and then a loss in the transportation will fall on the buyer, (a) unless attributable to the negligence of the seller; if the seller disregards such orders, the loss in transportation falls on him, though it does not happen through his neglect. Delivery of the goods by the seller to a carrier in accordance with the specific request of the purchaser, is a delivery to the purchaser. (aa)² If the directions be general, as

(y) See *Startup v. McDonald*, 6 Man. & G. 395.

(z) See *Willard v. Perkins*, 1 Bush. L. 253; *ante*, p. *529.

(a) *Vale v. Bayle*, Cowp. 294; *Gassett v. Godfrey*, 6 Foster (N. H.), 415; *Oreutt v. Nelson*, 1 Gray, 536; *Jones v. Sims*, 6 Port. (Ala.) 138. In *Godfrey v. Furzo*, 3 F. Wms. 186, and in *Vale v. Bayle*, *supra*, Lord Chief Justice *Eyre* is said to have held, "That though a trader in the country does not appoint a carrier, yet if the goods be embezzled he shall be liable, because he leaves it in the breast of the person to whom he gives the order to

send them by whom he pleases." The carrier is generally considered the agent of the buyer, and not of the seller. *Dutton v. Solomonson*, 3 B. & P. 584; *Anderson v. Hodgson*, 5 Price, 630. As soon, therefore, as the goods are in the due and regular course of conveyance, they are at the risk of the purchaser, and not before. *Diversy v. Kellogg*, 44 Ill. 114; *Ullock v. Redelin*, Dan. & L. 6; and see *Bull v. Robison*, 28 E. L. & E. 586; s. c. 10 Exch. 342.

(aa) *Glen v. Whitaker*, 51 Barb. 451. See *Bradley v. Wheeler*, 4 Rob. 18, and *Hills v. Lynch*, 3 Rob. 42.

¹ Where A. was to deliver hogs during the "first half of August," to be weighed at a certain place, he was given until noon of the 16th, till which time he was to keep hogs at the scales. *Kirkpatrick v. Alexander*, 60 Ind. 95. See *Croninger v. Crocker*, 62 N. Y. 151; *McClartey v. Gokey*, 31 Iowa, 505. — K.

² A carrier, in the eye of the law, is a bailee of the person to whom, not by whom, goods are sent. *Higgins v. Murray*, 73 N. Y. 252; *Cairo Bank v. Crocker*, 111 Mass. 163, 166; *Arnold v. Prout*, 51 N. H. 587; *Hall v. Gaylor*, 37 Conn. 550; *Magruder v. Gage*, 33 Md. 344. See *Garretson v. Selby*, 37 Iowa, 529. Delivery on a vessel for carriage, bill of lading being taken, is not a delivery to the buyer, but to the captain as bailee for delivery to the person named in the bill of lading, for whom they are to be carried. *Gabarron v. Kreeft*, L. R. 10 Ex. 274, 281. The delivery, however, to a buyer of a delivery order on a carrier, together with a sample of the goods, passes the title to him, whose loss they are if afterwards destroyed, and he is liable for the price.

(x) Under a sale of goods by which delivery and payment are to be made "about" a certain date, the purchaser has at least until midnight of that day for performance. *Smiley v. Barker*, 83 Fed. 684, 23 C. C. A. 9.

"by a carrier," without naming any one, usual and proper precautions must be taken, and will protect the seller. (b) And it is a part of his duty to give such notice of the sending them by ship or otherwise as will enable the buyer to insure or take other precautions. (c)

If the contract be to deliver the thing ordered at the residence or place of business of the buyer, the seller is liable, although such delivery becomes impossible, unless it becomes so through the act of the buyer. (d) If the seller refuse to deliver it at a * time and place agreed on, and it perish afterwards * 534 without his fault, he is liable for it. But if he be ready, and the vendee wrongfully refuse or neglect to receive it, the seller is not liable, unless the thing perishes through his gross and wanton negligence. And if the vendee unreasonably neglect or refuse to comply with conditions precedent to delivery, or to receive the goods on delivery, the seller may, after due delay and proper precautions, resell them, and hold the buyer responsible for any deficit in the price. (e)¹ It is common, and generally advisable, to sell them at auction; but this is not necessary. (f) If the seller sell on credit, the goods are to be delivered without payment; but if the buyer becomes insolvent before the time of delivery, the seller may demand security, and refuse to deliver the goods without it. (g) If goods are sold "on a credit of —

(b) The vendor, in delivering goods to a carrier, must exercise due care and diligence, so as to provide the consignee with a remedy over against the carrier. See *Buckman v. Levi*, 3 Camp. 414; *Clarke v. Hutchins*, 14 East, 475; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Dawes v. Peck*, 8 T. R. 330.

(c) *Cothay v. Tute*, 3 Camp. 129; *Brown on Sales*, § 526; 2 Kent Com. 500. — If it has been the usage between the parties, in former dealings, for the vendor to insure, or if he receive specific instructions to insure in any particular case, he is bound to insure. *Id.*; *London Law Mag.* vol. 4, p. 359. And see *Smith v. Lascelles*, 2 T. R. 189.

(d) *Hayward v. Scougall*, 2 Camp. 56, n.; *Atkinson v. Ritchie*, 10 East, 530; *DeMedeiros v. Hill*, 5 C. & P. 182. It is no defence to a breach of a contract to

deliver certain goods at a certain time, that such goods could not be had in the market at that time. *Gilpins v. Consequa*, Pet. C. C. 85; *Youqua v. Nixon*, id. 221.

(e) *McLean v. Dunn*, 4 Bing. 722; *Mertens v. Adcock*, 4 Esp. 251; *Girard v. Taggart*, 5 S. & R. 19; *Sands v. Taylor*, 5 Johns. 395.

(f) *Crooks v. Moore*, 1 Sandf. 279; *Conway v. Bush*, 4 Barb. 564.

(g) *Tooke v. Hollingworth*, 5 T. R. 215; and see *Bloxam v. Sanders*, 4 B. & C. 948; *Hanson v. Meyer*, 6 East, 614; *Grice v. Richardson*, 3 App. Cas. 319. And if the seller has despatched the goods to the buyer, and he becomes insolvent, the seller has a right, by virtue of his original ownership, to stop the goods if yet *in transitu*. *Mason v. Lickbarrow*, 1 H. Bl. 357; *Ellis v. Hunt*, 3 T. R. 464.

Webster v. Granger, 78 Ill. 230. *Hobart v. Littlefield*, 13 R. I. 341, decided that goods delivered at the wharf of a carrier with notice to him are *prima facie* at least at the buyer's risk, though sold "free on board," and destroyed before actually put on board. See *Mich. Central R. Co. v. Phillips*, 60 Ill. 190, and *Finn v. Western R. Co.*, 112 Mass. 524. — K.

¹ The seller, after notifying the buyer to come and take the goods, need not give him notice of resale. *Ullman v. Kent*, 60 Ill. 271. — W.

months, or cash at — discount,” and the buyer after delivery of the goods pays a part in cash, he will be held to have elected cash and not credit, and may be sued for the balance, discount off. (*h*)

If no place of delivery be specially expressed in the contract, the store, shop, farm, or warehouse, where the article is sold, made, grown, or deposited, is, in general, the place of delivery. (*i*) If expressly deliverable to the vendee, but no place is named, it may be delivered to him where he is, or at his house, or at his place of business, except so far as this option of the seller is controlled by the nature of the article. For if the pur-

chaser bought a load of cotton to be worked in his mill, it * 535 cannot, under an * agreement of delivery, be delivered at his distant dwelling-house; nor should a load of hay for his stable, or a cooking-range for his kitchen, be delivered at his store on the wharf.

Some cases distinguish between the duty of delivery arising from a contract of sale, and a contract to deliver goods in payment of a precedent debt. In the first case the buyer must take them where they are, and in the latter the owner must deliver them at such place as shall be reasonable from the nature of the case, or shall be pointed out by the party receiving them. (*j*)

But in the latter case, if the contract be merely that the creditor “may have them,” with no words or acts implying that they were to be carried to him, it should be enough if they are ready for him when he comes for them. There seems to be also a distinction between the case of very cumbersome goods and those more easily portable; and the seller is held more strictly to the duty of transporting the latter, and tendering them in specie. (*k*)

In general, if anything be ordered of a mechanic or manufacturer, the maker may deliver it where he makes it, unless he have a shop or depository where his manufactured articles are usually taken for sale or delivery, in which case such place may be the place of delivery.

The vendee is bound to receive and pay for the thing sold at the time and place expressed or implied in the contract of sale, and to pay all reasonable charges for keeping it after sale and

(*h*) *Schneider v. Foster*, 2 Exch. 4.

(*i*) 2 Kent Com. 505; *Lobdell v. Hopkins*, 5 Cowen, 516; *Goodwin v. Holbrook*, 4 Wend. 380; *Barr v. Myers*, 3 W. & S. 295. See *Devine v. Edwards*, 101 Ill. 138. If a particular place be appointed by the contract, the goods must be delivered there before an action will lie for their price.

Savage Man. Co. v. Armstrong, 19 Me. 147; *Howard v. Miner*, 20 id. 325.

(*j*) *Bean v. Simpson*, 16 Me. 49. And see *Bixby v. Whitney*, 5 Greenl. 192.

(*k*) *Stone v. Gilliam*, 1 Show. 149; *Currier v. Currier*, 2 N. H. 75; 2 Kent Com. 508.

before delivery. (l)¹ And if he refuse so to take or pay for the goods sold, he will be liable in an action for the price, or in a * special action for damages, unless he can show inca- * 536 pacity to contract, or sufficient error, duress, or fraud.

When payment of a debt is to be made by some specific article, it is not quite settled where the article is to be delivered; whether by the payor at his own residence, to the payee who must come for it, or to the payee at his residence or place of business, whither the payor must carry it. It might seem from some statements that local usages affect or decide this question in some cases. And possibly the distinction between bulky and portable articles might be carried so far as to lead to the conclusion that one who has thus to deliver an article easily carried, as a watch or a book, might be bound to take it to the payee. But we consider the law in general to be, that it is enough if the payor delivers the article at his own residence or shop. And if he there tenders it to the payee, and it be in all respects the article he should have tendered, and the payee refuse or neglect to receive it, with no valid objection grounded on the article itself, or on a stipulation in the contract, then the payor is no further responsible for what may happen to it. If it were, for instance, a carriage, and he had tendered it as it stood in his barn or warehouse, he would have no right—certainly none without sufficient notice to the payee—to roll it out into the street, and there let it perish. For this would be a wanton injury. But if it was in the street when he tendered it, and he said, I offer it to you as your carriage, and I shall have no more to do with it, he would not be bound to take any further care of it.

But questions of this kind generally arise in the defence to actions founded upon such contracts; and we shall again consider the subject of contracts for the delivery of specific articles, in our third volume, under the head of Defences.

(l) See *Cole v. Kerr*, 20 Vt. 21.

¹ A buyer ought to pay the price when due without waiting for any demand, if the goods are ready for delivery, and if he does not, he may be sued at once. *Brandon Manuf. Co. v. Morse*, 48 Vt. 322; *Davis, &c. Co. v. McGinnis*, 45 Iowa, 538. The buyer, if he has agreed to assume the risk of delivery on which the price is to be payable, must pay the price if the goods are destroyed. *Martineau v. Kitching*, L. R. 7 Q. B. 436. When payment is to be made after demand or notice, the buyer must be allowed a reasonable time to bring the money. *Bass v. White*, 65 N. Y. 565. — K.

CONDITIONAL SALES.

In every sale, unless otherwise expressed, there is an implied condition that the price shall be paid, before the buyer has a right to possession; and this is a condition precedent.^(m)¹(*x*) But it seems that in an action for non-delivery the buyer need only aver that he was *ready* and willing to receive and pay for them, and that the seller refused to deliver them, without averring an actual tender. (*n*)(*y*) But where the right to receive payment before

(*m*) See Noy, Maxims, p. 88, where it is said: "If I sell my horse for money, I may keep him until I am paid." See also *Hinde v. Whitehouse*, 7 East, 571; *Cornwall v. Haight*, 8 Barb. 328. — This implied condition that the price shall be paid before delivery is said to give the vendor a *lien* on the article sold until the payment. — But although the vendee may not have a right of *possession* in the article bought until the price is paid, yet the right of *property* passes *by the bargain*; and if the property is lost while yet in the possession of the vendor, without his fault, the loss will fall on the purchaser. *Willis v. Willis*, 6 Dana, 49; *Wing v.*

Clark, 24 Me. 366; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473. See also, *ante*, p. * 526, note (*u*), *et seq.*

(*n*) *Waterhouse v. Skinner*, 2 B. & P. 447; *Rawson v. Johnson*, 1 East, 203. The case of *Morton v. Lamb*, 7 T. R. 125, is not inconsistent with the doctrine laid down in the text, as it is explained by the subsequent case of *Rawson v. Johnson*, 1 East, 203. And there are many cases where *readiness to perform* is equivalent to performance. See *West v. Emmons*, 5 Johns. 179; *Miller v. Drake*, 1 Caines, 45; *Peeters v. Opie*, 2 Wms. Saund. 350 n. (3).

¹ Unless a contrary intention is indicated, payment of the price and delivery of possession are mutual and concurrent conditions. *Michigan, &c. R. R. Co. v. Phillips*, 60 Ill. 190; *Scudder v. Bradbury*, 106 Mass. 422, 427; *Southwestern, &c. Express Co. v. Plant*, 45 Mo. 517; *Phelps v. Hubbard*, 51 Vt. 489. See *Phillips v. Moor*, 71 Me. 78. If delivery is made in expectation of immediate payment, refusal to pay entitles the seller to reclaim the property or sue for conversion. *Bishop v. Shillito*, 2 B. & Ald. 329 n. a; *Owens v. Weedman*, 82 Ill. 409; *Ames v. Moir*, 130 Ill. 582; *Fishback v. Van Dusen*, 33 Minn. 111; *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115, 117; *Hodgson v. Barrett*, 33 Ohio St. 63. And see *Booraem v. Crane*, 103 Mass. 522. Nor does the fact that part of the price has been paid prevent a recovery of the goods or their full value by the vendor. *Hughes v. Kelley*, 40 Conn. 148; *Fairbanks v. Malloy*, 16 Ill. App. 277; *Fleck v. Warner*, 25 Kan. 492; *Brown v. Hayes*, 52 Me. 578; *Colcord v. McDonald*, 128 Mass. 470; *Duke v. Shackleford*, 56 Miss. 552; *Porter v. Pettingill*, 12 N. H. 299; *Sanders v. Keber*, 23 Ohio St. 630; cf. *Johnston v. Whittemore*, 27 Mich. 470; *Ketchum v. Brennan*, 53 Miss. 596. As to the right of the buyer to recover what he has paid, see *Latham v. Sumner*, 89 Ill. 233; *Haviland v. Johnson*, 7 Daly, 297; *Whelan v. Couch*, 26 Grant's Ch. 74. In most jurisdictions the vendor may assert his title against an innocent purchaser from the vendee. But as to this see *post*, p. * 538, note 1. — *W.*

(*x*) See *Shepherd v. Harrison* (L. R. 4 Q. B. 196), 23 English Ruling Cas. 349, 380, 383 notes; *Andrews & Co. v. Colorado Sav. Bank* (20 Col. 313), 46 Am. St. Rep. 291, 295 n.; *Bishop v. Minderhout* (Ala.), 52 L. R. A. 395; *H. M. Tyler Lumber Co. v. Charlton* (Mich.), 55 id. 301.

(*y*) An unaccepted tender does not transfer the title to the vendee; to support assumption for goods sold and de-

livered, actual delivery and acceptance must appear, and the plaintiff must prove such a delivery as passes the title, and divests himself of all lien upon the goods and enables the defendant to maintain trover for them without paying or offering to pay for them. *Greenleaf v. Gallagher*, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112.

delivery is waived by the seller, and immediate possession given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser. (o)¹

(o) *Porter v. Pettengill*, 12 N. H. 299; *Sargent v. Gile*, 8 N. H. 325; *Gambling v. Read*, 1 Meigs, 281; *Bigelow v. Huntley*, 8 Vt. 151; *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 9 Pick. 156; *Tibbetts v. Towle*, 3 Fairf. 341; *Bennett v. Sims*, Rice, 421; *Smith v. Lynes*, 1 Seld. 41; *Herring v. Hoppock*, 3 Duer, 20; *Brewster v. Baker*, 20 Barb. 364; *Parris v. Roberts*, 12 Ired. L. 268; *Smith v. Foster*, 18 Vt. 182; *Buckmaster v. Smith*, 22 id. 203; *Root v. Lord*, 23 id. 568; *Aubin v. Bradley*, 24 id. 55; *Buson v. Dougherty*, 11 Humph. 50; *Marquette Manuf. Co. v. Jeffery*, 49 Mich. 283. In most of these cases, the question whether the property had passed, arose between the parties themselves or between the vendor and attaching creditors of the conditional vendee, and the weight of authority is as above. [As to the rights of creditors and purchasers from the vendee, see *post*, p. *538, note 1.] — It has been decided that such conditional sales are not in effect chattel mortgages, and therefore void, because not recorded. *Buson v. Dougherty*, 11 Humph. 50; *Sawyer v. Fisher*, 32 Me. 28. [But in many States, recording is now required by statute. See *Budlong v. Cottrell*, 64 Iowa, 234; *Boyn-ton v. Libby*, 62 Me. 253; *Collender Co. v. Marshall*, 57 Vt. 232. And see *post*, p. *538, note 1.]

¹ But where the vendor allowed the goods sold to be mingled with the vendee's goods of the same kind, he was estopped to set up his title as against a subsequent purchaser of the vendee. *Foster v. Warner*, 49 Mich. 641. — A seller may retain a right over the goods, as by making the bill of lading in his own or agent's name, to secure the price, to be transferred on payment by indorsement; and the property will not pass until that is done. *Farmers', &c. Bank v. Logan*, 74 N. Y. 568; *Emery v. Irving Bank*, 25 Ohio St. 360. See *Mirabita v. Imperial Bank*, 3 Ex. D. 164; *Merchants' Bank v. Bangs*, 102 Mass. 291. In so doing, the seller does not reserve a lien only, in case the buyer fails to pay the price, but reserves a right of disposing of the goods, so long at least as the buyer continues in default. *Ogg v. Shuter*, 1 C. P. D. 47. That a bill of lading deliverable to the seller's order is nearly conclusive of an intention to reserve the *jus disponendi* to prevent the title passing to the buyer, see *Shepherd v. Harrison*, L. R. 5 H. L. 116. A seller may even reserve this right when the goods are placed on the buyer's own ship free of freight on that account. *Schots-mans v. Lancashire, &c. R. Co.*, 2 Ch. App. 332. Where a bill of exchange for the price is sent to a buyer for acceptance with the bill of lading, to retain the latter he must accept the former, and on refusing acceptance can acquire neither bill of lading nor the goods. *Chicago Marine Bank v. Wright*, 48 N. Y. 1; *Chicago Bank v. Bay-ley*, 115 Mass. 228, 230; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Cobb v. Ill. Cent. R. Co.*, 88 Ill. 394. A bill of lading to shipper's order, or "to — or order," indorsed to or making goods deliverable to a consignee by name as security for antecedent advances, vests in him a property, absolute or special, at the time of their delivery on board. *Bailey v. Hudson R. Co.*, 49 N. Y. 70; *Straus v. Wessel*, 30 Ohio St. 211. And in the case of animals the increase belongs to the vendor until the performance of the condition. *Clark v. Hayward*, 51 Vt. 14. Where a sale is made under an agreement to give a mortgage for the purchase-money, the title does not pass until the mortgage is given. *Thorpe v. Fowler*, 57 Iowa, 541; *Bauendahl v. Horr*, 7 Blatchf. 548; *Benner v. Puffer*, 114 Mass. 376; *Ridgeway v. Kennedy*, 52 Mo. 24; *Drury v. Hervey*, 126 Mass. 519; *Hegler v. Eddy*, 53 Cal. 597; *Carroll v. Wiggins*, 30 Ark. 402; *Brown v. Fitch*, 43 Conn. 512; *Jowers v. Blandy*, 58 Ga. 379; *Domestic, &c. Co. v. Arthurhultz*, 63 Ind. 322; *Moseley v. Shattuck*, 43 Iowa, 540; *Boon v. Moss*, 70 N. Y. 465; *Sanders v. Keber*, 28 Ohio St. 630; *Holt v. Holt*, 58 N. H. 276; *Pruman v. Hardin*, 5 Sawyer, 115; *Re Binford*, 3 Hughes, 295; *Rogers, &c. Works v. Lewis*, 4 Dillon, 158; *Fosdick v. Car Co.*, 99 U. S. 256; *Preston v. Whitney*, 23 Mich. 260; *Fifield v. Elmer*, 25 Mich. 48; *Everett v. Hall*, 67 Me. 497; *Wood, &c. R. Co. v. Brooke*, 2 Sawyer, 576; *Duncan v. Stone*, 45 Vt. 118; *Sage v. Sleutz*, 23 Ohio St. 1; *Shaffer v. Sawyer*, 123 Mass. 294; *Cole v. Berry*, 13 Vroom, 308. — K.

* 538 And generally, wherever in a contract of sale it * is stated that some precise fact is to be done by either party, this may amount to a condition, though not so expressed. As where, in a contract for sale of goods, the words are "to be delivered on or before" a certain day, this is a condition precedent, and if they are not delivered on or before that day, (*p*) the purchaser is not bound to take the goods. So if the goods are to be delivered "on request," the buyer must allege and prove a request, this being a condition precedent to his acquiring a complete right. (*q*) But if the seller has incapacitated himself from delivering by reselling, or otherwise, no request is necessary. (*r*)

If goods are sold and delivered conditionally, the vendor retains his right to them as against the vendee, but [it has been held] not against a *bonâ fide* purchaser from the vendee. (*rr*)¹ In Massachu-

(*p*) *Startup v. McDonald*, 2 Man. & G. 395. And the delivery must have been made at a reasonable time on that day, or the vendee is not bound. Id.

(*q*) *Bach v. Owen*, 5 T. R. 409, as explained in *Radford v. Smith*, 3 M. & W. 258.

(*r*) *Ranay v. Alexander*, Yelv. 76 n. (Metcalf's ed.); *Amory v. Brodrick*, 5 B. & Ald. 712; *Newcomb v. Brackett*, 16 Mass. 161; *Webster v. Coffin*, 14 Mass. 196. See also *ante*, note (*v*), p. *532.

(*rr*) *Wait v. Green*, 36 N. Y. 556; *Murch v. Wright*, 46 Ill. 487.

¹ The more general doctrine is that the vendor may maintain his right to the property or its value even against an innocent purchaser. *Harkness v. Russell*, 118 U. S. 663; *Holman v. Lock*, 51 Ala. 287; *Dudley v. Abner*, 52 Ala. 572; *Fairbanks v. Eureka Co.*, 67 Ala. 109; *Simpson v. Shackelford*, 49 Ark. 63; *Goodwin v. May*, 23 Ga. 205; *Sims v. James*, 62 Ga. 260; *Thomas v. Winters*, 12 Ind. 322; *Winchester, & Co. v. Carman*, 109 Ind. 31, 34; *Baker v. Hall*, 15 Iowa, 277; *Warner v. Johnson*, 65 Iowa, 126; *Hall v. Draper*, 20 Kan. 137; *Brown v. Haynes*, 52 Me. 578; *Armour v. Pecker*, 123 Mass. 143, 145; *Chase v. Pike*, 125 Mass. 117; *Salomon v. Hathaway*, 126 Mass. 482; *Kendrick v. Beard*, 81 Mich. 182; *Dewes Brewery Co. v. Merritt*, 82 Mich. 198; *Ketchum v. Brennan*, 53 Miss. 597; *Ridgeway v. Kennedy*, 52 Mo. 24; *Kingsland-Ferguson Mfg. Co. v. Culp*, 85 Mo. 548; *Heinbockle v. Zugbaum*, 5 Mont. 344; *Aultman v. Mallory*, 5 Neb. 178; *McCormick v. Stevenson*, 13 Neb. 70; *Weeks v. Pike*, 60 N. H. 447; *Marvin Safe Co. v. Norton*, 48 N. J. L. 410; *Redewill v. Gillen*, 4 N. Mex. 78; *Boon v. Moss*, 70 N. Y. 465; (but see *Comer v. Cunningham*, 77 N. Y. 391; *Parker v. Baxter*, 86 N. Y. 587); *Clayton v. Hester*, 80 N. C. 275; *Vasser v. Buxton*, 86 N. C. 335; *Sanders v. Keber*, 28 Ohio St. 630; *Call v. Seymour*, 40 Ohio St. 670; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Singer Co. v. Graham*, 8 Oreg. 17; *Goodell v. Fairbrother*, 12 R. I. 233; *Reeves v. Harris*, 1 Bailey, 563; (see also *Herring v. Cannon*, 21 S. C. 212); *Harding v. Metz*, 1 Tenn. Ch. 610; *Sinker v. Comparet*, 62 Tex. 470; *Child v. Allen*, 33 Vt. 476; *Walker v. Hyman*, 1 Ont. Ap. 345.

In some States, however, not only innocent purchasers from the vendee acquire a title superior to that of the vendor, but attaching creditors of the vendee are also preferred. *Brundage v. Camp*, 21 Ill. 330; *Murch v. Wright*, 46 Ill. 488; *Van Duzor v. Allen*, 90 Ill. 499; *Chickering v. Bastress*, 130 Ill. 206; *Vaughn v. Hopson*, 10 Bush, 337; (overruling *Patton v. McCane*, 15 B. Mon. 555); *Stadtfeld v. Huntsman*, 92 Pa. 53; *Forrest v. Nelson*, 108 Pa. 481; *Peek v. Heim*, 127 Pa. 500; *Old Dominion S. S. Co. v. Burckhardt*, 31 Gratt. 664.

In all jurisdictions where the vendor's right is held superior to that of a purchaser from the vendee, it is also held superior to that of the vendee's creditors. In Delaware it is held that the vendor's title is unaffected by the vendee's creditors. *Williams v. Connaway*, 3 Houst. 63. But that an innocent purchaser from the vendee gains a better title. *Mears v. Waples*, 4 Houst. 62. In two other States it has been decided that the vendor's right is superior to that of the vendee's creditors, but the rights of a purchaser from the vendee have not been determined. *Mack v. Story*, 57 Conn. 407; *Cardinal v.*

setts [and many other States, however, the vendor may assent his title even against such a purchaser. (x)]

* There is another class of sales on condition, often * 539 called "contracts of sale or return." In these the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time; or a reasonable time; and if he fails to exercise this option by so returning them, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. (s)¹ (y)

(s) *Moss v. Sweet*, 16 Q. B. 493 (overruling *Iley v. Frankenstein*, 8 Scott, N. R. 839, and *Lyons v. Barnes*, 2 Stark. 39); *Beverly v. Lincoln Gas Light & Coke Co.*, 6 A. & E. 82; *Bayley v. Gouldsmith*, Peake, Cas. 56; *Dearborn v. Turner*, 16 Me. 17. See *Meldrum v. Snow*, 9 Pick. 441; *Blood v. Palmer*, 2 Fairf. 414; *Eldridge v. Benson*, 7 Cush. 485; *Neate v. Ball*, 2 East, 116. And what is a reasonable time within which a contract is to be performed, or an act to be done, is, in the absence of any contract between the parties, a question of law for the court, to be determined by a view of all the circumstances of the particular case. See *Atwood v. Clark*, 2 Greenl. 249; *Hill v. Hobart*, 16 Me. 164; *Murry v. Smith*, 1 Hawks, 41. But see *Cocker v. Franklin*

Hemp and Flax Man. Co., 3 Sumner, 530; *Ellis v. Thompson*, 3 M. & W. 445. — Parol evidence of the conversations of the parties is admissible to show the circumstances under which the contract was made, and what the parties thought a *reasonable time*. *Cocker v. Franklin Hemp and Flax Man. Co.*, *supra*. And where A delivers property to B, on condition that if damaged while in B's possession, B shall keep it and pay for it, this is a conditional sale; and if the property is so damaged, the sale becomes absolute, and assumpsit for goods sold and delivered will lie. *Bianchi v. Nash*, 1 M. & W. 545. See also *Perkins v. Douglass*, 20 Me. 317; *Jameson v. Gregory*, 4 Met. (Ky.) 363.

Edwards, 5 Nev. 36; see also *Crawcour v. Salter*, 18 Ch. D. 636; *Ex parte Brooks*, 23 Ch. D. 261; *Ex parte Turquand*, 14 Q. B. D. 636.

In *Winchester, &c. Co. v. Carman*, 109 Ind. 31, it was held that retention of title by the vendor of goods sold to a dealer whose apparent intention is to resell them was necessarily fraudulent and therefore ineffectual as to the vendee's creditors, but the weight of authority is otherwise. *Mack v. Story*, 57 Conn. 407; *Sargent v. Metcalf*, 5 Gray, 306; *Dewes Brewery Co. v. Merritt*, 82 Mich. 198.

In many States the subject of conditional sales is regulated by statutes, many of which have been enacted very recently. Such statutes, which usually require the terms of the sale to be in writing and recorded, exist in Alabama, Iowa, Kentucky, Maine, Massachusetts (as to household furniture only), Missouri, Nebraska, New Hampshire, New York, North Carolina, Ohio, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, and perhaps other States. — W.

¹ If a seller receives part payment for a chattel, and takes the buyer's promise in writing to pay the balance on a day specified or to return the chattel, the title passes unconditionally. *McKinney v. Bradley*, 117 Mass. 321. And see *Hotehkiss v. Higgins*, 52 Conn. 205. A horse, sold on condition that it be tried for eight days and then returned if unsatisfactory, died on the third day without fault of either party, and it

(x) The vendor, if not guilty of laches, may reclaim property sold upon a condition not performed, even from a purchaser in good faith. *Wentworth v. S. A. Woods Machine Co.*, 163 Mass. 28, 39 N. E. 414; *Triplett v. Mansur & Tebbetts Implement Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284. Purchase of goods on the instalment plan will not be treated as a sale and mortgage back, and the title does

not pass until all the instalments are paid. *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519; *Cottrell & Sons Co. v. Carter, Rice & Co.*, 173 Mass. 155, 53 N. E. 375. The acceptance of the buyer's note may make absolute a sale, upon condition that the vendor retain title until paid. *Clark v. Baker* (Col.), 69 Pac. 506; *D. M. Osborne Co. v. Walther* (Okl.), id. 953.

(y) The pledging by the buyer of goods

In sales at auction there are generally conditions of sale, and where these are distinctly made known to the buyer, they are of course binding on him, and the auctioneer or the owner of the goods is bound on his part. (t) The question whether they were sufficiently made known to the buyer would be one rather of fact than of law. Thus where a horse is sold by warranty, and it is the uniform custom of the auctioneer to limit all objections to the space of twenty-four hours from the sale; if these terms are a part of all the advertisements of the auctioneer, and were announced by him at the beginning of the sale, and the purchaser had come in after such announcement, and no direct proof of his knowledge of this limitation was offered, evidence would probably be admitted that he took a paper containing such advertisement, and of any other facts tending to show such knowledge, and the jury would be permitted to infer the knowledge from them if they deemed them sufficient.

If it be provided in the conditions of sale that no error or misstatement shall avoid the sale, but that there shall be * 540 a proportionate * allowance on the purchase-money, this condition will not in general save a sale, where the error is of a material and substantial nature, although not fraudulent. (u) The test of this question, as a matter of law, seems to be, whether the error or misstatement is so far material and substantial that it may be reasonably supposed that the buyer would not have made the purchase had he not been so misled. And such misstatement will also avoid a sale if no reasonably accurate estimate can be made of the compensation which should be allowed therefor. (v) Any misstatement, made fraudulently, and capable of having any effect on the sale, will avoid it. Nor will

(t) *Hanks v. Palling*, 6 E. & B. 659.

(u) *The Duke of Norfolk v. Worthy*, 1 Camp. 340; *Flight v. Booth*, 1 Bing. N. C. 370; *Leach v. Mullett*, 3 C. & P. 115. See also *Robinson v. Musgrove*, 2 Mo. & Rob. 92; s. c. 8 C. & P. 469; *ante*, p. *494, note (i), *et seq.*

(v) See *Sherwood v. Robins*, 1 Mood.

& M. 194, s. c. 3 C. & P. 339, where it was determined, that a condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," applies only to cases where the circumstances afford a principle by which this compensation can be estimated.

was *held*, no sale. *Elphick v. Barnes*, 5 C. P. D. 321. And see *Prairie Farm Co. v. Taylor*, 69 Ill. 440; *Hunt v. Wyman*, 100 Mass. 198; *Hickman v. Shimp*, 109 Pa. 16. What is a reasonable time is generally for jury; but if the delay is too long continued, for the court. *Paige v. McMillan*, 41 Wis. 337; *Schlesinger v. Stratton*, 9 R. I. 578. — K.

delivered "on sale or return" is "an act adopting the transaction" within § 18, rule (a) of the Sale of Goods Act, 1893, so as to pass the property to him, and the

pledgee obtains a good title as against the seller. *Kirkham v. Attenborough*, [1897] 1 Q. B. 201.

the conditions of sale be binding against a purchaser, if so framed as to give the seller advantages which the buyer could not readily apprehend or understand without legal knowledge or advice; for a buyer is discharged from a purchase made under "catching conditions."^(w)

* SECTION VII.

* 541

OF BOUGHT AND SOLD NOTES.

Much of the commercial business of the country is transacted by the agency of brokers, who buy and sell goods for others, on commission. Though employed at the outset by only one of the parties, a merchandise broker becomes the agent of the other also, when he treats with him.^(x)

It is the duty, though not always the practice of brokers, to make a memorandum of the terms of the contract and the names of the parties, in their books, to sign such memorandum, and to transcribe therefrom the bought and sold notes.^(y)¹ The bought note is addressed to the purchaser, notifying him that the broker has bought for his account of the vendor, the goods described, stating price and terms, and signed by the broker. The sold note is a similar statement addressed to the vendor, informing him that he has sold to the purchaser, for his account, the same goods, giving the price and terms. The broker's signature to the entry in his book, or to the notes, will satisfy the Statute of Frauds, it being in law the signature of the parties by the agent of both parties.^(z)

* It is not uncommon for the principals to sign their * 542 approval upon the note to be handed to the other party;

^(w) *Adams v. Lambert*, 2 Jur. 1078; *Clark*, 2 Sandf. 133; *Toomer v. Dawson*, 1 Cheves, 68.

^(y) Per *Abbott*, C. J., in *Grant v. Fletcher*, 5 B. & C. 437.

^(z) *Hinde v. Whitehouse*, 7 East, 558; *Heyman v. Neale*, 2 Camp. 337; *Cabot v. Winsor*, 1 Allen, 546.

¹ Where one keeps a bought or sold note, he plainly admits that the broker acted by his authority and as his agent, and the broker's signature is his signature. *Thompson v. Gardiner*, 1 C. P. D. 777. The following memorandum of a contract of sale signed by the agents of the seller and purchaser: "Sold for Messrs. B. & Co., Boston, to Messrs. T. & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67, W. & H., Brokers," binds both parties thereto. *Butler v. Thompson*, 92 U. S. 412. "The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought." Per *Hunt*, J.—K.

but this proceeding, though convenient as settling the question of the broker's authority, is not necessary to give validity to the contract, if the broker's authority can be shown by other means.

Formerly the question was in some doubt whether the broker's entry in his book, duly signed by him, should not be regarded as the actual contract between the parties, and the bought * 543 and * sold notes as merely the evidence thereof. (a) It certainly appears unreasonable that the entry in the broker's book, which the parties do not see, should be taken as the contract between them, when it is obvious that their understanding of the agreement must be drawn from the notes delivered to them respectively. By retaining the note without objection, either party ratifies the contract set forth therein. By returning it at once, with his dissent, he repudiates the contract; and his liability then depends, not upon what the broker has done, but upon the authority which he actually gave to his agent.

The custom of delivering bought and sold notes has at length obtained so generally, that the courts both in this country and in England have been obliged, from the necessity of the case, to look to them rather than to the broker's book, for the terms and conditions of the contract. It seems accordingly to be settled, under the influence of this custom, that the bought and sold notes, if there be any, are the best evidence of the bargain; although, if there be none, the broker's entry in his book, if signed, will be sufficient. (b)¹

If these notes are signed by the broker and agree, but differ from an unsigned entry in the book, the notes constitute the contract. If they agree, but differ from a signed entry, and have been received and adopted by the vendor and purchaser, though the entry present the contract correctly as made, the notes will, it seems, constitute a new contract, in substitution and extinguishment of the contract evidenced by the signed entry. (c) If the notes differ from each other, and one of them agrees with the

(a) See remarks of *Ld. Ellenborough*, in *Dickenson v. Lilwal*, 1 Stark. 128; but see *Cumming v. Roebuck*, Holt, N. P. 173.

(b) *Hawes v. Forster*, 1 Mo. & Rob. 368; *Grant v. Fletcher*, 5 B. & C. 436;

s. c. 8 D. & R. 59; *Goom v. Afalo*, 6 B. & C. 117; s. c. 9 D. & R. 148.

(c) *Hawes v. Forster*, 1 Mo. & Rob. 368; and see remarks of *Campbell, C. J.*, in *Sievwright v. Archibald*, 17 A. & E. (N. s.) 121, 126; *Jeffcott v. No. Brit. Oil Co.*, Ir. R. 8 C. L. 17.

¹ It seems now to be held rather that the entry signed by the broker in his book constitutes the original memorandum of the contract, though the bought and sold notes constitute a sufficient memorandum to satisfy the Statute of Frauds. See *Benjamin on Sales*, §§ 275-307; *Thompson v. Gardiner*, 1 C. P. D. 777; *Remick v. Sanford*, 118 Mass. 102. — W.

signed entry, the entry and note agreeing with it, may, it seems, be taken together as constituting the contract of sale, to the exclusion of the other note. (*d*) It seems that a printed signature * of the broker is not a sufficient signing within the * 544 Statute of Frauds in New York, which requires that the memorandum shall be *subscribed*. (*e*) But it is well settled, that under the English statute, the appearance of the vendor's name printed in a bill of parcels is a sufficient signature to bind him. (*f*)

If the broker does not sign the same contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers different notes of the contract to each of the contracting parties, and there is no signed entry in his books to cure the discrepancy, there is no valid bargain at all. There is no proof of the assent of the parties to the same terms, no common understanding, and neither of them has the means of determining whether the broker has exceeded the authority given to him by the other. (*g*) Where a broker's bought note signed by him and delivered to the purchaser, described the subject-matter of the contract as "Riga Rhine hemp," and the sale note signed by him and delivered to the vendor described it as "St. Petersburg clean hemp;" and it appeared that the description in the first note had been inserted by mistake, and that it designated an article of a different and * better quality, and of higher * 545 price and value than that described in the second note; it was held that, as the parties were not bound to the same bargain, and had not respectively agreed to buy and sell the same thing, there was no contract subsisting between them. (*h*)

So an invoice of flour, described in a bought note to be of a particular brand, which proved upon landing to be of a different brand, was rightfully refused by the purchaser, the court deciding

(*d*) *Thornton v. Charles*, 9 M. & W. 802; *Sievwright v. Archibald*, 17 A. & E. (N. S.) 104; *Townend v. Drakeford*, 1 Car. & K. 20; *Goom v. Affalo*, 6 B. & C. 117; s. c. 9 D. & R. 148; *Thornton v. Meux*, 1 Mo. & Malk. 43.

(*e*) *Zachrisson v. Poppe*, 3 Bosw. 171.

(*f*) *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & Sel. 286, per *Ld. Eldon*, C. J. And see *Boardman v. Spooner*, 13 Allen, 353; *Brayley v. Kelley*, 25 Minn. 160.

(*g*) *Grant v. Fletcher*, 5 B. & C. 436; *Heyman v. Neale*, 2 Camp. 337; *Gregon v. Ruck*, 4 A. & E. (N. S.) 737; *Sievwright v. Archibald*, 17 A. & E. (N. S.)

104. In this case the broker's bought note specified "500 tons of Dunlop, Wilson & Co. pig iron," and the sold note, "500 tons of Scotch pig iron," and there was no signed entry in the broker's book. There was evidence that Dunlop's iron was of Scotch manufacture, but that there were other kinds of Scotch pig iron; and the court held, that the variation in the notes was material, and destroyed the contract. See *Peltier v. Collins*, 3 Wend. 459; *Suydam v. Clark*, 2 Sandf. 133; *Pitts v. Beckett*, 13 M. & W. 743.

(*h*) *Thornton v. Kempster*, 5 Taunt. 786.

that the word "Haxall," written in the margin of the note by the broker, was a warranty that the flour sold should be of that brand. *(i)* A statement in a bought note that the broker has sold the purchaser "seed to arrive," where the purchaser accepts it after arrival and an opportunity offered him to examine it, implies no warranty that the article is merchantable; and the purchaser has no remedy against the seller, should it subsequently prove to be unmerchantable. *(j)* In this case the contract was executed. But where the contract is executory, such a statement is regarded as an engagement that the goods are merchantable; and if they prove not to be so upon arrival, the purchaser will be released. *(k)* But an unimportant or immaterial variation in the notes will not avoid the bargain. Thus, where a purchaser's bought note specified the day for payment, with discount off, as did also the copy of the sold note furnished him by the broker upon the same paper, but the vendor's sold note did specify the day for such payment with discount, though a copy of the bought note on the same sheet of paper did so specify; and the purchaser, when sued for the non-fulfilment of the contract, pleaded this variance, the court held, that the mention of the day in the copy of the bought note contained on the same sheet with the sold note, must be taken to apply equally to the sold as to the bought note, and that the two corresponded sufficiently to sustain the contract. *(l)*

A mistake made by the broker, by describing erroneously the firm of the vendors, in the bought and sold notes, will not * 546 * justify the purchaser in avoiding the contract, after he has treated it as a subsisting contract, upon a subsequent communication from the vendors, unless he show that he has been prejudiced. *(m)*

The non-delivery of one of the notes to the party entitled to receive it, so that he is ignorant of the contract, might possibly destroy the contract, on the ground of want of mutuality of obligation. *(n)* A delivery by the broker of an invoice altered from the name of one purchaser to that of the new purchaser, accompanied by a letter to the latter, saying that to simplify the transaction they had transferred to him the invoice received by the vendor, will be effective to establish a valid contract. *(o)* And it

(i) *Flint v. Lyon*, 4 Cal. 17.

(j) *Moore v. McKinlay*, 5 Cal. 471.

(k) *Cleu v. McPherson*, 1 Bosw. 480.

(l) *Maclean v. Dunn*, 4 Bing. 722; s. c.

1 M. & P. 761, 779.

(m) *Mitchell v. Lapage*, Holt, N. P. 253.

(n) Per *Best*, C. J., in *Smith v. Sparrow*, 2 C. & P. 544; s. c. 4 Bing. 85, and 12 Moore, 266; per *Hullock*, B., in *Henderson v. Barnewall*, 1 Y. & J. 394; but see *Burrough*, J., 12 Moore, 266.

(o) *Pauli v. Simes*, 6 C. & P. 506.

is sufficient, in an action by a purchaser against a vendor, on a contract made through a broker, for the plaintiff to produce the bought note handed to him by the broker, and show the employment of the latter by the vendor. (*p*) Where the sold note varies from the bought note, it lies on the vendor to prove the variance by producing the former. (*q*) It is held in New York, that where no sale note is delivered by the broker, his entry on his book must agree with the contract as actually concluded, or neither party is bound. (*r*) Parol evidence of *mercantile usage *547 is admissible to explain apparent variances between bought and sold notes; (*s*) but it is questionable whether such evidence is admissible to explain their meaning, where there is an actual discrepancy between them. (*t*) The true office of mercantile usage is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of a doubtful or equivocal character; or to ascertain the true meaning of particular words in an instrument, when those words have various senses. (*u*)

Where upon a sale of goods the vendor produces a sample and represents the bulk as of equal quality, if there be sale notes which do not refer to the sample, it is not a sale by sample; for the writing is the only evidence of the contract. (*v*) But a warranty in the sale of a chattel is an essential part of the bargain, and should be stated in the bought and sold notes constituting the memorandum of sale; and it is held in New York, that the omission renders the contract void, and that parol evidence, in a suit for non-performance, is inadmissible to take the case out of the Statute of Frauds. (*w*) If the contract *has been executed in *548 conformity with the written memorandum by which it is evidenced, it is clear that parol evidence of a warranty not mentioned in the writing, is not admissible in a suit brought by the purchaser, for damages for breach of warranty. (*x*)

When a broker does not disclose the name of his principal in his sold note [or within a reasonable time,] he [may be shown by parol evidence of a custom to be] liable as the purchaser; (*y*) and

(*p*) *Hawes v. Forster*, 1 Mo. & Rob. 368. see *Waring v. Mason*, 18 Wend. 425. And see *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 627; *Cabot v. Winsor*, 1 Allen, 546.

(*q*) *Id.*

(*r*) *Davis v. Shields*, 26 Wend. 341.

(*s*) *Bold v. Rayner*, 1 M. & W. 343.

(*t*) *Godts v. Rose*, 17 C. B. 229.

(*u*) Per *Story, J.*, in *The Reeside*, 2 Sumn. 567.

(*v*) *Meyer v. Everth*, 4 Camp. 22; *Eng. C. L.* 288; *Humfrey v. Dale*, 7 E. Van Ostrand *v. Reed*, 1 Wend. 424. But & B. 266. See also *Mollett v. Robinson*,

(*w*) *Peltier v. Collins*, 3 Wend. 459.

(*x*) *Reed v. Wood*, 9 Vt. 285.

(*y*) *Thomson v. Davenport*, 9 B. & C.

78; *Pennell v. Alexander*, 3 E. & B. 77

Eng. C. L. 288; *Humfrey v. Dale*, 7 E.

& B. 266. See also *Mollett v. Robinson*,

if he have a principal who is subsequently discovered, the other party may, upon the discovery, elect which of the two to hold.(z) If in such case the vendor sue the broker for non-performance of the contract, the sold note signed by the latter, stating that he has sold to his principal, will be sufficient evidence of the contract; for the statement of a sale to a principal, though unnamed, necessarily implies that he has bought for him. Indeed the word "principal" in that connection itself imports a buyer.(a)

Where the contract is made through the agency of two brokers, one acting for the vendor and the other for the purchaser, and the sold note given by the purchaser's to the vendor's broker, states, that the sale is made on account of the latter instead of his principal, the vendor may nevertheless treat the contract as his own, and enforce it upon the terms of the sold note.(b)

If the broker in his bought note give the name of a wrong person as the vendor, the purchaser upon discovery of the real vendor may proceed against him for the non-fulfilment of the contract.(c)

Upon general principles we should be inclined to the conclusion, that the memorandum signed by the broker, whether it be an entry in his books, or the customary sale notes, must be signed by him at the time the contract is made, and not afterwards, in order to satisfy the Statute of Frauds, which requires a signing by the party to be charged *or his agent*; for, the broker being the agent of the principals only for the purpose of effecting the contract, after that duty is performed he is *functus officio*, and no longer the agent of the contracting parties.(d) The principals are not however thus restricted, but may sign a valid memorandum of the bargain thus effected, at any subsequent * time, either personally or by an agent duly authorized to perform that act.

So, too, the principal may, by ratifying the inoperative signature of the broker, render it effective to answer the requirements of the statute, and this result would be accomplished by the ratification, whether the original defect arose from the broker's signing after the contract was made, or from a want of authority to make the contract. The English Statute of Frauds, and gen-

L. R. 7 H. L. 802; Fleet v. Murton, L. R. 7 Q. B. 126; Hutchinson v. Tatham, L. R. 8 C. P. 482; Southwell v. Bowditch, 1 C. P. D. 374.

(z) 2 Smith Lead. Cas. 223. See *ante*, chapter on Agents, sect. vii.

(a) Humfrey v. Dale, 7 E. & B. 90 Eng. C. L. 266.

(b) Id.

(c) Trueman v. Loder, 11 A. & E. 589.

(d) See a remark by Campbell, C. J., favoring this conclusion in Sievwright v. Archibald, 17 A. & E. (N. S.) p. 124. See also Horton v. McCarty, 53 Me. 394; Bamber v. Savage, 52 Wis. 113; Flintoft v. Elmore, 18 Up. Can. C. P. 274.

erally those of the several States of the Union, while they require that the memorandum in writing shall be signed by the party to be charged, or his agent, do not provide as to the mode in which the agent is to receive his authority, but leave the question to be settled by the rules of common law. By the common law, the subsequent sanction of an agent's acts is considered as the same thing in effect, as assent at the time, upon the principle that *omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* (e)

It is held in England, that where the written contract is inadmissible in evidence for want of a stamp, neither party can give parol evidence of such contract. (h) (x) We have the authority of the English Court of Exchequer for the doctrine, that a factor selling goods for his principal has not the same authority as a broker to bind the purchaser by bought and sold notes; for he is not regarded in law as the agent of the purchaser. And though the sale notes be made out by him in the presence of the two principals, and delivered to them respectively, and the purchaser receive the bought note without objection at the time, or even so far recognize it as to request the factor to make an alteration in the date thereof; the transaction will not thereby be taken out of the Statute of Frauds, so that the owner of the goods can maintain an action against the purchaser for non-performance. All these circumstances, it is held, fall short of authorizing the factor to act for the purchaser, and unless express authority to sign for him be given by the purchaser, the bought note will not hold him. (i) This case strongly defines a *distinction * 552 between a factor and a broker, making the latter the agent of both contracting parties, and the former the agent of his principal only.

SECTION VIII.

OF SALES TO ARRIVE.

A very common form of contract at the present day is a sale of goods "to arrive." This is a sale of merchandise expected from abroad, effected before arrival, the condition being that the thing sold shall arrive, and that if it do not, the bargain shall be void.

(e) *Soames v. Spencer*, 1 Dow. & R. 32; *Maclean v. Dunn*, 4 Bing. 724; s. c. See 1 H. & C. 174.
1 M. & P. 779.

(h) 3 Starkie on Evid. 1005, 1006.

(i) *Durrell v. Evans*, 6 H. & N. 660.

(x) See now *Learoyd v. Bracken*, [1894] 1 Q. B. 114.

Upon the question whether under such a contract there is a present and executed sale, subject to be defeated by the non-arrival of the goods, or only an executory contract to sell and buy, there has been much discussion; but the authorities are strongly in favor of the latter view. Where however the quantity, quality, and price of the goods are specifically ascertained, and the bill of lading thereof is assigned by indorsement and delivery to the purchaser under a contract of this kind, we think that the general principles of the law-merchant would lead to the conclusion that there was a constructive delivery and executed sale,

and that the right of property passed. *(k)* And if any * 553 * other act of equivalent import to the assignment of a bill of lading, be performed, as an assignment upon the back of the invoice, the transfer of a policy of insurance upon the goods, and the giving an order on the vessel to deliver to the purchaser on arrival, the effect might be the same. *(l)* But this conclusion must be subject to important qualifications. Perhaps rules analogous to those which give and govern the right of stoppage *in transitu*, might be held applicable. If, for example, the purchaser becomes insolvent before the arrival, we cannot suppose that his assignees could take the goods without paying or securing the price agreed upon. *(m)* But they might take them by so doing, and make what profit they could out of them, for the benefit of the insolvent estate. We reach the same result by simply supposing that the constructive delivery above spoken of did not terminate the common-law lien of the vendor for his price.

In all cases of this kind, the intention of the parties, as gathered from the contract and the attending circumstances, will govern; and if from these it be apparent that the property was to pass immediately, the courts will so construe the contract; for no particular form is required for the sale of personal property. All that is necessary is, that the parties should intend, the one to part with his property, the other to become the owner of it. The union of intention constitutes the contract of sale. And it may be proved by any kind of legal evidence, parol or written; by a formal conveyance under seal, or by a loose correspondence; by a conversation direct between the parties, or mediate through the agency of other persons. *(n)*

(k) Alexander v. Gardner, 1 Bing. N. C. 671; 1 Scott, 630; 1 Hodges, 147. See Caldwell v. Ball, 1 T. R. 205; Stubbs v. Lund, 7 Mass. 453; Walter v. Ross, 2 Wash. C. C. 283; Jordon v. James, 5 Ham. (Ohio) 89; Lee v. Kimball, 45 Me. 172.

(l) See Gardner v. Howland, 2 Pick.

599; Howland v. Harris, 4 Mason, 497; Pratt v. Parkman, 24 Pick. 42; Lanfear v. Sumner, 17 Mass. 110.

(m) Benedict v. Field, 16 N. Y. 595.

(n) Per Morton, J., in Pratt v. Parkman, 24 Pick. 42.

*Ordinarily, a sale to arrive by a specified vessel does * 554 not pass any property in any specific chattel on board the vessel at the time the bargain was made; it being merely an agreement for the sale and delivery of a portion of the cargo at a future period, namely, when the vessel shall arrive; and to fulfil this condition a double event must take place; that is, the arrival of the vessel, with the goods on board.(x) The contract is therefore both executory and conditional.(o)

Whether the expression used in the contract be "to arrive" or "on arrival," the construction will be the same. Efforts have sometimes been made to induce the courts to give a more extended meaning to the former expression, as importing a warranty that the article shall arrive if the vessel does. It is held, however, that the word "to" does not mean that the goods "shall" arrive, but merely that they shall be sold on their arrival.(p)¹ Nor will this construction be varied if there be an express condition appended to the contract, that the contract itself shall be void should the vessel be lost. Whether appending a negative condition, — as, that "this contract shall not be valid unless the vessel arrives," — would vary the construction by excluding any implied condition, admits of some doubt. Baron *Alderson*, in the case just cited, expresses the opinion that a negative instead of an affirmative condition might make a difference.(q)

* A sale on arrival by a certain vessel is held to mean * 555 on the arrival of the goods and not the vessel only; and this construction will always be put upon the condition, unless the language used in the contract is so plain to the contrary as not to admit of it. For the courts are unwilling to assume that the contracting parties meant to enter into a mere wager.(r) In fact, the arrival of the goods by that particular vessel, is held to be a condition precedent to the vendor's obligation to deliver; so that if the goods which are the subject of the negotiation

(o) *Chitty*, Cont. * 444; *Russell v. Nichols*, 3 Wend. 112; *Shields v. Pettie*, 2 Sandf. 262, 4 Comst. 122; *Benedict v. Field*, 16 N. Y. 595; *Neldon v. Smith*, 7 Vroom, 148, 154; *Lovatt v. Hamilton*, 5 Mee. & W. 639; *Stockdale v. Dunlop*, 6 M. & W. 224; *Johnson v. McDonald*,

9 M. & W. 600. See *Hawes v. Lawrence*, 4 Comst. 345; *Boyd v. Siffkin*, 2 Camp. 326, and *Hawes v. Humble*, there cited.

(p) Per *Parke*, B., in *Johnson v. McDonald*, 9 M. & W. 600.

(q) Per *Alderson*, B., same case.

(r) *Boyd v. Siffkin*, 2 Camp. 325.

¹ As to what is "arrival," see *Montgomery v. Middleton*, 13 Ir. C. L. 173. — K.

(x) The captain of a vessel is an agent to receive goods for carriage, but not, unless expressly made so, an agent to accept

delivery under the contract for their purchase. *Vigers v. Sanderson*, [1901] 1 K. B. 608.

should arrive by some other vessel, the contract would be void. (s) ¹(x)

If the sale is of a definite quantity or number, as so many hundred bags of an article, the contract is not apportionable, and the vendor cannot recover damages for a refusal to take any less quantity or number. (ss)

They must also arrive at the agreed port of delivery, and in the ordinary course of trade and navigation, or the vendor will not be held. And if by any accident such an arrival is rendered impossible, it seems that the vendor is not obliged to adopt other means of transportation, by which the goods might readily be delivered to the purchaser within the stipulated time, in order to avoid his liability. (t)

* 556 * A sale of a specified quantity of goods to arrive by a particular vessel, will become an executed contract by the arrival of that vessel with the requisite quantity of goods to fill

(s) *Lovatt v. Hamilton*, 5 Mee. & W. 639. See also *Shields v. Pettie*, 2 Sandf. 262, 4 Comst. 122.

(ss) *Reimers v. Ridner*, 2 Rob. 11.
(t) *Idle v. Thornton*, 3 Camp. 274.

¹ A.'s firm having purchased certain nitrate of soda, and chartered the *Precursor* to bring it home, subsequently sold to B. "the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." Before the date of this contract, and without their knowledge, the greater part of the nitrate was destroyed by an earthquake, and the charter of the *Precursor* cancelled. A.'s firm then purchased other soda, sold it to other parties, and chartered the *Precursor* anew, which brought it home, where B. claimed it under the contract. *Held*, in the Queen's Bench (*Smith v. Myers*, L. R. 5 Q. B. 429), that the contract, though not for a specific lot of nitrate of soda, was for a specific adventure or voyage which both parties contemplated as about to take place, and did not attach to this second lot; in the Exchequer Chamber (L. R. 7 Q. B. 139, affirming the decision of the Queen's Bench), that the contract referred to a specific quantity of nitrate of soda, which was prevented from being shipped by an accident, and consequently became void. A lot of scrap iron was sold to arrive by the *Christopher*. It came in the *St. Christopher*, and it was held that unless the misnomer was of some consequence the buyer was not justified in refusing the goods. *Smith v. Pettie*, 70 N. Y. 13. "Cargo" means a vessel's entire load, and the vendee is not bound to accept less. *Borrowman v. Drayton*, 2 Ex. D. 15. See *Ireland v. Livingston*, L. R. 2 Q. B. 99; L. R. 5 Q. B. 516; L. R. 5 H. L. 395-410. — K.

(x) In a clause "no arrival, no sale," in a shipping contract, "arrival" refers, as "sale" necessarily refers, to the goods, and not to the particular vessel; if the words "ex ship" are used, they are not restricted to any particular ship, and, by the usage of merchants, they denote simply that the property in the goods is to pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing, — they do not constitute a condition, but are inserted for the seller's benefit; a contract to "ship

by" a certain vessel for a particular voyage means *prima facie* only "to put on board," not including the subsequent carriage. *Harrison v. Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616. Where, upon the sale of sugars, the title is to pass upon their delivery on board ship, and payment, a stipulation that "the sugars are to be thoroughly sampled and tested on arrival," does not relate to their quality on reaching their destination. *Lord v. Edwards*, 148 Mass. 476, 20 N. E. 161.

the contract, whether they are consigned to the vendor, or subject to his control or not. The implied conditions of the arrival of the goods which the law has attached to contracts of sale to arrive, seem to arise so naturally from a contract of this character, that their recognition by the courts as material terms thereof meets with very general approbation. But when it is proposed to add to these conditions an implication which has no foundation in necessity, and which no merchant of ordinary prudence could suppose the law would intend in his behalf, the well recognized principle, that courts will not make a contract for the parties which they have not made themselves, will probably prevent the courts from interpolating such an implied condition. There is no legal necessity that the vendor should be able to dispose of the goods at the time he enters into the contract; for he may acquire the ability to control them, by purchase or otherwise, subsequently to his engagement, and before the goods must be delivered. (*u*) And if he carelessly omits to guard against the possibility that the goods may arrive consigned to another instead of himself, the fault is his own, and he alone should suffer the consequences.

In a case before the English Common Bench, where a * purchaser had sued his vendor for non-delivery of a * 557 specified quantity of goods, expected to arrive by a particular vessel, the vessel having arrived with the necessary quantity on board, though not shipped for or on account of the vendor, the defendant resisted on the ground that, though the expected quantity arrived, it was not consigned to him or subject to his control. But the court were so strongly inclined to consider the contract as warranting the defendant's power of disposal over the goods, that without further prosecuting the appeal, he assented to this construction, and paid the damages as assessed upon that principle. (*v*)

* A sale of goods at sea, to be paid for on delivery at * 558 the place of the contract, is considered as equivalent to a contract to sell and deliver on arrival, and will be governed by the same rules. (*w*)

* A verbal contract for the sale of goods to arrive, from * 559 its non-compliance with the requirements of the statute of frauds, gives the purchaser no insurable interest therein; and if there be afterwards an arrival and delivery of part of the goods

(*u*) *Hibblewhite v. M'Morine*, 5 M. & W. 462. See *Pothier on Obligations*, vol. i. § 133; *Paradine v. Jane*, Aleyn, 27. also *Gorissen v. Perrin*, 2 C. B. (N. S.) 681.

(*w*) *Shields v. Pettie*, 2 Sandf. 262, 4 Comst. 122. Affirmed upon appeal, the Court of Appeals, 4 Comst. 122.

(*v*) *Fischel v. Scott*, 15 C. B. 69. See

thus bought under an entire contract, such partial delivery, though it will amount to a ratification of the contract as between the parties, will not relate back in its effects, so as to confer on the purchaser an insurable interest on a part of the goods which were wrecked at a date prior to the partial delivery. (x)¹

A statement in a contract of sale of goods to arrive by a particular vessel, that the vessel sailed on or about a day named, is considered as a representation, rather than a condition or warranty, as to the time of sailing; and if made without fraud, though the vessel in reality sailed at a day considerably later than the day named, and her arrival in port is thereby delayed, the purchaser is bound to accept and pay for the goods. (y)

* 560 * Indeed, it may be questionable whether even fraud in fixing the time of sailing, could be pleaded in such a case; the proper remedy for that being an action for deceit, as appears by a remark made by the Court of King's Bench, in giving judgment in a case somewhat similar to that above supposed. (z)

A sale of goods to arrive imports that they are merchantable, and conformable generally, in their condition and appearance, to that which would be understood by the trade, from the terms of description used in the contract; (a) for the contract being * 561 conditional and executory, the rule of the common law, *Caveat emptor*, does not apply; but rather the rule of the civil law, *Caveat venditor*. Where an examination of the goods is morally impracticable, as in the case of goods sold before their arrival, it seems but reasonable and just that this implication should be attached by courts to the contract. (b)

A contract for a sale of goods to be delivered on their arrival, at any time before a specified date, does not render the vendor liable for the non-delivery of the goods if they have not arrived within the time limited; for the specification of the time is held

(x) *Stockdale v. Dunlop*, 6 M. & W. 224.

4 M. & W. 399; *Hyatt v. Boyle*, 5 G. & J. 110.

(y) *Hawes v. Lawrence*, 4 Comst. 346.

See *Ollive v. Booker*, 1 Exch. 416. (b) Per *Cowen, J.*, in *Wright v. Hart*,

(z) *Hawes v. Humble*, 2 Camp. 327, n.

17 Wend. 267, 18 id. 449; *Paige, J.*, in

(a) *Cleu v. McPherson*, 1 Bosw.

Hargous v. Stone, 1 Seld. 86; *Chanter v.*

(N. Y.) 480. See *Gorissen v. Perrin*, 2 C. B.

Hopkins, 4 M. & W. 399; *Hyatt v. Boyle*,

(N. S.) 681; *Wright v. Hart*, 17 Wend.

5 G. & J. 110; and see *Moore v. McKin-*

267; 18 Wend. 449; *Chanter v. Hopkins*,

lay, 5 Cal. 471, for distinction as to warranty before and after arrival.

¹ The purchaser of a "cargo" of rice which is to be loaded on board a ship expected to arrive at a certain port, where it is to load for a voyage, agreeing to pay a sum certain "per cwt., cost and freight," has no such insurable interest in the purchase (*diss.* Lord O'Hagan and Lord Selborne), that should the rice put on board be lost before the loading is completed, he can recover on a policy of insurance effected on goods in the vessel. *Anderson v. Morice*, 1 A. C. 713. — K.

to be only a limitation fixing the period beyond which neither party is bound by the contract, and not as warranting that the goods shall, at all events, be delivered by the day fixed. (c)

* Under such a contract the obligations of the vendor and * 562 purchaser are mutual, the one to deliver, and the other to accept, if the condition of time be fulfilled. Accordingly it is held that where the contract is for the sale of goods to be delivered on arrival, but not to exceed a specified day, the purchaser is not bound to accept them after that day. (d) But a statement that the goods contracted for are now on the passage, and expected to arrive, naming the vessels and the quantity in each, is held to be a warranty that the goods were on the passage at the making of the contract; the term "expected to arrive," in that connection, being regarded as limited in its operation to goods that are on the passage, and not as rendering the shipment itself conditional. (e)

* A contract for the sale of goods expected may, how- * 563 ever, be construed to be conditional on the arrival of the vessel instead of the goods, if the terms are so explicit as entirely to exclude the implication that the time of arrival applies to the goods. In such a case, the condition of the arrival of the vessel is regarded as precedent in its nature, and if the vessel do not arrive the vendor will not be held under his contract. If however the vessel arrives, he will be liable, even though he does not receive the goods expected by the vessel, and though there be no default on his part. (f) In the case cited, the court observed that the vendor had by his own heedlessness undertaken to perform an impossibility, which he might have provided against in his contract, and therefore he, rather than the innocent purchaser, should suffer for his failure to perform.

A ship-owner's agreement to take freight at a foreign port, by a certain vessel which the owner says is to arrive at that port, is not regarded as conditional upon the arrival of the vessel, unless expressly made so by the terms of the contract. And if the only exceptions made are the dangers of the seas and fire, and the non-arrival is owing to a different cause from either of these, the owner will be held liable for the damage which the freighter may suffer by breach of contract. (g)

* A sale of goods, to be shipped by a specified vessel at * 564

(c) *Russell v. Nicoll*, 3 Wend. 112; *Rogers v. Woodruff*, 23 Ohio St. 632.

(d) *Alewyn v. Pryor, Ryan & Moo.* 406; and see *Russell v. Nicoll*, 3 Wend. 112, on this point.

(e) *Gorrissen v. Perrin*, 2 C. B. (N. S.) 681.

(f) *Hale v. Rawson*, 4 C. B. (N. S.) 85.

(g) *Higginson v. Weld*, 14 Gray, 165.

a certain time, is an absolute engagement that the goods shall be shipped as indicated; and if they are not so shipped the vendor is liable for the breach of contract, from whatever cause the failure arises. (*h*) (*x*)

It will be noticed that in construing a contract for the sale of goods by a particular vessel, a distinction is made between the specification of a day certain for the shipment, (*z*) and the limiting a time for the delivery, (*j*) — the former being regarded as a warranty, and the latter as merely a condition upon which the execution of the contract depends. If goods are not shipped when the vendor says they shall be, he is liable in all events to the purchaser for the non-arrival; if goods are not delivered within the time limited, in consequence of non-arrival, neither party can compel the other to perform the contract of sale. In both these cases time is an essential element in the contract, but

not for the same purpose in both. In the one, it fixes the * 565 * period when the vendor's absolute liability is to begin; in the other, when the conditional liability of vendor and purchaser is to end. Some confusion occasionally arises in discussing the question in any given case, whether time is or is not of the essence of the contract; but as a general thing, we think the matter may be rendered clear by considering whether, in the particular case, the time mentioned is or is not subordinate to any other condition. If it is, then its observance is less important, and it may be regarded as not of the essence of the contract. If, on the other hand, it be a condition, and not subordinate to any other condition of the contract, then, since the parties have seen fit to give it this primary place and controlling influence in

(*h*) *Splidt v. Heath*, 2 Camp. 57, n., following *Atkinson v. Ritchie*, 10 East, 530; *Atkinson v. Ritchie*, 10 East, 530; *Gor-rissen v. Perrin*, 2 C. B. (N. S.) 681.

(*j*) *Russell v. Nicoll*, 3 Wend. 112; *Alewyn v. Pryor, Ryan & Moo*. 406.

(*x*) In a contract for the sale of a cargo, to be shipped by a specified steamer at a specified time and place, there is an implied condition that the steamer shall be in existence at the specified time as a cargo-carrying vessel. *Nickoll v. Ashton*, [1901] 2 K. B. 126.

If shipments are agreed to be made monthly as nearly as possible, throughout the year, the time of shipment is material, and a plea is good that the vessels did not sail at the respective times agreed upon; but the shipper is not responsible merely for delay in arrival. *Peace River Phosphate Co. v. Graffin*, 58 Fed. 550. An

agreement that goods ordered are "to be shipped prompt" is not satisfied by a month's delay. *Soper v. Creighton*, 93 Me. 564, 45 Atl. 840, 74 Am. St. Rep. 375.

The risk, as to goods shipped, usually follows the title; when perishable goods, like fruit, are shipped for a long distance at "buyer's risk," this means that the purchaser takes the risk of transportation, but that all risks incident to improper packing in the car at the initial point of shipment are assumed by the shipper. *Rose v. Weinberger*, 108 Ga. 533, 34 S. E. 23, 75 Am. St. Rep. 73, and note.

their contract, courts must hold it to be of the essence of the contract. (x)

Thus, in the case of a sale on arrival, the goods to be delivered within a certain time, if the question be whether the mention of a time of delivery imposes an absolute obligation to deliver by that time, although the goods have not arrived, the answer is, that, as the delivery depends, by the very terms of the contract, upon the arrival, it is therefore subordinate to the arrival, and the time limited for delivery cannot control the condition of arrival, and cannot be so far of the essence of the contract as to make the seller responsible for the non-delivery. But if the goods arrive after the time of delivery has expired, and the question be whether the vendor is then bound to deliver, or the purchaser to receive, the answer is, that, as the arrival has already taken place, there is no longer anything to control the delivery but the specification of time; and as the condition of time is no longer subordinate, it must be allowed its full effect in determining the liability of the parties, and thus be regarded as of the essence of the contract. Again, if the question be whether the mention of a time for shipment imposes an absolute obligation that the goods shall be shipped at that date, the answer is that there is no other obligation in the contract to which the time of shipment is subordinate, and therefore, since the parties have seen fit to embody it in the contract, time must in this case be regarded as of the essence of the contract.

When the engagement to deliver is absolute, the vendor cannot *excuse himself by showing that he was prevented *566 from completing his bargain by the blockade of the port, or by any other inevitable accident. (k)

Where there is a contract for the sale of a cargo to be shipped by a particular vessel then on her way to the port of lading, and the kind and quality of the goods is fixed, as well as the price,

(k) *Atkinson v. Ritchie*, 10 East, 530; 517; *Hayward v. Scougall*, 2 Camp. 56; *Spence v. Chadwick*, 10 A. & E. (N. S.) De Medeiros v. Hill, 5 Car. & P. 182.

(x) In the contracts of merchants, time is of the essence, and any statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily a warranty amounting to a condition precedent, performance of which is essential to recovery upon any part of the contract. *Norington v. Wright*, 115 U. S. 183, 203, 6 S. Ct. 12, 29 L. Ed. 365; *Harrison v. Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616; *Kauffman v. Raeder*, 108 Fed. 171; *Red-*

lands Orange Growers' Ass'n v. Gorman, 161 Mo. 203, 61 S. W. 820; *Gill v. Benjamin*, 64 Wis. 362, 54 Am. Rep. 619, 625 n.; *Iasigi v. Rosenstein*, 141 N. Y. 414, 36 N. E. 509. This question is one that depends on the parties' intention. *Henderson v. McFadden*, 112 Fed. 389. Unless clearly so intended, time is not of the essence of a contract for the sale of land. *Frink v. Thomas* (20 Oregon, 265), 12 L. R. A. 239 and note.

and provision is made for a fair allowance to the buyer for an inferior description of the same kind of goods, the vendor also engaging to deliver what may be shipped on his account and in conformity with his invoice, and it is stipulated that the contract shall be void if the vessel should make an intermediate voyage, or should be lost, it is held that, with the two exceptions stipulated, this is a warranty that a cargo of the kind and quality specified shall be shipped by the vessel, and brought

home for the benefit of the buyers. *(l)* But if there be also

* 567 a * proviso that goods of the kind and quality contracted for are shipped on the vendor's account, and instead thereof a cargo of an inferior description of the same kind of goods should be shipped, the vendor would not in that event be liable for a breach of warranty; nor could the purchaser claim the delivery of such cargo, with the stipulated reduction in price for inferior quality, if the vendor has not expressly bound himself to deliver what may be shipped on his account, and in conformity with his invoice. *(m)*

A sale of a cargo at sea, with a transfer of all the indicia
* 568 of * property, is a different contract from a simple sale of goods to arrive, as we have before intimated, and necessarily imports that the purchaser is to be holden, whether the cargo arrives or not. But this sale must be subject to the conditions that the cargo is in existence at the time of the contract, and within the power to sell of the vendor, at that time. For if the cargo has previously been destroyed, there is nothing to which the contract can attach; and if the property has already been disposed of by an authorized agent of the vendor, so as to be beyond the control of the latter, the purchaser cannot be called on to fulfil the contract, though he may have the right to hold the vendor responsible for non-performance on his part. A case in which the vendor's right, under such circumstances, was adjudicated, came before the House of Lords on writ of error from the Exchequer Chamber, and the decision of the House, sustaining that of the Exchequer Chamber, was against the liability of the purchaser. The policy of insurance upon the cargo at sea had been transferred to the purchaser at the time of sale, but the cargo had already been destroyed as cargo, by damage, at the time the sale was made, though this was then unknown to the contracting parties. It was contended for the owner that the interest secured to the purchaser by the transfer of the policy of insurance was a suffi-

(l) *Simond v. Braddon*, 2 C. B. 324,
40 E. L. & Eq. 285.

(m) *Vernede v. Weber*, 1 H. & N. 311;
38 E. L. & E. 277.

cient support to the contract. The decision of the House of Lords against the vendor was upon the ground that the parties must have contemplated by the contract that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it.(n)

* SECTION IX.

* 569

MORTGAGES OF CHATTELS.

Sales of chattels, by way of mortgage, constitute a very important, and in recent times a very frequent, class of sales on condition.(o) [A mortgagor of personalty, like a mortgagor of realty, has an equity of redemption in the mortgaged goods.] (p) This subject is regulated *in many of the *570 States by statute, and, in general, record is required if possession of the goods be retained by the mortgagor; and an equity of redemption is allowed.(q) It seems that a mortgage of personal property, where the mortgagor retains possession, is not

(n) *Couturier v. Hastie*, 8 Exch. 40; 9 Exch. 102; 5 H. L. Cas. 673.

(o) See 4 Kent Com. 138, where the distinction between a pledge and a mortgage of personal property is fully set forth. A mortgage of goods is a conveyance of title *upon condition*, and if the condition is not performed, such title becomes absolute *in law*, but *equity* will, it seems, interfere to compel a redemption. Story on Bailm. §287; *Flanders v. Barstow*, 18 Me. 357; 2 Story, Eq. §1031. As to what instruments will be construed as a mortgage, and what as merely a pledge, see *Langdon v. Buel*, 9 Wend. 80; *Wood v. Dudley*, 8 Vt. 435; *Barrow v. Paxton*, 5 Johns. 258; *Coty v. Barnes*, 20 Vt. 78; *Whitaker v. Sumner*, 20 Pick. 399, and *post*, Bailments under the head of Pledge. A mortgage of personal property, like that of real estate, may consist of an absolute bill of sale, and a separate instrument of defeasance, given at the same time. *Brown v. Bement*, 8 Johns. 96; *Hopkins v. Thompson*, 2 Port. (Ala.) 433; *Winslow v. Tarbox*, 18 Me. 132; *Williams v. Roser*, 7 Mo. 556; *Barnes v. Holcomb*, 12 Sm. & M. 306; *Knight v. Nichols*, 34 Me. 208. And although the bill of sale is absolute, and

no *writing* of defeasance is given back, parol testimony is still admissible to prove that it was intended only as collateral security. *Reed v. Jewett*, 5 Greenl. 96; *Carter v. Burris*, 10 Sm. & M. 527; *Freeman v. Baldwin*, 13 Ala. 246. But see *Whitaker v. Sumner*, 20 Pick. 399; *Montany v. Rock*, 10 Mo. 506. It is well settled that mortgages of personal property need not be under seal. *Despatch Line v. Bellamy Co.*, 12 N. H. 205; *Milton v. Mosher*, 7 Met. 244; *Flory v. Denny*, 11 E. L. & E. 584; s. c. 7 Exch. 581.

(p) *Davis v. Hubbard*, 38 Ala. 185, 189; *Wylder v. Crane*, 53 Ill. 490; *Flanders v. Barstow*, 18 Me. 357; *Flanders v. Chamberlain*, 24 Mich. 305, 313; *Leach v. Kimball*, 34 N. H. 568; *Hinman v. Judson*, 13 Barb. 629; *Bragelman v. Dane*, 69 N. Y. 69; *Boyd v. Beardin*, 54 Wis. 193; *Blodgett v. Blodgett*, 48 Vt. 32.

(q) Thus in Massachusetts an equity of redemption of sixty days is allowed the mortgagor after condition broken, or after notice of an intention to foreclose given by the mortgagee for such breach. R. S. ch. 107, § 40; Stat. of 1843, ch. 72. (x) Nearly similar provisions exist in Maine. R. S. ch. 125, § 30. (y)

(x) See now Mass. Rev. Laws (1902), ch. 198, §§ 4-7.

(y) See now Me. Rev. Stats. (1883), ch. 91, §§ 3-7.

valid against a subsequent *bonâ fide* purchaser or attaching creditor, if there be neither record of the mortgage, nor actual knowledge of it on the part of the purchaser or creditor. (r)

It has been frequently attempted to make a mortgage of personalty extend over chattels not then owned by the mortgagor, but to be subsequently purchased. As where a shopkeeper makes a mortgage of "all the goods in his store, and of all which shall be bought to replace or renew the present stock." Such a mortgage might operate against the mortgagor somewhat by way * 571 of estoppel; but it has been decided that it is not * valid against a third party. (s) In general one cannot transfer

(r) As between *mortgagor and mortgagee*, a mortgage of personal property is valid, although there be no delivery of the property and no possession by the mortgagee, or record of the mortgage on the registry. *Smith v. Moore*, 11 N. H. 55; *Winsor v. McLellan*, 2 Story, 492; *Hall v. Snowhill* 2 Green (N. J.), 8. But as to subsequent purchasers, and attaching creditors of the mortgagor, without notice of the existence of the mortgage, by statute in several States, the mortgagee must either have and retain possession of the mortgaged property, or the mortgage must be recorded in the town where the mortgagor resided at the time of its execution. *Smith v. Moore*, *supra*. — And where such provision is made by statute, the recording is equivalent to actual delivery. *Forbes v. Parker*, 16 Pick. 462. But in New York it has been decided that the record of a mortgage does not rebut the presumption of fraud occasioned by the mortgagor's retention of the property, such record being merely an additional requirement. *Otis v. Sill*, 8 Barb. 102. The necessity of delivery to the mortgagee, or of a record, is wholly the effect of statutory provisions, and at common law a mortgage of personal property *might be* valid, in the absence of fraud, even against subsequent *bonâ fide* purchasers and attaching creditors, although the mortgagor remained in possession, and although no record of the mortgage existed. *Holbrook v. Baker*, 5 Greenl. 309; *Bissell v. Hopkins*, 3 Cowen, 166; *Bucklin v. Thompson*, 1 J. J. Marsh. 223; *Letcher v. Norton*, 4 Scam. 575; *Ash v. Savage*, 5 N. H. 545; *Homes v. Crane*,

2 Pick. 610. Such continued possession by the mortgagor may be sufficient evidence of fraud, but it would not alone be, in most States, conclusive. *Id.* In Vermont it would be. *Russell v. Fillmore*, 15 Vt. 130. Although the mortgagor remain in possession, and without any record of the mortgage, it seems that a subsequent purchaser, or attaching creditor *having actual notice* of the existence of the mortgages, acquires no rights against the mortgagee, the latter being guilty of no fraud. *Sanger v. Eastwood*, 19 Wend. 514; *Stowe v. Meserve*, 13 N. H. 46; *Gregory v. Thomas*, 20 Wend. 17. The contrary has been held in Massachusetts. (x) *Travis v. Bishop*, 13 Met. 304. And see *Denny v. Lincoln*, *id.* 200.

(s) *Jones v. Richardson*, 10 Met. 481. In this case the property mortgaged was thus described, namely: "The whole stock in trade of said A., as well as each and every article of merchandise which the said A. (the mortgagor) bought of one T. W., as every other article constituting said A.'s stock in trade, in the shape the same is and *may become*, in the usual course of the said A.'s business as a trader." It was admitted that the goods in question, which had been attached by a creditor of the mortgagor, were at *the time of the attachment* the stock in trade of the said A., but that only a part of them was owned by him, until after he had made said mortgage. The court after a critical review of the authorities bearing upon this point, *held*, that the mortgagee could not, as against third persons, acquire under this mortgage any valid title to those

(r) See *Smythe v. Sprague*, 149 Mass. 310, 313, 21 N. E. 383. Now, "unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto until it has

been so recorded (*i. e.* within fifteen days from the date written in the mortgage); and a record made subsequently to the time limited shall be void." Mass. Rev. Laws (1902), ch. 198, § 1.

what he has not at the time; but an assignment of property, with what may be its future increase or incidents, is valid, at least in equity, as the assignment of a ship, with the oil then in her, and all the oil to be taken during the voyage. (t)¹ (x)

Where the mortgagee permitted the mortgagor to remain in possession, for the purpose and with the power of selling the goods, such mortgage, although recorded, would not avoid the sale, even if it did not express in any way such purpose and power, if they could be inferred from the circumstances. Supposing the whole transaction to be *bonâ fide*, the mortgagor would be considered as selling the goods as the agent of the mortgagee, and the proceeds would belong to the mortgagee; and, if sold on credit, the debt could not be reached by an attaching creditor of the mortgagor through the trustee process. (u)

goods purchased by the mortgagor after the giving of the mortgage. The same view is supported by the case of *Lunn v. Thornton*, 1 C. B. 379; *Rhines v. Phelps*, 3 Gilman, 455; *Barnard v. Eaton*, 2 Cush. 294; *Pettis v. Kellogg*, 7 Cush. 471; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Otis v. Sill*, 8 Barb. 102. The case of *Abbott v. Goodwin*, 20 Me. 408, which may seem to conflict with the rule laid down in the text, does not seem to us correct, and is apparently inconsistent with the views of the same court as expressed in the later case of *Goodenow v. Dunn*, 21 Me. 96. And see also *Hope v. Hayley*, 5 E. & B. 830.

(t) *Langton v. Horton*, 1 Hare, 549.

(u) Unless there is some stipulation in

the mortgage, allowing the mortgagor to remain in possession of the goods, the right of immediate possession vests, together with the property in them, in the mortgagee; and he may have an action against any one taking them from the mortgagor. *Pickard v. Low*, 15 Me. 48; *Brackett v. Bullard*, 12 Met. 308; *Coty v. Barnes*, 20 Vt. 78. And parol proof is not admissible to show an agreement that the mortgagor should remain in possession, the mortgage itself being silent upon the subject. *Case v. Winship*, 4 Blackf. 425. And although the mortgage contains an express stipulation that the mortgagor shall remain in possession, until default of payment, and with a power to sell for the payment of

¹ As to a valid chattel mortgage upon the product of property in which the mortgagor has a present interest, see *Conderman v. Smith*, 41 Barb. 404; *Wilson v. Wilson*, 37 Md. 1, 11; *Robinson v. Elliott*, 22 Wall. 513; *Tennessee Bank v. Ebbert*, 9 Heiskell, 153; *Meyer v. Johnston*, 53 Ala. 237; *Gittings v. Nelson*, 86 Ill. 591. In California, a mortgage of a crop before seed-sowing, if the mortgagor owns the land, may be made. *Arques v. Wasson*, 51 Cal. 620. In Indiana, after-acquired property may be mortgaged. *Headrick v. Brattain*, 63 Ind. 438. — K.

(x) In Massachusetts, it is settled by the later decisions that possession of after-acquired property, rightfully taken and maintained by a mortgagee, under a mortgage purporting to cover it, gives him a title good against the mortgagor, and even against an assignee in insolvency or an attaching creditor. *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83; *Bennett v. Bailey*, 150 Mass. 257, 22 N. E. 916; *Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075.

A transaction which is intended as supplying security, though in the form of an absolute sale, is usually subject to the

statutes relating to chattel mortgages. See, e.g., *Damm v. Mason*, 98 Mich. 237, 57 N. W. 123; *Pinch v. Willard*, 108 Mich. 204, 66 N. W. 42. But a writing which is in effect a sale of chattels is not affected, as to the parties' rights or defences, by the addition of a seal. *Bridges v. Goldsmith*, 143 N. Y. 424, 33 N. E. 458. Nor will that which is really a conditional sale be changed by the fact that the contract contains such misnomers as "hired and received" and "rent." *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 381.

the mortgage debt, the mortgagee may nevertheless sustain trover against an officer attaching the goods as the property of the mortgagor. *Melody v. Chandler*, 3 Fairf. 282; *Forbes v. Parker*, 16 Pick. 462; *Welch v. Whittemore*, 25 Me. 86; *Ferguson v. Thomas*, 26 Me. 499. See *Barnard v. Eaton*, 2 Cush. 294; *Camp v. Camp*, 2 Hill (N. Y.), 628. See also *Collins v. Myers*, 16 Ohio, 547. In *Edgell v. Hart*, 13 Barb. 380,

where a mortgage, although recorded, was intended to cover property afterwards to be procured by the mortgagor, and in it the mortgagee gave him the right to sell the goods for ready pay, without being under any obligation to apply the proceeds to the discharge of the mortgage, or any other debt, it was *held*, that the mortgage was void, as calculated to delay, hinder, and defraud other creditors of the mortgagor.

* CHAPTER V.

* 573

WARRANTY.

THE warranties which accompany a sale of chattels are of two kinds in respect to their subject-matter; they are a warranty of title and a warranty of quality. They are also of two kinds in respect to their form, as they may be express or implied. (*x*)

Blackstone says, "A purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." (*a*) But he also says afterwards, "In contracts for sales, it is constantly understood, that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him to exact damages for this deceit." (*b*) From this it might be inferred that the action is grounded on the deceit, and therefore does not lie where there is no deceit, as where one sells as his own that which is not his own, but which he verily believes to be his own. The rule, as recognized in the English courts, or in some of them, although not distinctly and positively asserted, nor so well supported by direct decision as the American rule, is essentially the same. (*c*)¹

(*a*) 2 Bl. Com. 451.

(*b*) 3 Bl. Com. 166 (Wendell's ed.), and note.

(*c*) *Medina v. Stoughton*, 1 Salk. 210 ;

Crosse v. Gardner, Carth. 90. See especially *Morley v. Attenborough*, 3 Exch. 500. A sale by a pawnbroker, under the circumstances detailed in that case, may

¹ A warranty of title is implied in case of an exchange as well as in case of a sale. *Hunt v. Sackett*, 31 Mich. 18 ; *Patee v. Pelton*, 48 Vt. 182 ; *Byrnside v. Burdett*, 15 W. Va. 702. — W.

(*x*) An affirmation upon the sale or letting of realty may amount to a warranty if the like conditions exist as in the case of a warranty upon the sale of a chattel ; a verbal warranty by one who leases a dwelling-house with covenant to do the outside repairs, that the drains are in good condition is collateral to the lease and admissible in evidence. *De Lassalle v. Guildford*, [1901] 2 K. B. 215. A contemporaneous oral agreement excepting taxes from a covenant against encumbrances is also admissible in evidence. *Stanisics v. McMurtry* (Neb.), 90 N. W. 884.

Warranties are so far collateral that they survive the acceptance of the goods by the purchaser ; they are peculiar to contracts of sale and to policies of insurance, and have no application to bailments where one person agrees to perform labor upon another's materials, or to make for the employer an article to correspond with a sample. *Mack v. Snell*, 140 N. Y. 193, 205, 35 N. E. 493 ; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 12 C. C. A. 37 ; *Punteney-Mitchell Manuf. Co. v. T. G. Northwall Co.* (Neb.), 91 N. W. 863.

* 574 And in this country it is now well settled, * by adjudications in many of our States, that the seller of a chattel,^(d) if in possession, warrants by implication that it is his own, and is answerable to the purchaser, if it be taken from him by one who has a better title than the seller, whether the seller knew the defect of his title or not, and whether he did or did not

* 575 make a distinct affirmation of his title. But if the * seller is out of possession, and no affirmation of title is made, then it may be said that the purchaser buys at his peril.^(x) And

be analogous to that of a sale of a chattel by a sheriff on execution. And here all authorities, English and American, agree that the sheriff does not impliedly warrant the title of the execution debtor to the property seized on execution; but only that he does not know that he had no title to the goods. *Peto v. Blades*, 5 Taunt. 657; *Hensly v. Baker*, 10 Mo. 157; *Chapman v. Speller*, 14 Q. B. 621; *Yates v. Bond*, 2 McCord, 382; *Bashore v. Whisler*, 3 Watts, 490; *Stone v. Pointer*, 5 Munf. 287; *Morgan v. Fencher*, 1 Blackf. 10; *Davis v. Hunt*, 2 Bailey, 412; *Friedly v. Scheetz*, 9 S. & R. 156; *Rodgers v. Smith*, 2 Cart. (Ind.) 526; *Bostick v. Winton*, 1 Sneed, 525. So a sale by an executor, administrator, or other trustees, does not raise an implied warranty of title; such person does not sell the property as his own; he does not offer it as his own; and unless guilty of fraud, he would not be responsible if the title failed. *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; *Forsythe v. Ellis*, 4 J. J. Marsh. 298; *Bingham v. Maxcy*, 15 Ill. 295; *Prescott v. Holmes*, 7 Rich. Eq. 9; *Storm v. Smith*, 43 Miss. 497. [An auctioneer does not warrant his principal's title, *Wood v. Baxter*, 49 L. T. 45.] The language of Blackstone appears to be correct, that if a person in possession of a chattel sells it, *as his own*, there is an

implied warranty of title. That the case of *Morley v. Attenborough* should not be considered as an authority, further than the actual facts of the case warrant, see *Sims v. Maryatt*, 7 E. L. & E. 330, s. c. 17 Q. B. 281, where, however, there was an *express* warranty. See also *Eichholz v. Bannister*, 17 C. B. n. s. 708; *Dorab Ally Khan v. Abdool Azeez*, L. R. 5 Ind. Ap. 116, 126. It seems always to have been held, that if a vendor sells, knowing he has no title, and conceals that fact, he is liable as for a fraud. *Early v. Garret*, 9 B. & C. 932; *Sprigwell v. Allen*, *Aleyn*, 91. In *Robinson v. Anderton*, Peake, Cas. 94, a purchaser of fixtures, the title of which was not in the vendor, was allowed to recover their price as money had and received, although the vendor was not guilty of fraud, and *bonâ fide* believed himself the owner. See on warranty of title, *Miller v. Tassel*, 24 Cal. 458; *Linton v. Porter*, 31 Ill. 107.

(d) This must be confined to sales of *chattels*. In the sale of *real estate* by deed there are no implied warranties. The words "containing so many acres," &c., do not import a covenant of quantity. *Huntley v. Waddell*, 12 Ired. L. 32; *Rickets v. Dickens*, 148 Murphey, 343; *Powell v. Lyles*, 1 id. 348; *Roswel v. Vaughan*, Cro. J. 196. See *ante*, p. * 501.

(x) Warranty of title is not implied as to goods not in the vendor's possession, when he does not represent himself to be the owner. *Balte v. Bedemiller*, 37 Oreg. 27, 60 Pac. 601, 82 Am. St. Rep. 737. Upon a sale of choses in action, or of shares of stock, there is an implied warranty of genuineness, but none that the thing sold is free from liens or defences. *Flandrow v. Hammond*, 148 N. Y. 129, 42 N. E. 511; *McClure v. Central Trust Co.*, 53 N. Y. S. 188; *Titus v. Poole*, 73 Hun, 373, 33 Am. L. Reg. n. s. 699 and note.

Warranties, when part of the contract of sale, require no separate consideration. *Standard Underground Cable Co. v. Den-*

ver Cons. El. Co., 76 Fed. 422, 22 C. C. A. 258. But a warranty which is voluntarily inserted by the seller in a bill of sale, after delivery and payment of the price, and which the contract does not require him to give, does not bind him because without consideration. *McGaughy v. Richardson*, 148 Mass. 608, 20 N. E. 202.

Implied warranties are not inconsistent with a written contract of sale. *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Hungerford Co. v. Rosenstein*, 19 N. Y. S. 471; *McCormick Harvesting M. Co. v. Martin*, 32 Neb. 723, 49 N. W. 700; *Bucy v. Pitts Agr. Works*, 89 Iowa, 464,

this is the established rule of law in this country. (e)¹ In any case where there was this warranty of title, it would seem to follow from acknowledged principles, that a title subsequently acquired by the vendor would enure to the benefit of the vendee. (f) If the seller is in possession, but the possession is * of such a kind as not to denote or imply title in him, * 576 there would be no warranty of title in England, (g) and we are confident that there would be none in this country.²

(e) *Defreeze v. Trumper*, 1 Johns. 274 (1806); *Heermance v. Vernoy*, 6 Johns. 5 (1810); *Vibbard v. Johnson*, 19 Johns. 77 (1821); *Sweet v. Colgate*, 20 Johns. 196 (1822); *Reid v. Barber*, 3 Cowen, 272 (1824); *McCoy v. Archer*, 3 Barb. 323 (1848); *Edick v. Crim*, 10 Barb. 445. *Dresser v. Ainsworth*, 9 Barb. 619, is a valuable case upon this point. See also *Coolidge v. Brigham*, 1 Met. 551; *Bucknam v. Goddard*, 21 Pick. 760; *Hale v. Smith*, 6 Greenl. 420; *Butler v. Tufts*, 13 Me. 302; *Thompson v. Towle*, 32 Me. 87; *Huntingdon v. Hall*, 36 Me. 501; *Robinson v. Rice*, 20 Mo. 229; *Lines v. Smith*, 4 Fla. 47; *Lackey v. Stouder*, 2 Cart. (Ind.) 376; *Gookin v. Graham*, 5 Humph. 480; *Trigg v. Faris*, 5 Humph. 343; *Dorsey v. Jackman*, 1 S. & R. 42; *Eldridge v. Wadleigh*, 3 Fairf. 372; *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Mockbee v. Gardner*, 2 Har. & G. 176; *Payne v. Rodden*, 4 Bibb, 304; *Inge v. Bond*, 3 Hawks, 103; *Taylor, C. J.*; *Chism v. Woods*, Hardin, 531; *Scott v. Scott*, 2 A. K. Marsh, 217; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Boyd v. Bopst*, 2 Dallas, 91; *Colcock v. Good*, 3 McCord, 513; *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; *Williamson v. Sammons*, 34 Ala. 691; *Morris v. Thompson*, 85 Ill. 16; *Marshall v. Duke*, 51 Ind. 62; *Richardson*

v. Tipton, 2 Bush, 202; *Rice v. Forsyth*, 41 Md. 389; *Matheny v. Mason*, 73 Mo. 677; *Shattuck v. Green*, 104 Mass. 42; *Storm v. Smith*, 43 Miss. 497; *Sargent v. Currier*, 49 N. H. 310; *Wood v. Sheldon*, 42 N. J. L. 421; *McGiffin v. Baird*, 62 N. Y. 329; *Krumbhaar v. Birch*, 83 Penn. St. 426; *Gilchrist v. Hilliard*, 53 Vt. 592; *Croninger v. Paige*, 48 Wis. 229; 12 Am. Jur. 311; 2 Kent Com. 478. There is still some conflict of opinion upon this point, and the American doctrine has been thought not to rest upon good foundation. The arguments and authorities upon the opposite side of the question are very ably stated in 11 Law Rep. 272 *et seq.* *Seranton v. Clark*, 39 N. Y. 220. In this last case it was decided that if the vendor be not in possession there is no warranty, and if he afterwards acquire a good title it will not enure to the benefit of the purchaser.

(f) There is always an implied warranty of title, unless the subject of the sale is the vendor's title and not the thing itself; and if after such a sale the vendor acquire the full title, it will enure to the benefit of the vendee. *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; *Word v. Cavin*, 1 Head, 506.

(g) See *ante*, p. * 573, note (c).

¹ In Bennett's edition of Benjamin on Sales (ed. 1888), pp. 616-618, the learned editor doubts the reason for not implying a warranty of title though the vendor is out of possession, provided he purports to sell an absolute title, and after an examination of the cases finds but few actual decisions supporting the distinction. — W.

² In some jurisdictions it is held that no action lies for breach of a warranty of title until the vendee has been evicted or deprived of possession. *Gross v. Kierski*, 41 Cal. 111; *Linton v. Porter*, 31 Ill. 107; *Wanser v. Messler*, 29 N. J. L. 256;

56 N. W. 541. But a warranty cannot be added by parol evidence to a written agreement of sale, when not relating to different matters. *McCray R. & C. S. Co. v. Woods*, 99 Mich. 269, 58 N. W. 320; *Mast v. Pearce*, 58 Iowa, 579; *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71; *Green v. Batson*, 71 Wis. 54, 58, 36 N. W. 849. And when the contract is reduced to writing and contains no

warranty, the presumption is that none existed. *Jackson v. Helmer*, 77 N. Y. S. 835. A warranty or covenant will be implied only when necessary to give efficacy to the transaction, and to prevent such a failure of consideration as could not have been within the parties' contemplation. *Hamlyn & Co. v. Wood & Co.*, 60 L. J. Q. B. 734,

All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties; provided, however, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For such words of warranty are usually subjected to a careful, if not a precise and stringent interpretation, as it is the fault of the buyer who asks for or receives a warranty, if it does not effectually protect him as he intended. (h)¹ (x)

(h) A general warranty is said not to cover defects plain and obvious to the purchaser, or of which he had cognizance; thus if a horse be warranted *perfect*, and want a tail or an ear. 13 H. 4, 1 b. pl. 4; 11 Ed. 4, 6 b. pl. 10; *Southerne v. Howe*, 2 Rolle, 5; *Long v. Hicks*, 2 Humph. 305; *Schuyler v. Russ*, 2 Caines, 202; *Margetson v. Wright*, 5 Mo. & P. 606; *Dillard v. Moore*, 2 Eng. (Ark.) 166. See also *Birdseye v. Frost*, 34 Barb. 367; *Bennett v. Buchan*, 76 N. Y. 386; *Marshall v. Drawhorn*, 27 Ga. 275; *McCormick v. Kelly*, 28 Minn. 135; *Leavitt v. Fletcher*, 60 N. H. 182; *Williams v. Ingram*, 21 Tex. 300. The same rule applies whether the warranty is expected or whether a warranty is implied by law, from a sound price, as is the case in some States. *Richardson v. Johnson*, 1 La. An. 389. But a vendor may warrant against a defect which is patent and obvious, as well as against any other. A warranty that a horse is sound is broken if he cannot see with one eye. *House v. Fort*, 4 Blackf.

294. See *Margetson v. Wright*, 8 Bing. 454, s. c. 7 Bing. 603; *Liddard v. Kain*, 2 Bing. 183. In *Stucky v. Clyburn*, Cheves, 186, a slave sold had a *hernia*; this was known to the buyer. Yet it was held to be within an express warranty of soundness. So of a swelling in the abdomen, plainly visible and known to the purchaser. *Wilson v. Ferguson*, Cheves, 190. So where a slave had the *scrofula* at the time of sale. *Thompson v. Botts*, 8 Mo. 710. See also *Fletcher v. Young*, 69 Ga. 591; *First Bank v. Grindstaff*, 45 Ind. 158; *Pinney v. Andrus*, 41 Vt. 631. And where a defect is obvious, yet if the purchaser be misled as to its character or extent, a warranty is implied. *Wood v. Ashe*, 3 Strob. L. 64. [So if the defect though obvious is artfully concealed. *Tabor v. Peters*, 74 Ala. 90; *Chadsey v. Greene*, 24 Conn. 562; *Kenner v. Harding*, 85 Ill. 264; *Robertson v. Clarkson*, 9 B. Mon. 507. See also *Pinney v. Andrus*, 41 Vt. 631.]

Burt v. Dewey, 40 N. Y. 283; (compare *McGiffin v. Baird*, 62 N. Y. 329; *Cahill v. Smith*, 101 N. Y. 355.) See also *Randon v. Toby*, 11 How. 493; *Krumbhaar v. Birch*, 83 Pa. 426. In others an action is allowed whenever a superior title exists, though it has not been asserted. *Chancellor v. Wiggins*, 4 B. Mon. 201; *Perkins v. Whelan*, 116 Mass. 542; *Matheny v. Mason*, 73 Mo. 677, 680; *Word v. Cavin*, 1 Head, 506. A buyer may remove a lien and deduct the amount paid for that purpose from the purchase-money. *Harper v. Dotson*, 43 Iowa, 232. Or if the purchase-money has been paid, may sue for the amount paid in removing the lien. *Sargent v. Currier*, 49 N. H. 310. — W.

¹ To create a warranty, however, no special words are necessary. *Scales v. Scanlan*, 6 Ir. L. R. 367, 371; *Robinson v. Harvey*, 82 Ill. 58; *Polhemus v. Heiman*, 45 Cal. 573. The intention of the parties will govern, and, even where the alleged warranty is in writing, it may be left to the jury to say whether it is so or not. *Tewkesbury v. Bennett*, 31 Iowa, 83; *Horton v. Green*, 66 N. C. 596. Any assertion by the seller, not an opinion or judgment, respecting the kind, quality, or condition of the article, upon which he intends the buyer to rely as an inducement, and upon which buyer does rely, is an express warranty. *Hawkins v. Pemberton*, 51 N. Y. 198; *Bishop*

(x) Express warranties are never extended by implication. *Dickson v. Zizinia*, 20 L. J. C. P. 73, 23 English Ruling Cas. 494, 499 n. But such warranties may be

* If there be no express warranty, the common law, in * 577 general, implies none. Its rule is, unquestionably, both in England and in this country, *caveat emptor*,⁽ⁱ⁾—let the purchaser take care of his own interests. This rule is apparently severe, and it sometimes works wrong and hardship; and it is not surprising that it has been commented upon in terms of strong reproach, not only by the community, but by members of the legal profession; and these reproaches have in some instances been echoed from tribunals which acknowledge the binding force

(i) *Mixer v. Coburn*, 11 Met. 559; *Winsor v. Lombard*, 18 Pick. 59; *Parkinson v. Lee*, 2 East, 321; *Stuart v. Wilkins*, Dougl. 20; *Johnson v. Cope*, 3 Har. & J. 89; *Seixas v. Woods*, 2 Caines, 48; *Holden v. Dakin*, 4 Johns. 421; *Dean v. Mason*, 4 Conn. 428; *West v. Cunningham*, 9 Port. (Ala.) 104; *Mores v. Mead*, 1 Denio, 378; *McKinney v. Fort*, 10 Tex. 220; *Hawkins v. Pemberton*, 51 N. Y. 198; *Whitaker v. Eastwick*, 75 Penn. St. 229; *Roberts v. Hughes*, 81 Ill. 130; *Hadley v. Prather*, 64 Ind. 137; *Morris v. Thompson*, 85 Ill. 16; *Byrne v. Jansen*, 50 Cal. 624; *Robinson Works v. Chandler*, 56 Ind. 575; *Dooley v. Gallagher*, 3 Hughes, C. C. 214.

v. Small, 63 Me. 12; *Warren v. Philadelphia Coal Co.*, 83 Penn. St. 437; *Wolcott v. Mount*, 7 Vroom, 262; *Byrne v. Jansen*, 50 Cal. 624; *Sparling v. Marks*, 86 Ill. 125; *Clark v. Ralls*, 50 Iowa, 275; *Horn v. Buck*, 48 Md. 358; *Patrick v. Leach*, 8 Neb. 530. — K.

found in statements made in advertisements or in a catalogue, if relied upon by the buyer. *Morris v. Bradley Fertilizer Co.*, 64 Fed. 55, 12 C. C. A. 34. And they may include patent defects. *Watson v. Roode*, 43 Neb. 348, 61 N. W. 625; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493.

The plaintiff's damages are not limited to the price paid for the warranted chattel. *Ashworth v. Wells*, 78 L. T. 136; *Reiger v. Worth Co.*, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362; *Livermore Foundry & Machine Co. v. Union Compress Co.*, 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482. The expenses caused by a breach of warranty are always an element of the damages. *Fisher v. Bertram*, 100 Ill. App. 542; *Hoenan v. Redmen*, 101 id. 603; *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53; *Dille v. Ratcliff* (id.), 69 id. 237. Thus expenses of making sales and shipments to and from the purchaser's customers, who return them, are properly included in the damages. *Punteney-Mitchell Manuf. Co. v. T. G. Northwall Co.* (Neb.), 91 N. W. 863.

The fact that the defendant made a profit by reselling warranted goods is immaterial in a suit for breach of a warranty as to the quality of the goods. *Andrews v. Schreiber*, 93 Fed. 367; see *Guetzkow Bros. Co. v. Andrews & Co.* (92 Wis. 214), 52 L. R. A. 209 and note.

The right to sue for breach of a war-

ranty is not dependent upon rescission of the sale and a return of the property. *Short v. Matteson*, 81 Iowa, 638; *Halley v. Folsom*, 1 N. D. 325; *Wait v. Borne*, 123 N. Y. 592; *Shupe v. Collender*, 56 Conn. 425.

A purchaser may recover damages for personal injuries resulting from the sale of dangerous property with a false warranty. *Dushane v. Bendedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810; *Tyler v. Moody* (Ky.), 54 L. R. A. 417. But as to third persons, remoteness of damage and the lack of privity of contract prevent, by the weight of authority, a third person thus injured from recovering against the vendor, at least when the thing sold is not imminently dangerous. See *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478; *McCaffrey v. Mossberg Manuf. Co.* (R. I.), 50 Atl. 651; 15 Harv. L. Rev. 666, where the authorities are well reviewed. In England, it is held that if a chattel, such as a chain for unloading a cargo, is known by the seller to be bought for a special purpose, and proving defective, causes personal injury to a stranger, the purchaser may recover from the seller, for breach of implied warranty, the damages he is obliged to pay for such personal injury. *Mowbray v. Merryweather*, [1895] 2 Q. B. 640; *Vogan v. Oulton*, 81 L. T. 435; *Williamson v. Rover Cycle Co.*, [1901] 2 Ir. R. 615.

of the rule. But the assailants of this rule have not always seen clearly how much of the mischief apparently springing from it arises rather from the inherent difficulty of the case. As a general rule, we must have this or its opposite; and we apprehend that the opposite rule—that every sale implies a warranty of quality—would cause much litigation and injustice. It is always in the power of a purchaser to demand a warranty; and it is a most reasonable principle, and is now established as a rule of law, that a purchaser who is put upon inquiry, is chargeable with notice or knowledge of all those facts which he would have learned by reasonable inquiry and such investigation as a man of common prudence would have made. (ii)

The decisions under the rule of *caveat emptor* have fluctuated very much, and there is a noticeable conflict and uncertainty in respect to many points of the law of warranty upon sales. But some exceptions and qualifications to the general rule are now nearly, if not quite, established, both in England and in this country; and the rule of *caveat emptor*, as it is now explained and modified, may perhaps be regarded as upon the whole well adapted to protect right, to prevent wrong, and to provide a remedy for a wrong where it has occurred.

* 578 * One important and universal exception is this: The rule never applies to cases of fraud, never proposes to protect a seller against his own fraud, nor to disarm a purchaser from a defence or remedy against a seller's fraud. (j) It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. If the seller knows of a defect in his goods, which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought perhaps on moral grounds to avoid the transaction. But this *moral* fraud has not yet grown into a *legal* fraud. In cases of this kind there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be *active fraud*. The common law does not oblige a seller to disclose all that he knows which lessens the

(ii) *Cooper v. Newman*, 45 N. H. 339. *Otts v. Alderson*, 10 Sm. & M. 476; *War-
(j) Irving v. Thomas*, 18 Me. 418; *ren v. Phila. Coal Co.*, 83 Penn. St. 437.

value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent; if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. The distinction seems to be, — and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions, — the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself. (k) ¹

* As mere silence implies no warranty, neither do re- * 579
marks which should be construed as simple praise or con-
demnation; (l) but any distinct assertion or affirmation of quality

(k) Laidlaw v. Organ, 2 Wheat. 178. See Bench v. Sheldon, 14 Barb. 66; Kintzing v. McElrath, 5 Penn. St. 467. In Irving v. Kirkpatrick, 3 E. L. & E. 17, it was decided by the House of Lords that a concealment upon a sale of real estate, to avoid the sale, must be of something that the party concealing was bound to disclose. See also Blydenburgh v. Welsh, 1 Baldw. 331; Calhoun v. Vechio, 3 Wash. C. C. 165; Echelbierger v. Barnitz, 1 Yeates, 307; Pearce v. Blackwell, 12 Ired. L. 49. In Hill v. Gray, 1 Stark. 434, from the report itself, it might seem that Lord *Ellenborough held*, that silence alone was a fraudulent concealment, sufficient to vitiate the contract. But the case is explained in Keates v. Cadogan, 10 C. B. 591, *Jervis, C. J.*, saying in Hill v. Gray, there was a “*positive aggressive* deceit. Not removing the delusion might be equivalent to an express misrepresentation.” See also Fox v. Mackreth, 2 Bro. Ch. 420; McEntire v. McEntire, 8 Ired. L. 297; Williams v. Spurr, 24 Mich. 335; Harris v. Tyson, 24 Pa. 347; Law v.

Grant, 37 Wis. 548; cf. Williams v. Beazley, 3 J. J. Marsh. 577. — On the other hand, the vendor must not practise any artifice to conceal defects, nor make any representations for the purpose of throwing the buyer off his guard. See Matthews v. Bliss, 22 Pick. 48; Arnot v. Biscoe, 1 Ves. Sen. 95. It is well settled, that misrepresentations of material facts, by which a purchaser is misled, vitiate the contract. Bench v. Sheldon, 14 Barb. 66; Doggett v. Emerson, 3 Story, 700; Daniel v. Mitchell, 1 id. 172; Small v. Attwood, 1 Younge, 407; Hough v. Richardson, 3 Story, 659; Warner v. Daniels, 1 Woodb. & M. 90. For a case where the *suppressio veri* is held to be an actionable deceit, see Paddock v. Strowbridge, 3 Williams, 470. The whole subject is ably examined in 2 Kent Com. 482 *et seq.* And in Bigelow on Fraud (ed. 1888), Vol. 1, p. 590 *et seq.* See also Bean v. Herrick, 3 Fairf. 262; Ferebee v. Gordon, 13 Ired. L. 350; Wood v. Ashe, 3 Strob. L. 64; Weimer v. Clement, 37 Penn. St. 147.

(l) Thus in Arnott v. Hughes, Chitty

¹ Thus a seller of a bill purchased by him from, and known by him to have been drawn for the accommodation of, the acceptor, as a means of borrowing money, is not bound, in the absence of any inquiry by the buyer, and where the means of information are open to the latter, to disclose at the time of the sale the circumstances under which the paper was made. People's Bank v. Bogart, 81 N. Y. 101. Where a buyer believes an article offered for sale to possess a certain quality, which it does not, and the seller is conscious of the existence of such belief, but does nothing, directly or indirectly, to bring it about, simply offering his article and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party, such “passive acquiescence of the seller in the self-deception of the buyer will not entitle the latter to avoid the contract.” Per *Coekburn, C. J.*, in Smith v. Hughes, L. R. 6 Q. B. 597. But see Stewart v. Wyoming Rancho Co., 128 U. S. 383; Barrow v. Alexander, 27 Mo. 530; Lunn v. Shermer, 93 N. C. 164; Merritt v. Robinson, 35 Ark. 483. — K.

* 580 made by the * owner *during a negotiation*, (m) for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty. (mm) (x) If such affirmation were made in good faith, it is still a warranty; and if made with a knowledge of its falsity, it is a warranty, and it is also a fraud. Whether such affirmation was intended to be, and was received as a warranty, seems to be a question for the jury; (mn) but whether the statements were in law mere expressions of opinion, or affirmations equivalent to warranty, is a question of law. Some light may be thrown on this question, which is sometimes one of much difficulty, by a comparison of two recent cases. It was held in California, that statements of a seller of mining stock, concerning the amount and richness of the ore taken out and the wood and water within reach, were not matters of opinion, but statements on which the buyer had a right to rely. (mo) While it was held in Illinois, that statements by a seller of a patent right for a certain kind of cast-iron coffins, concerning their durability and probable sale, were only expressions of opinion. (mp) It will be noticed that the statements in the

on Cont. 393, n., an action was brought on a warranty that certain goods were fit for the China market. The plaintiff produced a letter from the defendant, saying, that he had goods fit for the China market, which he offered to sell cheap. Lord *Ellenborough* held, that such a letter was not a warranty, but merely an invitation to trade, it not having any specific reference to the goods actually bought by the plaintiff. See also *Carter v. Brick*, 4 H. & N. 412, where it was held that no warranty was implied in a purchase by sample, where both parties upon inspection took it for granted that the article was of the quality represented by a third party.

(m) It is essential that a warranty, to be binding, be made *during* the nego-

tiation; if made after the sale is complete, it is without consideration and void. *Roscorla v. Thomas*, 3 Q. B. 234; *Bloss v. Kittredge*, 5 Vt. 28; *Towell v. Gatewood*, 2 Scam. 22. — If, however, the vendor in a negotiation between the parties a few days before the sale, offer to warrant the article, the warranty will be binding. *Wilmot v. Hurd*, 11 Wend. 584; *Lysney v. Selby*, Ld. Raym. 1120. But see *Hopkins v. Tanqueray*, 26 E. L. & E. 254; s. c. 15 C. B. 130.

(mm) *Hahn v. Doolittle*, 18 Wis. 196; *Marsh v. Webber*, 13 Minn. 109; *Tewkesbury v. Bennett*, 31 Iowa, 83.

(mn) *Bond v. Clark*, 35 Vt. 577.

(mo) *Gifford v. Carvill*, 29 Cal. 539.

(mp) *Miller v. Young*, 33 Ill. 354.

(x) Thus a representation that an engine "is as good as new in every particular," is not mere commendation, but a statement of fact. *Milwaukee Rice Mach. Co. v. Hamacek* (Wis.), 91 N. W. 1010. See *Morse v. Moore*, 83 Maine, 473, 22 Atl. 362; *White v. Stelloh*, 74 Wis. 435, 43 N. W. 99; *Gentili v. Starace*, 133 N. Y. 140, 30 N. E. 660; *Naylor v. McSvegan*, 21 N. Y. S. 930; *Zabriskie v. Central Vt. R. Co.*, 59 Hun, 623; *Hexter v. Bast*, 125 Penn. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874; *Wiggin v. Butcher*, 154 Mass.

447, 28 N. E. 677; *Morse v. Union Stock Yard Co.*, 21 Oregon, 289, 28 Pac. 2.

A commercial contract, even when a vague, generic word is used, such as "Manilla hemp," or a cargo of "ice" or "coal," although, taken literally, it might be satisfied by a worthless article, calls for a merchantable article of that name. *Gillespie Bros. & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q. B. 59; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742.

case in California referred to the past or present, and those in the case in Illinois referred to the future.

The rule on the subject of representations recently laid down in Pennsylvania is substantially this: if the parties to a sale are not in a condition of perfect equality as to their ability to judge accurately of the thing sold, false representations of the seller will avoid the contract. (*mq*)

It is certain that the word "warrant" need not be used, nor any other of precisely the same meaning. (*x*) It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be; or an equivalent to such undertaking. (*n*) It may be often difficult to distin-

(*mq*) *Bigler v. Flickingers*, 55 Penn. St. 279. See also *Harris v. Mullins*, 32 Ga. 704, and *Overbay v. Lighty*, 27 Ind. 27.

(*n*) A bare affirmation, not intended as a warranty, will not make the vendor liable. *Chandeler v. Lopus*, Cro. J. 4; *Bacon v. Brown*, 3 Bibb, 35; *Davis v. Meeker*, 5 Johns. 354; *Budd v. Fairmaner*, 8 Bing. 52, where a receipt for "a gray four-year old colt" was held only an affirmation or representation that he was four years old, but was no warranty to that effect. See also *Seixas v. Woods*, 2 Caines, 48, a very strong case; *Holden v. Dakin*, 4 Johns. 421; *Swett v. Colgate*, 20 id. 196; *Conner v. Henderson*, 15 Mass. 320; *Stewart v. Dougherty*, 3 Dana, 479; *House v. Fort*, 4 Blackf. 293; *Adams v. Johnson*, 15 Ill. 345. So where a horse was sold under the following advertisement "To be sold, a black gelding, five years old; has been constantly driven in the plough. Warranted," the warranty was held to apply only to his soundness, and the statement as to age was considered only as an affirmation or representation of his age, and as creating no liability unless there was deceit. *Richardson v. Brown*, 1 Bing. 344. See also *Dunlop v. Waugh*, Peake, Cas. 123; *Power v. Barham*, 4 A. & E. 473; *Jendwine v. Slade*, 2 Esp. 572; *Willard v. Stevens*, 4 Foster (N. H.), 271. On the other hand, any affirmation of the quality or condition of the thing sold (not intended as matter of opinion or belief), made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied upon by the purchaser, is an express warranty. *Osgood v. Lewis*, 2 Har. & G. 495, a very important case on the subject of warranty. *Hawkins v.*

Berry, 5 Gilman, 36; *Hilman v. Wilcox*, 30 Me. 170; *Otts v. Alderson*, 10 Sm. & M. 476; *McGregor v. Penn*, 9 Yerg. 74; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; *Beals v. Olmstead*, 24 Vt. 115. See also *Towell v. Gatewood*, 2 Scam. 22; *Pennock v. Tilford*, 17 Penn. St. 456. In *Roberts v. Morgan*, 2 Cowen, 438, the plaintiff and defendant being in negotiation for an exchange of horses, the former said "he would not exchange unless the latter would warrant his horse to be sound." The defendant answered, "He is sound except the bunch on his leg." The horse had the glanders. Held, that this was an express warranty. See also *Oneida Manuf. Society v. Lawrence*, 4 Cowen, 440; *Chapman v. Murch*, 19 Johns. 290. In *Cook v. Mosely*, 13 Wend. 277 (a sale of a mare), the buyer asked the seller if the mare was lame; the latter answered, "She was not lame, and that he would not be afraid to warrant that she was sound every way as far as he knew." See also *Beeman v. Buck*, 3 Vt. 53; *Wood v. Smith*, 4 C. & P. 45; *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; *Carley v. Wilkins*, 6 Barb. 557. In *Cave v. Coleman*, 3 Man. & R. 2, the vendor of a horse told the vendee, "You may depend upon it, the horse is perfectly quiet and free from vice." This was held to amount to an express warranty. But see *Erwin v. Maxwell*, 3 Murphey, 241. *Jackson v. Wetherill*, 7 S. & R. 480, holds that when the vendor of a horse told the purchaser before the sale that *he was sure he was perfectly safe, kind, and gentle in harness*, this created no warranty, being but a bare affirmation of quality. See also *McFarland v. Newman*, 9 Watts, 56; *Shepherd v. Temple*, 3 N. H. 455. See *Stevens v. Fuller*, 8 N. H. 463, as to what is competent evidence to prove a warranty. A

* 581 guish *between such warranty as this, and the naked praise (*nuda laus*), or simple commendation (*simplex commendatio*), which neither by the common law nor by the civil law impose any obligation; but, as matter of law, the distinction is well settled.

If a bill of sale be given, in which the article sold is * 582 described, * we consider it the better rule that this description has the full effect of warranty; (o) although there

statement that a horse's eyes "are as good as any horse's eyes in the world," does not, of itself, necessarily amount to a warranty. *House v. Fort*, 4 Blackf. 293. The question whether any particular affirmation amounts to a warranty is for the jury, the criterion being the understanding and intention of the parties. *Duffee v. Mason*, 8 Cowen, 25; *Morrill v. Wallace*, 9 N. H. 111; *Chapman v. Murch*, 19 Johns. 290. It is for the jury to say whether the language used was intended as a mere *opinion*, or belief, or as a *representation*. *Whitney v. Sutton*, 10 Wend. 411; *Foster v. Caldwell*, 18 Vt. 176; *Bradford v. Bush*, 10 Ala. 386; *Baum v. Stevens*, 2 Ired. L. 411; *Foggart v. Blackweller*, 4 id. 238; *Tuttle v. Brown*, 4 Gray, 457. A bare affirmation of soundness of a horse which is then exposed to the purchaser's inspection, is not, *per se*, a warranty. It is of itself only a representation. To give it the effect of a warranty, it must be shown to the satisfaction of the jury that the parties intended it to have that effect. *House v. Fort*, 4 Blackf. 296. See also *Tyre v. Causey*, 4 Harring. (Del.) 425. The affirmation must be made to assure the buyer of the truth of the fact asserted, and induce him to make the purchase, and must be so received and relied upon by him. *Ender v. Scott*, 11 Ill. 35; *Humphreys v. Comline*, 8 Blackf. 508.

(o) *Henshaw v. Robins*, 9 Met. 83; *Hastings v. Lovering*, 2 Pick. 214. In *Yates v. Pym*, 6 Taunt. 446, the article was described in the sale note as "58 bales of prime singed bacon." It was held to amount to a warranty that the bacon was *prime singed*. See also *Osgood v. Lewis*, 2 Har. & G. 495; *Richmond Trading, & Co. v. Farquar*, 8 Blackf. 89; *Shepherd v. Kain*, 5 B. & Ald. 240. See *Paton v. Duncan*, 3 C. & P. 336; *Teesdale v. Anderson*, 4 id. 198; *Wilson v. Backhouse*, Peake, Ad. Cas. 119; *Gardiner v. Lane*, 9 Allen, 492; 12 Allen, 399; 98 Mass. 492; *Wolcott v. Mount*, 86 N. J. L. 262; *Hawkins v. Pemberton*, 51 N. Y. 198; *White v. Miller*, 71 N. Y. 118; *Lewis v. Rountree*, 78 N. C. 323; *Jones v. George*, 61 Tex. 345; *Fraley v. Bispham*, 10 Penn. St. 320.

And see *Jennings v. Gratz*, 3 Rawle, 168; *Shister v. Baxter*, 109 Pa. 443; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Whitney v. Boardman*, 118 Mass. 242; *Hyatt v. Boyle*, 5 G. & J. 110. A contract for "good fine wine" has been held to import no warranty, these words being too uncertain and indefinite to raise a warranty. *Hogins v. Plympton*, 11 Pick. 97. A warranty that certain oil "should stand the climate of Vermont without chilling," means, that it will not chill, when used in Vermont, in the ordinary manner in which lamp oil is used. *Hart v. Hammett*, 18 Vt. 127. So a bill of sale describing the article sold simply as "tallow," raises no implied warranty that the tallow should be of good quality and color. *Lamb v. Crafts*, 12 Met. 353. And in a bill of sale of "certain lots of boards and dimension stuff now at and about the mills at P." there is no implied warranty that the boards are *merchantable*. *Whitman v. Freese*, 23 Me. 212. A bill of sale of a negro described her as "being of sound wind and limb, and free from all disease." *Held*, an express warranty that she was sound. *Cramer v. Bradshaw*, 10 Johns. 484. But a bill of sale of a horse as follows: "T. W. bought of E. R. one bay horse, five years old, last July, *considered* sound," signed by the vendor, creates no warranty of the soundness of the horse. *Wason v. Rowe*, 16 Vt. 525. See also *Towell v. Gatewood*, 2 Scam. 22; *Baird v. Matthews*, 6 Dana, 129; *Winsor v. Lombard*, 18 Pick. 57. A sale of vitriol in casks as "blue vitriol, sound and in good order," is no warranty that the vitriol is unmixd sulphate of copper, and there being proof that the term "blue vitriol" was used only as a commercial designation, the question of warranty was left to the jury in *Hawkins v. Pemberton*, 6 Rob. 42. In some early cases in America, it was *held*, that the description given to property in advertisements, bills of sale, sold notes, &c., did not enter into the contract, and therefore being but matters of description, created no warranty. Such are the cases of *Seixas v. Woods*, 2 Caines, 48; *Barrett v. Hall*, 1 Aik. 269; *Swett v. Colgate*, 20

is some disposition to * confine this rule to cases where * 583 the buyer either could not, or did not, examine into the character and condition of the goods himself; thus it has been held, that a sale with a bill of parcels implies no warranty, if the buyer actually inspected the articles for himself. (p)¹ But it was held that a bill of sale of "one horse, sound and kind" carried a warranty of soundness, although the buyer saw the horse before the sale and knew that he was lame, and the seller, when asked, refused to give a warranty. (pp) (x) A renunciation of warranty by the buyer does not bind him if there be fraud on the part of the seller. (pq)

One exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should "beware," or should take care to ascertain for himself the quality of the thing he buys, becomes utterly unreasonable, under circumstances which make such care impossible. If, therefore, the seller alone possesses the requisite knowledge, or the means of knowledge, and offers his goods for sale under circumstances which compel the purchaser to rely upon the judgment and honesty of the seller, without any examination on his own part as to the quality of the thing offered, it has been held, that the rule of *caveat emptor* does not apply, because it cannot apply, and that the seller warrants that the goods he offers for sale are, in respect to their qualities, what the purchaser may fairly understand them to be; in other words, that they are of merchantable value, and proper subjects of trade. (q)

Johns. 196, and some others; but we think that by the more modern cases a rule of law, in itself sound, was in those instances erroneously applied. See *Henshaw v. Robins*, 9 Met. 83, and 2 Kent Com. 489. See also the valuable notes to *Chandelor v. Lopus*, 1 Smith, Lead. Cas. 76 *et seq.*, where will be found an able examination of the whole subject of warranty, and p. * 586, note 1, *post*.

(p) *Carson v. Bailie*, 19 Penn. St. 375; *Lord v. Grow*, 39 Penn. St. 88.

(pp) *Brown v. Bigelow*, 10 Allen, 242.

(pq) *Berans v. Farrell*, 18 La. Ann. 232.

(q) *Gardiner v. Gray*, 4 Camp. 144; *Hanks v. McKee*, 2 Lit. 227; *Wieler v. Schilizzi*, 17 C. B. 619. See also *Gallagher v. Waring*, 9 Wend. 20, where the court were inclined to extend the rule to the case of a sale of cotton in bales,

¹ Where there is no opportunity to inspect the commodity, as in the case of canned fruit or vegetables, the maxim *caveat emptor* does not apply. *Boyd v. Wilson*, 83 Penn. St. 319. And see *Weiger v. Gould*, 86 Ill. 180; *Lord v. Grow*, 39 Pa. 88; *Pease v. Sabin*, 38 Vt. 432; *Best v. Flint*, 58 Vt. 543; *Merriam v. Field*, 39 Wis. 578. — W.

(x) See *Quis v. Halloran*, 77 N. Y. S. 196; *Johansmeyer v. Kearney*, 76 id. 930; *Wilson v. Ward* (Ind.), 64 N. E. 458. A representation that a horse is sound and kind in harness is not a warranty that it will not take fright at an electric car. *Meyer v. Krauter*, 56 N. J. L. 696, 27 Atl. 938;

Holmes v. Tyson, 147 Penn. St. 305, 23 Atl. 564; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612. By letting a horse the keeper of a livery stable does not warrant it free from undiscovered faults. *Copeland v. Draper*, 157 Mass. 528, 32 N. E. 944; see 7 Harv. L. Rev. 213.

* 584 * It might seem that the reason of this rule should apply to all cases where an article is sold of which the value is materially affected by some defect which the buyer cannot know or discover. But it is not yet conceded that in all such cases there is an implied warranty. The implication does not appear to extend to cases where an examination would be fruitless, but only to those in which there can be no examination. It is true, that in the fluctuation which has marked the course of adjudication on the subject of warranty with sale, there is a series of cases in which, for a considerable time, a principle seemed to be acquiring favor, which was almost equivalent to a rule that every sale carried with it an implied warranty of the merchantable quality of the goods sold.¹ Of course such a rule would in fact annul that of *caveat emptor*. But of late the courts seem to be retracing their steps; and, in this country at least, we consider the ancient rule as distinctly established. (r) There are but two of our States in which it is an acknowledged rule of law that a sale of a chattel for a full price carries with it an implied warranty. And in one of these the civil law, of which this is a principle, prevails. (s)

lying in the storehouse of the vendor, situate in the place where both vendor and vendee resided, notwithstanding that the vendor had no better opportunity than the vendee for the inspection of the article. Hyatt v. Boyle, 5 G. & J. 110, holds, that the rule of *caveat emptor* does not apply, if the buyer has no opportunity to inspect the goods, and in such case the seller impliedly warrants them to be merchantable. See a strong case to this effect in Merriam v. Field, 24 Wis. 640. But the mere fact that the examination is *attended with inconvenience* to the purchaser is not sufficient to dispense with the rule. It must be morally impracticable. See, on the point that an opportunity which the buyer has to inspect the thing sold prevents an

implied warranty, Taymon v. Mitchell, 1 Md. Ch. 496, and Carley v. Wilkins, 6 Barb. 557. And see also, as qualifying this rule, Foster v. Swasey, 2 Wood. & M. 217, and Taylor v. Fleet, 1 Barb. 471.

(r) The weight of authority decidedly determines that a sale for a sound price implies no warranty of quality, or that the article is merchantable. Dean v. Mason, 4 Conn. 428, is an able case on this subject; Holden v. Dakin, 4 Johns. 421; Snell v. Moses, 1 id. 96; Johnston v. Cope, 3 Har. & J. 89; Cozzins v. Whitaker, 3 Stew. & P. 322; La Neuville v. Nourse, 3 Camp. 351; West v. Cunningham, 9 Port. (Ala.) 104; Wetherill v. Neilson, 20 Penn. St. 448.

(s) South Carolina and Louisiana are

¹ Where the seller undertakes to supply goods to be manufactured by him, or goods which for any reason the buyer has no opportunity to examine, a warranty is implied that the goods shall be merchantable. Jones v. Just, L. R. 3 Q. B. 197; Weed v. Dyer, 53 Ark. 155; Blackwood v. Cutting Packing Co., 76 Cal. 212; Wilcox v. Hall, 53 Ga. 635; Mann v. Everston, 32 Ind. 355; Weiger v. Gould, 86 Ill. 180; Chicago, &c. Co. v. Tilton, 87 Ill. 547; Murchie v. Cornell, 155 Mass. 60; Grieb v. Cole, 60 Mich. 397; Hoe v. Sanborn, 21 N. Y. 552; Gaylord Mfg. Co. v. Allen, 53 N. Y. 515, 518; Lewis v. Rountree, 78 N. C. 323; Holloway v. Jacoby, 120 Pa. 583; Gerst v. Jones, 32 Gratt. 518; Harris v. Waite, 51 Vt. 480; Best v. Eliot, 58 Vt. 543; Hood v. Bloch, 29 W. Va. 244; Morehouse v. Comstock, 42 Wis. 626. But see Englehardt v. Clanton, 83 Ala. 336. Where, however, an express warranty is made, it excludes the implication of an implied warranty that the goods sold were merchantable or fit for their intended use. De Witt v. Berry, 134 U. S. 306; Johnson v. Latimer, 71 Ca. 470; Shepherd v. Gilroy, 46 Iowa, 193; McGraw v. Fletcher, 35 Mich. 104; Cosgrove v. Bennett, 32 Minn. 371; Internat. Pavement Co. v. Smith, 17 Mo. App. 264. — W.

This distinction has been asserted. If the contract be executed, the buyer must take the thing sold with all its defects, if there be neither warranty nor fraud; but an executory contract to sell carries an obligation that the thing sold shall be merchantable. (s.)¹ The reasons for this distinction are not quite clear.

If one contracts to manufacture for a buyer an article of a certain quality, and when the article is delivered it is so deficient as to justify a refusal to accept, it is held that the buyer may tender the article to the seller, and if he refuses to receive it, may sell it for the best price he can obtain without giving notice to the seller of the time and place. (st) And the rule requiring that the deficient article must be returned when the deficiency is discovered, has no application where the deficiency was discovered only by the destruction of the article in using it; as in a case of guano sold and found to be worthless. (su)

* If goods are sold by sample, there can be no examination of the goods, but there may be of the sample. There is, therefore, in this country, an implied warranty that the goods correspond to the sample. (t)² (x) An English case seems to

the only States in which it is held that the sale of a *chattel* for a sound price creates a warranty against all faults known or unknown to the seller. *Timrod v. Shoolbred*, 1 Bay, 324; *Dewees v. Morgan*, 1 Mart. (La.) 1; *State v. Gaillard*, 2 Bay, 19; *Barnard v. Yates*, 1 Nott & McC. 142; *Missroon v. Waldo*, 2 id. 76; *Bulwinkle v. Cramer*, 27 S. C. 376; *Melançon v. Robichaux*, 17 La. 97. But this does not extend to sales of real estate. *Rupart v. Dunn*, 1 Rich. L. 101. And in sales of personal property, if the buyer is informed fully of all the circumstances, and has a fair opportunity of informing himself, he is bound by his contract, although it be a losing one. *Whitefield v. McLeod*, 2 Bay, 380. And see *Carnochan v. Gould*, 1 Bailey, 179; *Rose v. Beatie*, 2 Nott & McC. 538. And if the parties expressly agree that the buyer shall take the property at his own risk, the vendor is not

answerable for its soundness. *Thompson v. Lindsay*, 3 Brevard, 305. And a sound price does not imply a *value* of the property equal to the price, but only that there is no unsoundness. And such unsoundness must materially affect the article. *Smith v. Rice*, 1 Bailey, 648. In *Presbury v. Morris*, 18 Mo. 165, it is held, that the sale of a land-warrant carries with it an implied warranty of its validity, and the Court of Claims holds that a sale of government goods captured in war, carries a warranty of title to the purchaser. *Post v. U. S.*, 19 Law Rep. 12.

(ss) *McClung v. Kelley*, 21 Iowa, 508.

(st) *Messmore v. N. Y. Shot Co.*, 40 N. Y. 422; *Smith v. Love*, 64 N. C. 439.

(su) *Smith v. Love*, 64 N. C. 439.

(t) *Bradford v. Manley*, 13 Mass. 139, is a leading case in America upon this point. *Oneida Manuf. Society v. Lawrence*, 4 Cowen, 440; *Andrews v. Knee-*

¹ In the case of an executory sale, "when defects in the goods are patent and obvious to the senses, when the purchaser has full opportunity for examination, and knows of such defects, he must, either when he receives the goods or within what, under the circumstances, is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise, the defects will be deemed waived." *Locke v. Williamson*, 40 Wis. 377. — K.

² But the sale must be solely by sample. *Day v. Raguet*, 14 Minn. 273. In Pennsylvania, a sale by sample is not a warranty, but a guaranty simply that the goods are like

(x) Upon a sale by sample, the general rule of law is that there is a warranty both that the goods conform to the sample, and that they contain no latent defect

hold, that if the goods do not correspond to the sample, the vendee can recover only by showing some knowledge on the part of the vendor of this want of correspondence. (u) We doubt this, because we hold that such a sale implies warranty. (x) If they do

land, 6 id. 354; *Gallagher v. Waring*, 9 Wend. 20; *Beebe v. Robert*, 12 id. 413; *Boorman v. Jenkins*, 12 id. 466; *Moses v. Mead*, 1 Denio, 386; *Brower v. Lewis*, 19 Barb. 574; *Beirne v. Dord*, 1 Seld. 95; *Hargous v. Stone*, id. 73; *Borrekins v. Bevan*, 3 Rawle, 37; *Rose v. Beatie*, 2 Nott & McC. 538; *Barnard v. Kellogg*, 10 Wall. 383; *Hughes v. Bray*, 60 Cal. 284; *Merriman v. Chapman*, 32 Conn. 146; *Webster v. Granger*, 78 Ill. 230; *Home Lightning Rod Co. v. Neff*, 60 Iowa, 138; *Gill v. Kaufman*, 19 Md. 157; *Schnitzer v. Oriental Print Works*, 114 Mass. 123; *Graff v. Foster*, 67 Mo. 512; *Boothby v. Plaisted*, 51 N. H. 436; *Osborn v. Gantz*, 60 N. Y. 540; *West Republic Mining Co. v. Jones*, 108 Pa. 55; *Proctor v. Spratley*, 78 Va. 254; *Dayton v. Hooglund*, 39 Ohio St. 671. *Beirne v. Dord*, 2 Sandf. 89, is an excellent case upon this point. It is there held, that in order to constitute a sale by sample, it must appear that the parties contracted solely in reference to the sample, or article exhibited, and that both mutually understood they were dealing with the sample, and with an understand-

ing that the bulk was like it. And in the same case upon appeal, 1 Seld. 95, and in *Hargous v. Stone*, 1 id. 73, it is decided, that the mere exhibition of a sample is not sufficient to constitute a warranty that the bulk of the goods is of the same quality with the sample; that such exhibition is but a representation that the sample has been fairly taken from the bulk of the commodity; and that for the production of the sample to have the effect of a strict warranty, it must be shown that the parties mutually understood that there was an agreement on the part of the seller that the bulk of the commodity should correspond with the sample. — An opportunity for a personal examination of the bulk is a strong circumstance against considering the sale to have been made by sample. *Hargous v. Stone*, 1 Seld. 73; *Beirne v. Dord*, 1 id. 95. See also *Waring v. Mason*, 18 Wend. 434; *Williams v. Spafford*, 8 Pick. 250; *Dickinson v. Gay*, 7 Allen, 29; *Gunther v. Atwell*, 19 Ind. 157.

(u) *Ormrod v. Huth*, 14 M. & W. 651.

in kind and merchantable. *Boyd v. Wilson*, 83 Penn. St. 319; *Selser v. Roberts*, 105 id. 242. As to a sample being free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties, see *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Drummond v. Van Ingen*, 12 App. Cas. 284. If the goods sold by sample are delivered and accepted by the buyer, he cannot return them. *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Couston v. Chapman*, L. R. 2 Sc. & D. App. 250. If the goods are sold by an average sample, it is only necessary that all the goods sold when mixed together be equal to such sample. *Leonard v. Fowler*, 44 N. Y. 289; *Schnitzer v. Oriental Works*, 114 Mass. 123. *Grimoldby v. Wells*, L. R. 10 C. P. 391, held that where the bulk of goods sold by sample are found by the purchaser on inspection after delivery not to be equal to the sample, he may reject the goods by giving notice to the vendor that he would not accept them, and that they are at vendor's risk, and need not send or offer to send them back or place them in neutral custody. — K.

which an ordinary examination will not disclose. *Price v. Kohn*, 99 Ill. App. 115; *Roth v. Continental Wire Co. (Mo. App.)*, 67 S. W. 594, 604; *Tye v. Fynmore* (3 Camp. 462), 23 English Ruling Cas. 440, 458, 463, 464 n.

In an action to recover the purchase price of goods sold by sample, the defendant has the burden of proof to show a breach of the implied warranty of conformity to the sample. *Roth v. Continental Wire Co. (Mo. App.)*, 68 S. W. 594; *Ogden v. Beatty*, 137 Penn. St. 197, 20 Atl. 620, 21 Am. St. Rep. 862; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5

L. R. A. 213, 14 Am. St. Rep. 455; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507. The Penn. Act of April 13, 1887, ch. 17, provides that, "in all sales by sample, unless the parties shall agree otherwise, there shall be an implied warranty on the part of the seller that the goods, chattels and property sold and to be delivered are the same in quality as the sample shown."

(x) Upon a sale of goods "by description," which includes a sale by sample, or when the goods are afterwards to be procured or manufactured, the buyer, not having seen the articles sold, buys by the description; there is then an implied con-

correspond, and the sample itself has a defect, even if this defect be unknown, and not discoverable by examination, there is no implied warranty against this defect, and the seller is not responsible. (v)¹ If there be an express warranty, an examination * of samples is no waiver of the warranty; nor is any in- * 586 quiry or examination into the character or quality of the things sold; for a man has a right to protect himself by such inquiry, and also by a warranty. (w)² But if the purchaser is told

(v) *Parkinson v. Lee*, 2 East, 314; (w) *Willings v. Consequa*, Pet C. C. Nichol v. Godts, 10 Exch. 191. 301.

¹ Unless he is the manufacturer or grower. *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Drummond v. Van Ingen*, 12 A. C. 284. In Pennsylvania a sale by sample implies a warranty only to the extent that the goods shall correspond to the sample in kind, and be merchantable goods of that kind; so that, if the sample were sound and undamaged and the goods unsound and damaged, no action could be maintained by the vendee if the goods were merchantable and of the same kind as the sample. *Selser v. Roberts*, 105 Penn. St. 242. — W.

² In the case of a sale of unspecified goods by sample or description, there can be no doubt that the buyer may refuse to take the goods when offered unless they correspond to the sample or description. *Bowes v. Shand*, 2 App. Cas. 455; *Re Arbitration between Green and Balfour*, 63 L. T. 97; *Fogel v. Brubaker*, 122 Penn. St. 7; and cases *infra*. Indeed many cases hold that in such case the buyer must reject the goods when opportunity for inspection is first had, and that failing to do this he has no right of action for damages. *Mackey v. Swartz*, 60 Iowa, 710; *Haase v. Nonnemacher*, 21 Minn. 486; *Thompson v. Libby*, 35 Minn. 443; *Reed v. Randall*, 29 N. Y. 358, 368; *McCormick v. Sarson*, 45 N. Y. 265; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Coplay Iron Co. v. Pope*, 103 N. Y. 232; *Studer v. Bleistein*, 115 N. Y. 316; *Meagley v. Hoyt*, 125 N. Y. 771; *Gilson v. Bingham*, 43 Vt. 410; *Barton v. Kane*, 17 Wis. 37. If these decisions are sound it would seem accurate to say that an executory sale by sample or description is subject to an implied condition rather than that it is accompanied by an implied warranty. It seems admitted, however, where, as in the case of drugs, an examination of the goods may involve their destruction, that an action lies for breach of warranty if they prove inferior, though not rejected. It was so held in regard to drugs in *Jones v. George*, 61 Tex. 345. In regard to seeds, in *Shaw v. Smith*, 45 Kan. 334; *White v. Miller*, 71 N. Y. 118; conf. *Shisler v. Baxter*, 109 Pa. 443. So in regard to railway frogs which broke from latent defects. *Gurney v. Atlantic Ry. Co.*, 58 N. Y. 358. And certainly if it is so intended there may be in any executory sale a true warranty which may be sued on if broken, though after inspection the goods have not been rejected. *Day v. Pool*, 52 N. Y. 416; *Briggs v. Hilton*, 99 N. Y. 517; *Kent v. Friedman*, 101 N. Y. 616; *Zabriskie v. Central Vt. R. R. Co.*, 131 N. Y. 72; *Dayton v. Hooglund*, 39 Ohio St. 671. And according to the better view a contract to sell goods like a certain sample or of a certain description implies not merely a condition, but also a promise that they shall correspond to the sample or description, and this promise may be enforced though the goods are retained after inspection. *Weed v. Dyer*, 53 Ark. 155; *Forcheimer v. Stewart*, 65 Iowa, 593; *Morse v. Moore*, 83 Me. 473; *Gould v. Stein*, 149 Mass. 570; *Holloway v. Jacoby*, 120 Pa. 583; *Wolcott v. Mount*,

dition that the goods shall correspond with the description, which is a different thing from a warranty; if he does not return the goods within the reasonable time allowed for inspecting them, he can treat a misdescription only as a collateral warranty, and not as a condition entitling him to rescind the contract of sale. *Varley v. Whipp*, [1900] 1 Q. B. D. 513; *Tye v. Fynmore* (3 Camp. 462), 23 English Ruling Cas. 440, 458, 461 n.; *Sorg. Co. v. Crouse*, 88 Hun

(N. Y.), 246; *Dowdle v. Bayer*, 41 N. Y. S. 184; *Knabe v. Flameless Gas Stove Co.*, 43 N. Y. S. 205; *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493; *Brummett v. Nemo Heater Co.*, 177 Mass. 480, 59 N. E. 58; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 12 C. C. A. 37; *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

that the sale must be on examination of the goods, there is no warranty, although he chooses to make no examination, and trusts to the samples. (*ww*)

Evidence of usage has been refused, when offered as to warranty by sample, (*x*) and as to warranty in general; (*y*) but this cannot be a universal rule. Indeed, we should admit it only when the evidence was itself objectionable, or the usage to be proved was insufficient. (*z*)

If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. (*a*)¹ (*xx*) This

(*ww*) *Kellogg v. Barnard*, 6 Blatch. 279, and *Barnard v. Kellogg*, 10 Wallace, 383.

(*x*) *Beirne v. Dord*, 1 Seld. 95.

(*y*) *Wetherill v. Neilson*, 20 Penn. St. 448.

(*z*) *Carter v. Crick*, 4 H. & N. 412; *Atwater v. Clancy*, 107 Mass. 369; *Jones v. Wasson*, 3 Baxter, 211; *Graff v. Foster*, 67 Mo. 512. *Re* arbitration between *Green v. Balfour*, 63 L. T. Rep. 97.

(*a*) *Beals v. Olmstead*, 24 Vt. 114; *Jones v. Bright*, 5 Bing. 533, is the leading English case on the subject. There the defendant was a *manufacturer* and vendor of copper. The plaintiff applied to him "for copper for sheathing a vessel." The defendant said: "I will supply you well." From the defendant's warehouse the plaintiff's agent then selected such copper as was wanted, and applied it to the plaintiff's vessel. It proved to be very defective, and lasted only about four months, in place of four years, the usual time of wear of good sheathing; the jury found that the decay was caused by some intrinsic defect in the quality of the copper, but that there was no satisfactory evidence of what the defect was. No fraud was imputed to the defendant. After full argument and deliberation, it was *held* by the whole Court of Common Pleas, that there was an implied warranty that the article was fit for the purpose for which it was sold. See also *Brenton v. Davis*, 8

Blackf. 317; *Rodgers & Co. v. Niles & Co.*, 11 Ohio St. 48, and *Bird v. Mayer*, 3 Wis. 362; *Fisk v. Tank*, 12 Wis. 276. *Lainge v. Fidgeon*, 6 Taunt. 108, is also an important case. See also *Brown v. Edington*, 2 Man. & G. 279; *Shepherd v. Pybus*, 3 Man. & G. 868. See also *Chambers v. Crawford, Addison*, 150, that a boat-builder, constructing a boat, is held to warrant it sufficient for *ordinary use*. See further *Ollivant v. Bayley*, 5 Q. B. 288; *Barnett v. Stanton*, 2 Ala. 195; *Kirk v. Nice*, 2 Watts, 367. The principle of the text, and the distinction between a sale of a manufactured article by the manufacturer himself, and of an ordinary sale of a chattel, as to implied warranty, is recognized in *Misner v. Granger*, 4 Gilman, 69; and in *Leflore v. Justice*, 1 Sm. & M. 381, where it is said that every person who contracts to do a piece of work, impliedly undertakes to apply sufficient skill and dexterity to its performance to complete it in a just and workmanlike manner. So in *Howard v. Hoey*, 23 Wend. 351, the distinction between manufactured articles and others is recognized. See also *Hart v. Wright*, 17 Wend. 267; s. c. 18 id. 449; *Getty v. Rountree*, 2 Chاند. 28; *Bull v. Robinson*, 28 E. L. & E. 586; s. c. 10 Exch. 342; *Brown v. Sayles*, 1 Williams, 227; *Dickson v. Jordan*, 11 Ired L. 166; *Pease v. Sabin*, 38 Vt. 432; *Bartlett v. Hoppock*, 34 N. Y. 118.

36 N. J. L. 262, 266; *Eastern Ice Co. v. King*, 86 Va. 97. See also *R. B. Gage Mfg. Co. v. Woodward*, 23 At. Rep. 16 (R. I.). If the bargain relates to specific goods, there will ordinarily be an executed sale at once, and the buyer's remedy is by action for damages. *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Underwood v. Wolf*, 131 Ill. 425; conf. *Azémar v. Cafsella*, L. R. 2 C. P. 431. See *Wiley v. Athol*, 150 Mass. 426, 434. Also p. * 582, n. (*o*) *ante*. — W.

¹ *Jones v. Padget*, 24 Q. B. D. 650; *Pacific Guano Co. v. Mullen*, 66 Ala. 582;

(*xx*) In England, see now the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), § 14; *Gillespie Bros. & Co. v. Cheney*, *Eggart & Co.*, [1896] 2 Q. B. 59; *Jones*

principle *has been carried very far. It must, however, be * 587 limited to cases where a thing is ordered for a special pur-

Snow v. Schomacker Co., 69 Ala. 111; *Curtis, &c. Mfg. Co. v. Williams*, 48 Ark. 325; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Wilcox Co. v. Owens*, 64 Ga. 601 (statutory); *Chicago Packing Co. v. Tilton*, 87 Ill. 547; *Poland v. Miller*, 95 Ind. 387; *Conant v. Nat. Bank*, 121 Ind. 323; *Blackmore v. Fairbanks*, 79 Iowa, 282; *Craver v. Hornburg*, 26 Kan. 94; *Downing v. Dearborn*, 77 Me. 457; *Rice v. Forsyth*, 41 Md. 389; *Cunningham v. Hall*, 4 Allen, 268, 273; *White v. Miller*, 71 N. Y. 118; *Thomas v. Simpson*, 80 N. C. 4; *Rogers v. Niles*, 11 Ohio St. 48; *Byers v. Chapin*, 28 Ohio St. 300; *Morse v. Union Stock Yard Co.*, 21 Ore. 289; *Port Carbon Co. v. Groves*, 68 Pa. 149; *Overton v. Phelan*, 2 Head, 445; *Bragg v. Morrill*, 49 Vt. 45; *Gerst v. Jones*, 32 Gratt. 518; *Bigelow v. Baxall*, 38 Up. Can. Q. B. 452. And see *Wilson v. Dunville*, 4 L. R. Ir. 249; 6 L. R. Ir. 210. But if the buyer selects the goods or orders a particular kind which is sent there is no warranty. *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510; *Farrows v. Andrews*, 69 Ala. 96; *Cogel v. Knisely*, 89 Ill. 598; *Walker v. Pue*, 57 Md. 155; *Hight v. Bacon*, 126 Mass. 10; *Giroux v. Stedman*, 145 Mass. 439; *Gould v. Brophy*, 42 Minn. 109; *Deeming v. Foaler*, 42 N. H. 165; *Dounce v. Dow*, 64 N. Y. 411; *Wolcott v. Mount*, 36 N. J. L. 262, 267; 38 N. J. L. 496; *Port Carbon Co. v. Groves*, 68 Pa. 149; *Shisler v. Baxter*, 109 Penn. St. 443; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Mason v. Chappell*, 15 Gratt. 572. — W.

v. Just (L. R. 3 Q. B. 197), 23 English Ruling Cas. 466, 477 n.; *Randall v. Newson* (2 Q. B. D. 10), id. 480, 490, 492 n.

The doctrine of warranty is founded on the vendor's responsibility for deception. *Dodge v. Dickson Manuf. Co.*, 113 Fed. 218; *Hexter v. Bast*, 125 Penn. St. 57, 17 Atl. 252, 11 Am. St. Rep. 874. See *Cameron v. Mount*, 86 Wis. 477; *Houston v. Cook*, 153 Penn. St. 43, 105; *Young v. Arntze*, 86 Ala. 116. If he is a manufacturer, and the vendee has ordered an article for a particular purpose, and has no opportunity of inspecting it during the manufacture, the vendor is presumed to have knowledge of latent defects produced by the process of manufacture, and is liable therefor even after acceptance. *Bierman v. City Mills Co.*, 151 N. Y. 482, 490, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Dwight Bros. Paper Co. v. Western Paper Co. (Wis.)*, 90 N. W. 444. But when the vendee has an opportunity of inspection and relies on his own judgment, there is no presumption of deceit, and no warranty is implied. *Dodge v. Dickson Manuf. Co.*, 113 Fed. 218. And when a known and described article is ordered for a particular purpose, there is no implied warranty that it will answer the buyer's purpose if the manufacturer actually supplies the thing ordered. *Seitz v. Brewers' Ref. Machine Co.*, 141 U. S. 510, 12 S. Ct. 46, 35 L. Ed. 837; *Pullman's Palace Car Co. v. Met'n St. Ry. Co.*, 157 U. S. 94, 108, 15 S. Ct. 503, 39 L. Ed. 632; *Providence Machine Co. v. Laurens Cotton Mills*, 98 Fed. 198; *Van Pub. Co. v. Westinghouse*, 76 N. Y. S. 340.

No implied warranty of fitness arises, from the payment of a full price, or from

the mere statement of the purpose for which an article is ordered, if not specific in detail, or showing reliance upon the seller's judgment. *Pullman's Palace Car Co. v. Met. St. Ry. Co.*, *supra*; *Ottawa Bottle Co. v. Gunther*, 31 Fed. 208; *Hood v. Bloch*, 29 W. Va. 244; *Goulds v. Brophy*, 42 Minn. 109; *McQuaid v. Ross*, 85 Wis. 492; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120. But goods or machinery ordered are impliedly warranted to be sufficient in quality or strength for the purposes known to be intended. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *McGowan v. American P. T. B. Co.*, 121 U. S. 575; *Wilson v. Lawrence*, 139 Mass. 318; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651; *Murchie v. Cornell*, 155 Mass., 60, 29 N. E. 207; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Boyer v. Neel*, 50 Mo. App. 26; *Johnson v. Sproull*, id. 121; *McQuaid v. Ross (Wis.)*, 22 L. R. A. 187, and note; 36 Cent. L. J. 192; *Omaha Coal Co. v. Fay*, 37 Neb. 68; *Cochran v. Jones*, 85 Ga. 678; *Shaw v. Smith*, 45 Kan. 334.

The buyer's personal inspection and his acceptance of the goods, or his failure to return them, do not waive an express warranty. *Lichtenstein v. Rabolinsky*, 77 N. Y. S. 792; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493; *Watson v. Roode*, 30 Neb. 264, 61 N. W. 625; *Postel v. Oard*, 1 Ind. App. 252; *Long v. J. K. Armsby Co.*, 43 Mo. App. 253; *Miller v. Moore*, 83 Ga. 684; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260.

If the seller so loads the goods as to interfere with a proper inspection, the ordinary rule that a warranty of the *quality* of goods does not survive their inspection and acceptance does not apply. *Fay Fruit*

pose, and not applied to those where a special thing is ordered, although this be intended for a special purpose. For if *588 the thing is itself *specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose. Nor can he rely upon statements and assertions made by the maker in circulars and advertisements concerning the article, as a warranty that it will do what is stated. (b) But where he orders a thing for a special purpose, or to do a specific work, there he puts this risk upon the person who is to supply the thing. (c) If the thing were not ordered and sold for a special purpose, evidence is admissible to show that the buyer in fact bought it intending to apply it to a special purpose, and found it unfit. (cc)

In all sales of provisions for immediate domestic use, there is an implied warranty that they are wholesome and fit for use. But this warranty extends no farther, and does not cover a sale of provisions for any other than immediate consumption. (cd) ¹ (x)

*589 *But whatever may be the law as to an implied warranty that personal property bought and sold, or ordered

(b) *Prideaux v. Burnett*, 1 C. B. (N. S.) 613.

(c) *Macfarlane v. Taylor*, L. R. 1 Sc. & D. App. 245; *Thoms v. Dingley*, 70 Me. 100. "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable." *Mauls, J.*, in *Keates v. Cadogan*, 2 E. L. & E. 320; s. c. 10 C. B. 591. See also *Chanter v. Hopkins*, 4 M. & W. 399, which fully establishes the distinction taken in the text, and is a leading case on the subject. See also *Prideaux v. Burnett*, 1 C. B. (N. S.) 613; *Bluett v. Osborne*, 1 Stark. 384; *Gray v. Cox*, 4 B. & C. 108; *Dickson v. Jordan*, 11 Ir. L. 166; *Burns v. Fletcher*, 2 Cart. (Ind.) 372.

(cc) *Bartlett v. Hoppock*, 34 N. Y. 118.

(cd) *Moses v. Mead*, 1 Denio, 378. And it seems not to matter that they are *purchased* for domestic use, unless they were *exposed to sale* for that purpose, or the seller was a *provision dealer*. *Burnby v. Bollett*, 16 M. & W. 644. But see *Divine v. McCornick*, 50 Barb. 116. See also *Van Branklin v. Fonda*, 12 Johns. 468; *Emerson v. Brigham*, 10 Mass. 197; *Hart v. Wright*, 17 Wend. 267; s. c. 18 id. 449; *Winsor v. Lombard*, 18 Pick. 57; *Humphreys v. Comline*, 8 Blackf. 516; *Sinclair v. Hathaway*, 57 Mich. 60; *Morehouse v. Comstock*, 42 Wis. 626. If an innkeeper agree with a brewer to take all his beer of him, he is bound to furnish him with beer of a wholesome quality. *Holcombe v. Hewson*, 2 Camp. 391; *Cooper v. Twibill*, 3 Camp. 286.

¹ As in sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use. *Howard v. Emerson*, 110 Mass. 320; *Ward v. Hobbs*, 2 Q. B. D. 331 3, Q. B. D. 150. See also *Ryder v. Neitge*, 21 Minn. 70. And in *Giroux v. Stedman*, 145 Mass. 439, it was held that where a farmer, not being a regular dealer in provisions, killed a hog and sold it, knowing that the purchaser intended to eat it, there was no implied warranty that it was fit for food. — W.

Co. v. Talerico (Tex. Civ. App.), 69 S. W. 196; see *Lichtenstein v. Rabolinsky*, 77 N. Y. S. 792.

(x) *Warren v. Buck*, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754. Nor does it

apply to a grocer's sale of canned meat or fish prepared by another person. *Julian v. Laubenberger*, 38 N. Y. S. 1052; *supra*, p. 619, n. 1.

and manufactured for a particular purpose, shall be reasonably fit for such a purpose, — no such rule applies to real estate. It seems, indeed, to be quite well settled, that in a lease or purchase of a house and land, there is no implied warranty that it shall be reasonably fit for habitation, occupation, or cultivation; still less that it shall be fit for the purpose for which it was taken. (d) ¹ (x)

(d) *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, 12 M. & W. 52, where the subject is very ably examined and discussed. These decisions may be in conflict with, and if so, doubtless overrule, the case of *Smith v. Marrable*, 11 M. & W. 5, where it was held, that in a lease of a house and furniture, for a temporary residence at a watering-place, and where the furniture formed the greater part of the consideration of the contract, there was an implied warranty that the house and furniture should be fit for the purpose for which it was hired; and Lord Abinger, in *Sutton v. Temple*, attempted to distinguish the two cases. The other judges, however, were inclined to think, both in *Sutton v. Temple* and *Hart v. Windsor*, that *Smith v. Marrable* could not be supported. And the same may be said of *Edwards v. Etherington*, Ry. & M. 268; s. c. 7 Dow. & R. 117; *Collins v. Barrow*, 1 Mood. & R. 112; *Salisbury v. Marshall*, 4 C. & P. 65. The doctrine of the text is sustained also in cases in Massachusetts. *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, 9 Cush. 242, 5 Law Rep. (N. S.) 155, and note. See also *ante*, p. *501, note (l).

¹ *Smith v. Marrable*, 11 M. & W. 5, referred to above, note (d), has been approved and followed in England, and it may be now regarded as settled there that there is an implied warranty or condition that a furnished house shall be tenanted at the time the tenancy is to begin. *Wilson v. Finch-Hatton*, 2 Ex. D. 336.

In both these cases the lease was for a period of a few weeks or months during the fashionable season of the place where the house was located, though the language of the court was not entirely confined to such a case. In *Ingalls v. Hobbs*, 156 Mass. 348, the Supreme Court of Massachusetts, following the English cases, held that, "In a lease of a completely furnished dwelling house for a single season, at a summer watering place, there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might be reasonably expected to make in appropriating it to the use for which it was designed." In *Franklin v. Brown*, 113 N. Y. 110, a furnished house was, when leased, unfit for habitation, owing to noxious gases (not originating in the house). The court questioned somewhat the correctness of the English cases, but in deciding that the lessee was not entitled to relief drew two distinctions between the English cases and the case at bar: "1st, It involves a lease for the ordinary period of one year, instead of a few weeks or months during the fashionable season. 2d, The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default." In *Edwards v. McLean*, 122 N. Y. 302, it was held that the lessor was not responsible for infection arising in a furnished house after the execution of a lease for four months, though before the beginning of the term, and that there was no defence to an action for rent. In *Fisher v. Lighthall*, 4 Mackey, 82, it was held broadly that in the letting of a furnished house there is no implied contract or condition that it shall be habitable. — W.

(x) When a house or rooms are let furnished or unfurnished, for other than a very short term, there is no implied warranty or condition that the premises will continue reasonably fit for habitation during the tenancy. *Sarson v. Roberts*, [1895] 2 Q. B. 395; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286; *Petts v. Voight Brewery Co.*, 116 Mich. 418, 74 N.W. 651; *Toner v. Meussdorffer*, 123 Cal. 462, 56 Pac. 39; *Gately v. Campbell*, 124 Cal. 520, 57

Pac. 567; *Roehrs v. Timmons* (Ind. App.), 63 N. E. 481.

In building contracts specifications used merely to show what kind of work and materials as to the roof were called for, do not require the construction of a roof that will remain tight for a specified time, and there is no continuing warranty as to the condition of the roof during such time. *White v. McLaren*, 151 Mass. 553, 557, 24 N. E. 911.

No warranty can be implied from circumstances, if there be an express refusal to warrant. *(e)* And where the contract of sale is in writing, and contains no warranty, there parol evidence * 590 is not admissible to add a warranty. *(f)* And if there * be a warranty in writing, it cannot be enlarged or varied by parol evidence. *(g)* But although there be a writing between the parties, if it does not amount to a contract of sale, as if it be an ordinary bill of sale, merely intended as a receipt, or an acknowledgment of the payment of the price, then it seems that parol evidence is admissible to show the actual terms of the sale, and that there was a warranty. *(h)*

Ships often are, and any property may be, sold "with all faults." *(x)* This is an emphatic exclusion of all warranty. But it gives the seller no right to commit a fraud, nor will it prevent the sale from being avoided on proof of fraud. And it is fraud if the seller conceals existing faults, and draws the attention of the buyer away so as to prevent his discovering them, or places the property in such circumstances that discovery is impossible, or made very difficult. *(i)*

(e) *Rodrigues v. Habersham*, 1 Spears, 314. See also *Bywater v. Richardson*, 1 A. & E. 508; *Atkins v. Howe*, 18 Pick. 16.

(f) This was distinctly adjudged in *Van Ostrand v. Reed*, 1 Wend. 424. It rests upon the familiar principle that the writing is supposed to contain all the contract. *Reed v. Wood*, 9 Vt. 285; *Mumford v. McPherson*, 1 Johns. 414; *Wilson v. Marsh*, 1 Johns. 503; *Lamb v. Crafts*, 12 Met. 353; *Dean v. Mason*, 4 Conn. 432; *Randall v. Rhodes*, 1 Curtis, 90; *Mast v. Pearce*, 58 Iowa, 579.

(g) *Kain v. Old*, 2 B. & C. 634; *Pickering v. Dowson*, 4 Taunt. 779; *Pender v. Fobes*, 1 Dev. & B. 250; *Smith v. Williams*, 1 Murphey, 426. — So an express warranty will not be extended by implication from other parts of the contract in which it occurs. *Dickson v. Zizinia*, 2 E. L. & E. 314; s. c. 10 C. B. 602.

(h) *Allen v. Pink*, 4 M. & W. 140; *Herson v. Henderson*, 1 Foster (N. H.), 224; *Hogins v. Plympton*, 11 Pick. 97;

Bradford v. Manly, 13 Mass. 142. So parol proof is admissible to show a usage of trade as to the mode of making sales, the written memorandum and bought and sold notes being silent upon the subject. *Boorman v. Jenkins*, 12 Wend. 567; and to prove that the vendor informed the vendee at the time of sale of the defect complained of. *Schuyler v. Russ*, 2 Caines, 202.

(i) *Baglehole v. Walters*, 3 Camp. 154, is a leading case on this subject. It was there held, that if a ship is sold "with all faults," the seller is not liable for latent defects, *which he knew of*, but did not disclose at the time of sale, *unless he used some artifice to conceal them from the purchaser*. The case of *Mellish v. Motteux*, Peake, Cas. 115, where a contrary rule was adopted, was cited, but not followed. See also *Pickering v. Dowson*, 4 Taunt. 785; *Whitney v. Boardman*, 118 Mass. 242. The doctrine of the text was laid down by *Mansfield*, C. J., in *Schneider v. Heath*, 3 Camp. 508. But in all these

(x) This phrase does not cover a fault of misdescription. In *Peters & Co. v. Plummer*, commented upon in 98 L. T. 297, Mr. Justice Hawkins, in delivering judgment, is reported to have held that, where goods, "by reason of decay or other damage, become worthless, having entirely lost their distinctive character as merchantable commodities," this maxim does not

apply; but he added that he did not think that "with all faults" "did cover or entitle the purchaser to reject any number of faulty eggs, so long as there remained a sufficient number of good eggs corresponding with the sample to represent a merchantable bulk, diminished as it might be by such faulty or worthless ones."

* There has been much question as to what is a breach * 591 of the warranty of soundness; and what are the rights and remedies of a party who bought with warranty, which warranty has been broken. For an answer to the first question we will refer to the definitions and illustrations in our notes. (j)¹ On the second point, it may be gathered from the somewhat conflicting authorities, first, that the buyer may bring his action at once, founding it upon the breach of warranty, without returning the goods; but his continued possession of the goods * and * 592 their actual value would be considered in estimating the damages. (k) Secondly, he may return the goods forthwith,

cases actual fraud in the vendor must be proved in order to render him liable. See *Freeman v. Baker*, 5 B. & Ad. 797; *Early v. Garrett*, 9 B. & C. 928. As to the construction of contracts of the kind mentioned in the text, see *Freeman v. Baker*, *supra*; *Shepherd v. Kain*, 5 B. & Ald. 240; *Taylor v. Bullen*, 1 E. L. & E. 472; s. c. 5 Exch. 779. And see *ante*, p. * 578.

(j) The question has been often raised, what is soundness or unsoundness in a horse or other animal, sold with a warranty of soundness. The subject was ably examined in *Kiddell v. Burnard*, 9 M. & W. 668. *Parke, B.*, there said: "The rule as to unsoundness is, that if at the time of sale the animal has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the usefulness of the animal; or if he has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effect will diminish his natural usefulness, such animal is unsound." See also *Coates v. Stephens*, 2 Mo. & Rob. 157; *Elton v. Jordan*, 1 Stark. 127; *Elton v. Brogden*, 4 Camp. 281. So if a horse has at the time of sale the seeds of disease, which in its ordinary progress will diminish his natural usefulness, this is unsoundness. *Kiddell v. Burnard*, 9 M. & W. 668. But a temporary and curable injury, although existing at the time of sale, if it does not injure the animal for present service, is not an unsoundness. *Roberts v. Jenkins*, 1 Foster (N. H.), 116. It seems to be immaterial whether the

injury be permanent or temporary, curable or incurable, if it render the animal less fit for present usefulness and convenience. *Roberts v. Jenkins*, *supra*; *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. 127; *Kornegay v. White*, 10 Ala. 225. But see *Garment v. Barrs*, 2 Esp. 673. *Roaring* has been held to be an unsoundness. *Onslow v. Eames*, 2 Stark. 81; *contra*, *Basset v. Collis*, 2 Camp. 523. But "*crib-biting*" has been held not to be an unsoundness. *Broennenburgh v. Haycock*, Holt, 630. If not an unsoundness, it is a "vice," and if a horse is warranted free from vice, it is a breach of the warranty. *Paul v. Hardwick*, Chitty on Cont. 403, n. (r). A "bone spavin" is an unsoundness. *Watson v. Denton*, 7 C. & P. 85. A *nerved* horse is unsound. *Best v. Osborne*, Ry. & M. 290. But a defective formation, or badness of shape, which has not produced lameness at the time of sale, although it may render the horse liable to become lame at some future time (*e. g.* "*curby hocks*"), is not an unsoundness. *Brown v. Elkington*, 8 M. & W. 132. See also *Dickinson v. Follett*, 1 Mood. & R. 299. The "*navicular disease*" is an unsoundness. *Matthews v. Parker*, Oliphant, Law of Horses, 228. So of "*thick wind*." *Alkinson v. Horridge*, id. 229. "*Ossification of the cartilages*." *Simpson v. Potts*, id. 224. The question of soundness or unsoundness is particularly for the jury; and the court will not set aside a verdict on account of a preponderance of the testimony the other way. *Lewis v. Peake*, 7 Taunt. 153.

(k) *Fielder v. Starkin*, 1 H. Bl. 17, is

¹ Crib-biting was held covered by a warranty against vices, in *Dean v. Morey*, 33 Iowa, 120; as to which, however, see *Walker v. Hoisington*, 43 Vt. 608. Corns were held a breach as to soundness, in *Alexander v. Dutton*, 58 N. H. 282. Nor is it material that a disease is curable. *Thompson v. Bertrand*, 23 Ark. 731. See also *Kenner v. Harding*, 85 Ill. 265. — W.

and if he does so without unreasonable delay, this will be a rescission of the sale, and he may sue for the price if he has paid it, or defend against an action for the price, if one be brought by the seller.¹ But if he has sold a part before his discovery of the breach, and therefore cannot return them, he may still rescind the sale, and will be liable for the market value of what he does not return. (*l*) And if the vendor refuses to receive the goods back, when tendered, the purchaser may sell them; and if he sells them for what they are reasonably worth, and within a reasonable time, he may recover of the vendor the loss upon the resale, with the expense of keeping the goods and of selling them. (*m*) We should say, on the reason of the thing, that if

* 593 the buyer sells the goods with all proper precautions as * to time, place, and manner, to insure a fair sale, the vendor will be bound by the price the goods bring, whether that be in fact equal to their value or not; but this may not yet be established by adjudication. If he has a right to return the goods, his tender of them completes his right to sue for the price, whether the

a leading case upon this point. A neglect to inform the vendor of the discovered breach of the warranty for several months after the sale, will not bar the purchaser's right to an action for breach of warranty. *Pateshall v. Tranter*, 3 A. & E. 103. *Rutter v. Blake*, 2 Har. & J. 353, is a strong American case, that an action may be maintained for breach of warranty without returning the goods; but it was here *held*, that the purchaser ought to give the vendor notice where the goods were deposited. In *Kellogg v. Denslow*, 14 Conn. 411, where the authorities are very elaborately and critically examined by *Sherman*, J. the rule of the text is adopted. See also *Waring v. Mason*, 18 Wend. 425; *Thompson v. Botts*, 8 Mo. 710; *Borrekens v. Bevan*, 3 Rawle, 23; *Cozzens v. Whitaker*, 3 Stew. & P. 322; *Carter v. Stennel*, 10 B. Mon. 250; *Parker v. Pringle*, 2 Strob. L. 242; *Milton v. Rowland*, 11 Ala. 732; *Ferguson v. Oliver*, 8 Sm. & M. 332; *Wright v. Howell*, 35 Iowa, 288. The weight of modern authority is decidedly in favor of the rule of the text, that an action lies for breach of a warranty express or implied, without returning the property, or giving any notice of the defect. In *Hills v. Bannister*, 8 Cowen, 31, A sold B a bell,

warranting it not to crack within a year, and promising to recast it if it did. He was *held* not liable on his warranty, without notice, and neglect to recast it. Of course, if the purchaser has not returned the goods, their real value will be deducted from his damages; the difference between the price paid, or to be paid, and the real value, being the measure of damages. *Caswell v. Core*, 1 Taunt. 566; *Germaine v. Burton*, 3 Stark. 32; *Cary v. Gruman*, 4 Hill (N. Y.), 625; *Voorhees v. Earl*, 2 Hill (N. Y.), 288; *Comstock v. Hutchinson*, 10 Barb. 211; *Hitchcock v. Hunt*, 28 Conn. 343; *Crabton v. Kile*, 21 Ill. 180; *Plant v. Condit*, 22 Ark. 454; *Shupe v. Collender*, 56 Conn. 489; *Underwood v. Wolf*, 131 Ill. 425; *Murphy v. McGraw*, 74 Mich. 318; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260.

(*l*) *Shields v. Pettie*, 4 Comst. 122.

(*m*) *Chesterman v. Lamb*, 2 A. & E. 129; *McKenzie v. Hancock*, Ry. & M. 436; *Maclean v. Dunn*, 4 Bing. 722, *Best*, C. J.; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Messmore v. N. Y. Shot Co.*, 40 N. Y. 422; *Pope v. Allis*, 115 U. S. 363; *Woodward v. Thacher*, 21 Vt. 580; *Buffington v. Quantin*, 17 Penn. St. 310.

¹ *Jack v. Des Moines, &c. R. R. Co.*, 53 Iowa, 399; *Marshall v. Perry*, 67 Me. 78; *Morse v. Brackett*, 98 Mass. 205; *Wiley v. Athol*, 150 Mass. 426, 434; *Butler v. Northumberland*, 50 N. H. 83; *O'Malley v. Hendrickson*, 29 N. J. L. 371; *Youghiogheny Iron Co. v. Smith*, 66 Penn. St. 340; *Gates v. Bliss*, 43 Vt. 299. — W.

vendor receives them or not. (*n*) But some authorities of great weight limit his right to return the goods for breach of warranty to cases of fraud, or where there was an express agreement to that effect between the parties. (*o*)

The general rule for the amount of damage would be the price paid if the thing bought were returned. If not, it would be the difference between the price paid and the actual value. But if further damage resulted directly from the breach of warranty, that too would be recovered. Thus one selling coal dust to be used in making brick, and warranting it free from soft coal, was held responsible for the damage done to the bricks by the soft coal dust in that which was sold. (*oo*)

When a seller with warranty brings an action for the price, it seems to be settled in England that a mere breach of warranty, which is not accompanied with fraud, or does not go to destroy the identity or the value of the thing sold, is not a bar to the action; (*p*) and the tendency of American law is in the same direction. (*q*)

In general, when a buyer asserts that the goods he purchased are not what they were warranted to be, or are so different from what he ordered, or from the seller's representation of them, or from the quality and value such articles should possess, as to give him a right to rescind and avoid the sale, he must forthwith return the goods if he would exercise this right. Delay in doing so, or any act equivalent to acceptance, employment, or disposition of the goods, after he knows or should know their deficiency, if it exists, would be construed either into an admission that there was no such deficiency, or into a waiver of his right to rescind the sale because of such deficiency. (*r*)

(*n*) *Washington, J.*, in *Thornton v. Whynn*, 12 Wheat. 193.

(*o*) See *Carter v. Walker*, 2 Rich. L. 40. This is the rule in New York. *Cary v. Gruman*, 4 Hill (N. Y.), 625; *Voorhees v. Earl*, 2 Hill (N. Y.), 288; *Briggs v. Hilton*, 99 N. Y. 517. In Kentucky, *Lightburn v. Cooper*, 1 Dana, 273. In the United States courts, *Thornton v. Wynn*, 12 Wheat. 183; *Lyon v. Bertram*, 20 How. 149. In Pennsylvania, *Kase v. John*, 10 Watts, 107; *Freyman v. Knecht*, 78 Penn. St. 141. In Tennessee, *Allen v. Anderson*, 3 Humph. 581. It is the English rule. See *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Parson v. Sexton*, 4 C. B. 899; *Ollivant v. Bayley*, 5 Q. B. 238; *Dawson v. Collis*, 4 E. L. & E. 338; s. c. 10 C. B. 523; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447. And in

action brought for the price of goods sold or services performed, the defendant may reduce the damages by showing a breach of warranty on the part of the plaintiff. *Allen v. Hooker*, 25 Vt. 137.

(*oo*) *Milburn v. Belloni*, 39 N. Y. 53.

(*p*) *Parson v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 4 E. L. & E. 338; s. c. 10 C. B. 523.

(*q*) *Freeman v. Clute*, 3 Barb. 424; *West v. Cutting*, 19 Vt. 536.

(*r*) Thus in *Milner v. Tucker*, 1 C. & P. 15, a person contracted to supply a chandelier sufficient to light a certain room. The purchaser kept the chandelier six months, and then returned it; he was held liable to pay for it, although it was not according to the contract. So in *Cash v. Giles*, 3 C. & P. 407, a threshing machine was kept several years, without

- * 594 * In general there is no implied warranty whatever arising from judicial sales. (s)

complaint, but only used twice; the vendee was held liable for the price, although it was of little or no value. And in *Perceival v. Blake*, 2 C. & P. 514, keeping property two months without objection was *held* to be an acceptance, and the purchaser was bound to pay for it, there being no fraud. See *Grimaldi v. White*, 4 Esp. 95; *Groning v. Mendhan*, 1 Stark. 257; *Hopkins v. Appleby*, 1 Stark. 477; *Kellogg v. Denslow*, 14 Conn. 411; *Gilson*

v. Bingham, 43 Vt. 410. Keeping a warranted article for a length of time without objection, and selling part, is evidence tending to prove that it corresponded with the warranty. *Prosser v. Hooper*, 1 J. B. Moore, 106. But the delay must take place after the discovery of the deficiency in the goods. *Clements v. Smith's Administrators*, 9 Gill, 156.

(s) *The Monte Allegre*, 9 Wheat. 644; *Puckett v. U. S.*, 19 Law Rep. 18.

* CHAPTER VI.

* 595

STOPPAGE IN TRANSITU.

SECT. I. — *What the right of Stoppage is, and who has it.*

If a vendor, who has sent goods to a purchaser at a distance, finds that the purchaser is insolvent, he may stop the goods at any time before they reach the purchaser. This right is called the right of stoppage *in transitu*. It has been held, although it cannot be considered as settled, that the discovery of the falsehood of material representations on the part of the buyer, gives the seller this right. (a) ¹ (x)

(a) *Fitzsimmons v. Joslin*, 21 Vt. 129.

¹ Stoppage *in transitu* is called into existence for the vendor's benefit after the buyer has acquired title and right of possession, and even constructive possession, but not yet actual possession, *Keeler v. Goodwin*, 111 Mass. 490, 492; *Treadwell v. Aydlett*, 9 Heiskell, 388; for the reason, it is said, that the seller's property ought not to be used in paying the buyer's debts, *Keeler v. Goodwin*, 111 Mass. 490, 492. As to a seller in such a case becoming the bailee of the buyer, see *Farneloe v. Bain*, 1 C. P. D. 445; *Gunn v. Bolckow*, L. R. 10 Ch. 491. As to estoppel of a vendor generally who has given a delivery order, see *Voorhis v. Olmstead*, 66 N. Y. 113. — K.

(x) See *Taylor v. Gt. Eastern Ry. Co.*, [1901] 1 K. B. 774; *Dixon v. Yates* (5 B. & Ad. 313), 23 Eng. Ruling Cas. 385, 407, 409 n.; *Litt v. Cowley* (7 Taunt. 169), id. 411, 413, 415, n.; *Branan v. Atlanta, &c. R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; *Wheeling & Lake Erie R. Co. v. Koontz*, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435.

One party's mere declaration of insolvency entitles the other party to put an end to the contract only when made in such circumstances as show that the insolvent cannot, or does not intend to, carry out the contract, and then the solvent party can rescind. *Mess v. Duffus*, 6 Com. Cas. 165; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117.

The right to stop in transit does not exist if the seller knew, when he sold, of the buyer's insolvency. *Smith v. Barker*, 102 Ala. 679, 15 So. 340; *Farrell v. Richmond & D. R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647; *Kingman v.*

Denison, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347; *Schuster v. Carson*, 28 Neb. 612, 44 N. W. 734; *Fenkhausen v. Fellows*, 20 Nev. 312, 4 L. R. A. 732. It is not analogous to the right to rescind a contract; and when the title has once passed by delivery, it is not divested by a subsequent change of purpose, or by an intention afterwards formed by the purchaser not to pay for the goods. *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413. See *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124; *Shaw v. Lady Ensley Coal Co.*, 147 Ill. 526, 35 N. E. 620. And, in general, a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. Per *Holmes, C. J.*, in *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383.

This right exists, strictly speaking, only when the vendor has parted with the goods. If they have never left his possession, he has a lien on them for the full payment of their price; but not this right of stoppage. (b)¹

While insolvency is necessary to create this right, it is not perfectly well settled what constitutes, for this purpose, insolvency. It would seem, however, that it should be not merely a general inability to pay one's debts; but the having taken the benefit of an insolvent law, or a stoppage of payment, or a failure evinced by some overt act. (c) Or, as it has been defined, "an inability

(b) *Parks v. Hall*, 2 Pick. 212. As to the difference between these rights, see *McEwan v. Smith*, 2 H. of L. Cas. 309. See also *Gibson v. Carruthers*, 8 M. & W. 321; *Jones v. Bradner*, 10 Burb. 193.

(c) In *Rogers v. Thomas*, 20 Conn. 54, *Storrs, J.*, said: "The cases on this subject generally mention 'insolvency' as one of the conditions on which the right of stoppage *in transitu* accrues, but they are wholly silent as to what constitutes such insolvency; and therefore its sense, as thus used, is to be gathered from the circumstances of the cases. For it is a term which is used with various meanings. In a technical sense it denotes the having taken the benefit of an insolvent law; in the popular sense, a general inability to pay debts, and in a mercantile sense, a stoppage of payment, or failure in one's circumstances, as evinced by some overt act. That a technical insolvency is sufficient to authorize the exercise of the right of stoppage *in transitu* has always been conceded. That it is not indispensable for that purpose is equally clear. Mr. Smith, in his *Compendium of Mercantile Law*, p. 549, n., expresses his belief that merchants have very generally acted as if the right to stop goods was not postponed till the occurrence of insolvency in the technical sense, and pertinently adds: 'The law of stoppage *in transitu* is as old, it must be recollected, as 1670, on the 21st of March, in which year *Wiseman v. Vandeput* was decided; so that if *insolvency* is to be taken in a technical sense, the law of stoppage *in transitu* has been varying with the varied enactments of the legislature regarding it.' That stoppage of payment amounts to insolvency for this purpose, is assumed in many of the cases. Lord *Ellenborough*, in *Newsom v. Thornton*, 6 East, 17, places the right of the vendor to stop the property on the '*insolvency*' of

the consignee, where there had been only a stoppage of payment by the vendee, when notice was given to the carrier by the vendor to retain the goods. In *Vertue v. Jewell*, 4 Camp. 31, the terms used were 'stopped payment.' See also *Dixon v. Yates*, 5 B. & Ad. 313. No case is found in which the right of stoppage *in transitu* has been either sanctioned or attempted to be justified on the ground of the insolvency of the vendee, where there was not a technical insolvency, or a stoppage of payment, or failure in circumstances, evidenced by some overt act; and Mr. Blackburn (Sale, p. 130, where this subject is very minutely examined) says, that there seems to have been no such case; and adds, that although the text-books and *dicta* of the judges do not restrict the use of the term 'insolvent,' or 'failed in his circumstances,' to one who has stopped payment, there must be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril, if the consignee be in fact solvent, it would seem no unreasonable rule to require, that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act. Mr. Smith, in his above work, clearly favors the same view, p. 130, n. Hence it appears that the authorities and text-writers furnish no support to the claim that a mere general inability to pay debts, unaccompanied with any visible change in the circumstances of the debtor, constitutes insolvency, in such a sense as to confer the right of stoppage *in transitu*." But see *Hays v. Mouille*, 14 Penn. St. 51; *Biddlecombe v. Bond*, 4 A. & E. 332; *Naylor v. Dennie*, 8 Pick. 205; *Chandler v. Fulton*, 10 Tex. 2; *Lee v. Kilburn*, 3 Gray, 594.

¹ That his remedy is not impaired by giving a delivery order, if countermanded before his bailee attorns to the buyer, see *Keeler v. Goodwin*, 111 Mass. 490. — K.

* to pay one's debts in the ordinary course as persons * 596 generally do." (d)¹

The mere insolvency or bankruptcy of the vendee will not, *per se*, amount to a stoppage *in transitu*; for there must be some act on the part of the consignor indicative of his intention to repossess himself of the goods. (e) But if it was ever considered necessary for the consignor, or some one in his behalf, to take actual possession of the goods, in order to perfect and execute his right, that doctrine is now exploded. Notice of the consignor's claim and purpose given to the carrier before delivery by him is sufficient; (f) and it should be given to the carrier having possession * and not to the vendee himself * 597 without giving notice to the carrier. (g) This notice and demand on behalf of the consignor need not be made by any person specially authorized for that purpose; it may be made by a general agent of the consignor; or even by a stranger, if it be ratified by the vendor before the delivery to the vendee. (h)² But a ratification of a notice and demand by an unauthorized person, not made until after delivery to the vendee, will not suffice. (i)

(d) *Thompson v. Thompson*, 4 Cush. 134; *Shore v. Lucas*, 3 Dow. & R. 218; *Bayly v. Schofield*, 1 M. & Sel. 338; *Secomb v. Nutt*, 14 B. Mon. 326.

(e) 2 Kent Com. 543. But the right exists only in cases of *insolvency* of the vendee. *The Constantia*, 6 Rob. Adm. 321.

(f) *Litt v. Cowley*, 7 Taunt. 169; *Holst v. Pownall*, 1 Esp. 240; *Newhall v. Vargas*, 13 Me. 93. Notice should be given, it seems, to the carrier, middleman, or other person having at the time the actual custody of the goods; or given to such a person, that it may reach the carrier before delivery. *Mottram v. Heyer*, 5 Denio, 629. But in *Bell v. Moss*, 5 Whart. 189, it was given to the assignees of the consignee, who had become insolvent, and was held sufficient. In *Northey v. Field*, 2 Esp. 613, the demand was on the officer of the custom-house where the

goods were stored. In *Whitehead v. Anderson*, 9 M. & W. 518, it is held, that a notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time, and under such circumstances, as that he may, by the exercise of reasonable diligence, communicate it to his servant, in time to prevent the delivery to the consignee. See also *Ex parte Falk*, 14 Ch. D. 446; *Kemp v. Falk*, 7 Ap. Cas. 573; *Rucker v. Donovan*, 13 Kan. 251; *Seymour v. Newton*, 105 Mass. 272, 275; *Reynolds v. Boston, &c. R. R.*, 43 N. H. 580.

(g) *Mottram v. Heyer*, 5 Denio, 629.

(h) *Whitehead v. Anderson*, 9 M. & W. 518; *Bell v. Moss*, 5 Whart. 189; *Newhall v. Vargas*, 13 Me. 93. See *ante*, p. * 49, note (g).

(i) *Bird v. Brown*, 4 Exch. 786.

¹ "By the term, 'insolvency' of the buyer, is meant his inability to pay his debts in the usual course of business. It is not necessary that he should have been adjudicated a bankrupt or insolvent debtor." Per *Morton, J.*, in *Durgy, &c. Co. v. O'Brien*, 123 Mass. 12, 13. See also *Secomb v. Nutt*, 14 B. Mon. 261; *Blum v. Marks*, 21 La. An. 268; *Walsh v. Blakely*, 6 Mont. 194; *More v. Lott*, 13 Nev. 376; *Benedict v. Schaettle*, 12 Ohio St. 515, 519. — W.

² In *Durgy, &c. Co. v. O'Brien*, 123 Mass. 12, where the demand was made by a person sent by the seller's agent, whose acts were subsequently ratified, before the buyer came into possession, but after a creditor of the buyer had attached them, the right of stoppage was held to have been reasonably exercised. — K.

The question has been raised when the insolvency may take place, in order to give this right; that is, whether the right exists by reason of an insolvency before the sale; and it was held that

the insolvency must take place between the time of the sale * 598 and that of the exercise of the right of stoppage. (j) * But

"we are far from certain that the insolvency of the buyer, existing at the time of the sale, but then unknown to the seller, and discovered by him before delivery to the buyer, does not give this right."¹

It has been much disputed whether this is a right to rescind the sale, (k) or only an extension of the common-law lien of the seller. (l) The difference is important. If stoppage *in transitu* rescinds the sale, the vendor thereby takes possession of the goods as his own, and the debt is at an end, and the seller has no claim on the purchaser for the price. But if it be only the exercise of a right of lien, then the property in the goods remains in the purchaser, or those who represent him, and the right to the price of the goods remains with the vendor. (m) Therefore, if the vendor now sells them, it must be as any one may sell goods on which he has a lien to secure an unpaid debt; if they bring

(j) Rogers v. Thomas, 20 Conn. 53.

(k) This question was much discussed in Clay v. Harrison, 10 B. & C. 99; but according to a *dictum* of Parke, J., in Stephens v. Wilkinson, 2 B. & Ad. 323, not decided. See Litt v. Cowley, 7 Taunt. 169; Wilmhurst v. Bowker, 5 Bing. N. C. 547; s. c. 7 M. & G. 882; Edwards v. Brewer, 2 M. & W. 375; Key v. Cotesworth, 14 E. L. & E. 435; s. c. 7 Exch. 595. The old case of Langfort v. Tiler, 1 Salk. 113, permitting the vendor to resell the goods, seems to proceed upon the ground of a rescission of the contract. The history and character of this right were discussed in Gibson v. Carruthers, 8 M. & W. 336. And see Wentworth v. Outhwaite, 10 M. & W. 451.

(l) The weight of authority, as well as the reason of the thing, is decidedly in favor of considering the right as an extension of the common-law lien for the price, or, as Lord Kenyon observed in Hodgson v. Loy, 7 T. R. 445, "an equitable lien adopted by the law for the purpose of substantial justice." And it seems

that the right was first introduced into equity before it was applied by the common-law courts. See Wiseman v. Vandeput, 2 Vern. 203; Snee v. Prescott, 1 Atk. 246; D'Aquila v. Lambert, 2 Eden, 75; s. c. Ambl. 399. In the following cases this right has been considered not a rescission of the sale, but merely an extension of the lien. Wentworth v. Outhwaite, 10 M. & W. 436; Bloxam v. Sanders, 4 B. & C. 941; Jordan v. James, 5 Hamm. 88; Cross v. O'Donnell, 44 N. Y. 661; Babcock v. Bonnell, 80 N. Y. 244; Rucker v. Donovan, 13 Kan. 251; Rowley v. Bigelow, 12 Pick. 307; Newhall v. Vargas, 13 Me. 93; s. c. 15 Me. 315; Rogers v. Thomas, 20 Conn. 53; Gwynne, *Ex parte*, 12 Ves. 379; Martindale v. Smith, 1 Q. B. 389; Chandler v. Fulton, 10 Tex. 2.

(m) There would seem to be no doubt that the vendor may sue for the price of the goods, notwithstanding he has stopped them *in transitu*, provided he is ready to deliver them on demand and payment. Kymer v. Suwercroft, 1 Camp. 109.

¹ It is well settled that this is sufficient (contrary to Rogers v. Thomas, note (j), *supra*); Loeb v. Peters, 63 Ala. 243; Jones v. Earl, 37 Cal. 630; Pattison v. Culton, 33 Ind. 240; Blum v. Marks, 21 La. An. 268; O'Brien v. Norris, 16 Md. 122; White v. Mitchell, 38 Mich. 390; Kingman v. Denison, 84 Mich. 608; More v. Lott, 13 Nev. 376, 380; Reynolds v. Boston, &c. R. R., 43 N. H. 580; Benedict v. Schaettle, 12 Ohio St. 515. — W.

more than the debt * he must account for the surplus; if * 599 they bring less he may demand the balance from the purchaser. (n) If he sells them only to enforce his lien, and they bring more than the price, he must return the balance to the original buyer.

This question has been much agitated; but we think the strongly prevailing authority and reason are in favor of its being an exercise of a lien by the seller, and not a rescission of the sale. Doubtless there are difficulties attendant upon either view of this question. Thus, it may be said that a seller cannot retain a lien who has parted with his possession. And then the right would be considered rather as a *quasi* lien; or, in other words, the right of stoppage *in transitu* is measured and governed, as to its effect and consequences, rather by the rules of law applicable to lien than by those which belong to rescission of sale. Perhaps the difference of opinion on this subject may be attributed, in some degree at least, to the difference in the circumstances of the cases in which the question has arisen. Thus, if there has been a complete sale of a specific chattel, agreeably to a specific order of the purchaser, the *property* in the chattel would, it should seem, pass thereby to the purchaser, subject only to the exercise of the seller's lien for the price. And, in such a case, the exercise of the right of stoppage would revest in the seller only the *possession*, just as it was when he sent the goods away; that is, subject to the *property* in the purchaser, and only for the purpose of restoring and making effectual the seller's lien. But, on the other hand, if A should send to B an order for a certain quantity of goods of a certain kind or description, and B should procure goods which he supposed answerable to the order, and send them to A, and should then hear of the failure of A, and thereupon stop the goods on their passage, B's rights might become the same as if he had never sent the goods; and the *property* would remain in him, because they had never been accepted by A, and now never could be. (o) Still, however, we think there is a strong tendency in the courts, both of England and this country, * to * 600 treat the right of stoppage *in transitu* as the exercise of a lien.

In some respects it is treated as an absolute lien, and on this ground denied to exist at all, where it cannot exist as a lien. Thus it is said that this right belongs only to one who sold the

(n) This was distinctly adjudged in *Newhall v. Vargas*, 15 Me. 314, a very able case on this subject.

(o) See *Clay v. Harrison*, 10 B. & C. 99, n.; *James v. Griffin*, 2 M. & W. 623, 632, *Parke*, B.

goods, or had distinctly the property in them; and not to one who has himself only a lien on them, as a bailee who has a lien for work done, or the like; for when such a party sends the goods away from him, he parts with the possession, and his own lien ceases. (*p*)

It is indeed quite well settled that the right of stoppage *in transitu* exists only between vendor and vendee, or between persons standing *substantially* in that relation.¹ A mere surety for the price, upon whom there is no primary liability to pay for the goods, cannot stop them upon the insolvency of the vendee merely to secure himself from loss. (*q*) But if the consignor is *virtually* the vendor, he may exercise the right. Thus, if a person in this country should send an order to his correspondent in Paris to procure and ship to him certain goods, which the latter should procure *on his own credit*, without naming the principal, and ship to him at the original price, adding only his commission, he would be considered as an original vendor, so far at least as to give him the right of stoppage *in transitu*, (*r*) if not for all purposes. So a principal, who consigns goods to his factor upon credit, may stop them on the factor's insolvency. (*s*)

The right of stoppage *in transitu* is not confined to a sale of goods. A person remitting money on a particular account, or for a particular purpose, may stop the same on hearing of the insolvency of the consignee. (*t*)² The fact that the accounts between the consignor and consignee are unadjusted, rendering it uncertain whether there is, or will be, a balance due the consignor, will not prevent the consignor from exercising this right. (*u*)

* 601 But goods shipped to pay a precedent and existing * debt, cannot be stopped on the insolvency of the consignee. (*v*)

A consignor may exercise this right, although he has received

(*p*) Sweet *v.* Pym, 1 East, 4.

(*q*) Siffkin *v.* Wray, 6 East, 371.

(*r*) Feise *v.* Wray, 3 East, 93; Newhall *v.* Vargas, 13 Me. 93; Seymour *v.* Newton, 105 Mass. 275. See also *Ex parte* Miles, 15 Q. B. D. 39.

(*s*) Kinlock *v.* Craig, 3 T. R. 119.

(*t*) Smith *v.* Bowles, 2 Esp. 578. *Aliter*

upon a general remittance from a debtor to his creditor on account of his debt.

(*u*) Wood *v.* Jones, 7 Dow. & R. 126; Vertue *v.* Jewell, 4 Camp. 31.

(*v*) Wood *v.* Roach, 1 Yeates, 177; s. c. 2 Dallas, 180; Summeril *v.* Elder, 1 Binn. 106; Clark *v.* Mauran, 3 Paige, 373.

¹ It was held in Memphis, &c. R. R. Co. *v.* Freed, 38 Ark. 614, that where a buyer ordered goods from A, who requested B to furnish and forward the goods to the buyer, and B shipped the goods to the buyer and sent the bill and bill of lading to A, that B had no right to stop the goods on account of A's insolvency. *Ex parte* Golding, 13 Ch. D. 628, however seems *contra*. See also Gwyn *v.* Richmond, &c. R. R., 85 N. C. 429. — W.

² Thus the right of stoppage *in transitu* is applicable to bills of exchange. Muller *v.* Pondir, 55 N. Y. 325. — K.

a bill of exchange for the goods, and indorsed it over; (w) or even if he has received actual payment for a part of the goods. (x)

SECTION II.

WHEN AND HOW THE RIGHT MAY BE EXERCISED.

The general rule is that this right exists as long as the goods are *in transitu*. But it is sometimes difficult to determine whether the goods which it is sought to stop are still *in transitu*. (y)¹

(w) And this is true although the bills are not yet mature. *Newhall v. Vargas*, 13 Me. 93; *Bell v. Moss*, 5 Whart. 189; *Feise v. Wray*, 3 East, 93; *Jenkyns v. Osborne*, 7 Man. & G. 678, 698; *Donath v. Broomhead*, 7 Penn. St. 301. And it is said that the consignor need not tender back the bill. *Edwards v. Brewer*, 2 M. & W. 375; *Hays v. Mouille*, 14 Penn. St. 48. But of this we should have some doubts.

(x) *Hodgson v. Loy*, 7 T. R. 440; *Newhall v. Vargas*, 13 Me. 93 — *Quære*, whether in those States where a negotiable bill or note is considered *prima facie* as payment, such a bill or note, given for the whole price, would defeat the right of stoppage? See *Chapman v. Searle*, 3 Pick. 38; *Hutchins v. Olcott*, 4 Vt. 549; *White v. Dougherty*, Mart. & Y. 309. See *Horncastle v. Farran*, 3 B. & Ald. 497; *Bunney v. Poyntz*, 4 B. & Ad. 568.

(y) If part of the goods have been delivered, the rest may nevertheless be stopped. *Buckley v. Furniss*, 17 Wend. 504. So held where the goods were separated, and one wagon-load had been delivered before the rest arrived. See also *Hanson v. Meyer*, 6 East, 614. *Ex parte Cooper*, 11 Ch. D. 68. In *Tanner v. Scovell*, 14 M. & W. 28, goods were shipped for London, and were landed at a wharf, and entered on the wharfinger's books in the *consignor's* name; he had also given the vendee an order for their delivery, under which he had received and sold the greater part; *held*, notwithstanding, that the *transitus* of the rest might be arrested. On the other hand,

in *Hammond v. Anderson*, 4 B. & P. 69, the vendor and vendee both lived in the same town, and the goods lay at the wharf of a third person. The vendee, having received an order for the delivery of the property, went to the wharf, weighed the *whole*, and took away a part; it was *held*, that the vendor had then no right to stop the remainder. So in *Slubey v. Heyward*, 2 H. Bl. 504, the whole property arrived at the port of delivery; the consignees entered the *whole* cargo at the custom-house, they also *removed a part before* the consignor attempted to stop the goods. It was *held* too late. See also *Jones v. Jones*, 8 M. & W. 431; *Bunney v. Poyntz*, 4 B. & Ad. 571, where part delivery of a portion of a haystack, with intent to separate that from the remainder, was *held* not sufficient. A valid stoppage of a part of the goods forwarded under an entire contract, will not abrogate the effect of an actual or constructive possession acquired by the consignor of the residue. *Wentworth v. Outhwaite*, 10 M. & W. 436, a very important case. The *dictum* of *Taunton, J.*, in *Betts v. Gibbins*, 2 A. & E. 57, that a partial delivery is *prima facie* a delivery of the whole has been denied. See *Tanner v. Scovell*, 14 M. & W. 37. This seems mainly on the ground that it was not *intended* by the vendee, by taking possession of part, to take possession of the whole, but to separate that part, and take possession of it alone. See *Crawshaw v. Eades*, 1 B. & C. 181; *Miles v. Gorton*, 2 Cr. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 313; *Blackman v. Pierce*, 23 Cal. 508.

¹ As long as the goods are in the possession of the carrier as such, and the bill of lading has not been transferred to a *bona fide* purchaser for value, the right continues, even though the end of the route has been reached, and when the carrier gives up his possession the right ceases. *Ex parte Watson*, 5 Ch. D. 35; *Ex parte Golding*, 13 Ch. D. 628; *Greve v. Dunham*, 60 Iowa, 108; *Symus v. Schotten*, 35 Kan. 310; *Seymour v. Newton*, 105 Mass. 272, 275; *Mohr v. Boston, &c. R. R. Co.*, 106 Mass. 67; *King-*

It seems to be settled that they are so not only while * 602 * in motion, and not only while in the actual possession of the carrier (although he was appointed and specified by the consignee), but also while they are deposited in any place distinctly connected with the transmission or delivery of them,^(z) or, rather, while in any place not actually or constructively the place of the consignee, or so in his possession or under his control that the putting them there implies the intention of delivery.

Thus, if goods are lodged in a public warehouse for non-
* 603 payment * of duties, they are not in the possession of the vendee, and the vendor may stop them.^(a)¹ So where goods are still in the custom-house, the right to stop them is not defeated, although the vendee has paid the freight, the goods having been *not* entered through loss of the invoice.^(b) The entry of the goods without payment of duties is not a termination of the transit.^(c)

^(z) This point was much discussed in *Sawyer v. Joslin*, 20 Vt. 172, where the cases on this point were thus classified by *Hall, J.*: "The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes: 1. Cases in which it has been held that the right of stoppage existed, where the goods were originally forwarded on board of a ship chartered by the vendee. 2. Where the delivery of the goods to the vendee has been deemed incomplete, by reason of his refusal to accept them. 3. Where goods remained in the custom-house, subject to a government bill for duties. 4. Where they were still in the hands of the carrier, or wharfinger, as his agent, subject to the carrier's lien for freights. 5. Where the goods, though arrived at their port of delivery, were still on shipboard,

or in the hands of the ship's lighterman, to be conveyed to the wharf. 6. Where the goods had performed part of their transit, but were in the hands of a middleman, to be forwarded on by other carriers." See *Tucker v. Humphrey*, 1 Mo. & P. 378; *Richardson v. Goss*, 3 B. & P. 127; *Loeschman v. Williams*, 4 Camp. 181; *Mills v. Ball*, 2 B. & P. 457; *Rowe v. Pickford*, 1 J. B. Moore, 526; *Leeds v. Wright*, 3 B. & P. 320; *Marshall v. Fall*, 9 La. An. 92.

^(a) *Northey v. Field*, 2 Esp. 613; *Nix v. Olive*, cited in *Abbott on Shipping*, 490; *Mottram v. Heyer*, 5 Denio, 629; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Lewis v. Mason*, 36 Up. Can. Q. B. 590; *Wiley v. Smith*, 1 Out. Ap. 179.

^(b) *Donath v. Broomhead*, 7 Penn. St. 301.

^(c) *Mottram v. Heyer*, 5 Denio, 629; s. c. 1 Denio, 483, an important case.

man v. Denison, 84 Mich. 608; *Morris v. Shrycock*, 50 Miss. 590; *U. S. Wind Engine, &c. Co. v. Oliver*, 16 Neb. 612; *Calahan v. Babcock*, 21 Ohio St. 281; *Wenger v. Barnhart*, 75 Pa. 300; *Treadwell v. Aydlett*, 9 Heisk. 388; *Half v. Allyn*, 60 Tex. 278. But if the goods have reached the place named by the buyer to the seller, the transit is at an end, though the buyer or his agent forward them to another place. *Kendal v. Marshall*, 11 Q. B. D. 356; *Ex parte Miles*, 15 Q. B. D. 39; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Becker v. Hallgarten*, 86 N. Y. 167; *Guilford v. Smith*, 30 Vt. 49. Cf. p. * 606, note 1, *post*.

The vendee or his agent may stop the goods while in transit, and thereby determine the vendor's right before the destination originally agreed upon is reached. *Wood v. Yeatman*, 15 B. Mon. 270; *Mohr v. Boston, &c. R. R.*, 106 Mass. 67, 72. See *Poole v. Houston, &c. R. R. Co.*, 58 Tex. 134. — W.

¹ So if the goods are stored in a government bonded warehouse, upon the records of which they are transferred to the buyer, the right to stop them is not defeated if, by the terms of the sale, the seller is to forward them to their destination on the buyer's order. *Mohr v. Boston, &c. R. Co.*, 106 Mass. 67. — K.

They are in transit until they pass into the possession of the vendee. But this possession may be actual or constructive. (x) The doctrine that the goods must come to the "corporal touch" of the vendee, as was once said by Lord *Kenyon*, has long since been exploded. (d) Thus, suffering the goods to be marked and resold, and marked again by the second purchaser, has been considered a constructive delivery. (e) So a delivery by the vendor, to the vendee, of the key of the vendor's warehouse, where the goods are stored, amounts to a delivery. (f)¹ So, demanding and marking the goods by the vendee's agent at the inn where the goods arrived at their destination. (g)

If the carrier, by reason of an arrangement with the consignee, or for any cause, remains in possession, but holds the goods only as the agent of the consignee, and subject to his order, this is * the possession of the consignee. (h) (y) Yet, even in * 604

(d) *Wright v. Lawes*, 4 Esp. 82; *Mottram v. Heyer*, 1 Denio, 483.

(e) *Stoveld v. Hughes*, 14 East, 308.

(f) So thought Lord *Kenyon* himself in *Ellis v. Hunt*, 3 T. R. 464.

(g) *Ellis v. Hunt*, 3 T. R. 464. So if the vendor agreed to let the goods lie in his warehouse for a short time, although free of rent, and to accommodate the vendee. *Barrett v. Goddard*, 3 Mason, 107. But see *Townley v. Crump*, 4 A. & E. 58, *contra*. So if rent be paid. *Hurry v. Mangles*, 1 Camp. 452. So delivering to the vendee a bill of parcels with an order on the storekeeper for the delivery of the goods. *Hollingsworth v. Napier*, 3 Caines, 182. But *quære*, see *post*. So giving an order by the vendor to the keeper of a warehouse, for the delivery of the goods. *Harman v. Anderson*, 2

Camp. 243. See also *Frazier v. Hilliard*, 2 Strob. L. 309. Delivery to mercantile house, merely for transmission to the vendee, by a forwarding house, does not take away the right of stoppage. *Hays v. Mouille*, 14 Penn. St. 48.

(h) This principle is well illustrated by the case of *Allan v. Gripper*, 2 Cr. & J. 218; s. c. 2 Tyr. 217. The goods were conveyed by a carrier by water, and deposited in the carrier's warehouse, to be delivered thence to the purchaser or his customers, as they should be wanted, in pursuance of an agreement to this effect between the carrier and the purchaser. This was the usual course of business between them. It was held, that the carrier became the warehouseman of the purchaser, upon the goods being deposited there, and that the vendor's right

¹ The giving a delivery order to the buyer, who gives it to a warehouseman, puts an end to the right of stoppage. *Croker v. Lawder*, 9 Ir. L. R. 21. — K.

(x) The transit does not end until the goods arrive in the purchaser's possession, actual or constructive; he has not such possession, nor is he entitled thereto, but the right to stop *in transitu* remains until he discharges the carrier's lien for freight and other charges. *Hall v. Dimond*, 63 N. H. 565, 3 Atl. 423; *Jenks v. Fulmer*, 160 Penn. St. 527, 28 Atl. 841; *Brewer Lumber Co. v. Boston & A. R. Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435; *Ex parte Hughes*, 67 L. T. 598; *Kelsea v. Ramsey & Gore Manuf. Co.*, 55 N. J. L. 320, 26 Atl. 907; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82; *Sheppard v. Newhall*, 54 Fed. 306, 4 C. C. A. 352; 32 Cent. L. J. 364. The right exists only where

there is a carrier's agency, and not when the goods are held independently, as under the charter of a log-driving company. *Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50. In order to terminate the right, the carrier's holding for the buyer must amount to an attornment. *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351.

(y) *Taylor v. Gt. Eastern Ry. Co.*, [1901] 1 K. B. 774; *William v. Hodges*, 118 N. C. 36, 18 S. E. 83; *O'Neal v. Day*, 53 Mo. App. 139. The right is not ended by successive carriage on different roads. *Lewis v. Sharvey*, 58 Minn. 464, 59 N. W. 1096.

cases where an existing usage authorizes a carrier to retain the goods in his hands as security for his whole claim against a consignee, the consignor may still stop them as *in transitu*, and take them from the carrier, by paying to him the amount due specifically for the carriage of those goods. (*i*) And the master of a ship chartered wholly, or even owned by the consignee, may, nevertheless, be a carrier in whose hands the consignor may stop the goods, if the goods are to be delivered finally to the charterer himself; but if they are on board the buyer's ship to be carried to some third party, they are so far delivered to the buyer, when they go on board his ship, as to destroy the right of stoppage. (*j*)

* 605 * So, if by the bill of lading the goods are deliverable to the order of the consignor or his assigns, the property therein does not pass to the consignee, so as to defeat this right, although they may be delivered on board the consignor's own vessel, (*k*) or on one chartered by him, (*kk*) and although the bill of lading expressed that the consignee was to pay no freight, the goods "being owner's property." (*l*) But it might be otherwise if it appeared by the bill of lading that the goods were put on board to be carried for and on * account and risk of the consignee. (*m*) So if the goods are intended for a market foreign to the residence of the consignee, and never designed to

of stoppage was gone. And the case was likened to *Foster v. Frampton*, 6 B. & C. 107; s. c. 9 Dow. & R. 108, where the vendee desired the carrier for his own convenience to let the goods remain in his warehouse until he received further directions, and also took home samples of the goods, but before the bulk was removed, he became insolvent; *held*, that the right of stoppage *in transitu* was gone. *Scott v. Pettit*, 3 B. & P. 469, was decided on the same principle.

(*i*) *Oppenheim v. Russell*, 3 B. & P. 42, is a very excellent case upon this subject.

(*j*) *Stubbs v. Lund*, 7 Mass. 453, recognizes this principle. See also *Coxe v. Harden*, 4 East, 211. In *Newhall v. Vargas*, 13 Me. 93, the purchaser lived in America; the consignor, in Havana. The former sent *his own vessel* to Havana for a cargo of molasses, which was shipped on board the vessel, consigned to the vendee, and to be delivered to him at his port of residence; it was *held*, that the vendor had the right to stop the goods at any time before they came into the actual possession of the vendee, and the case of *Stubbs v. Lund* was fully approved. See

also *Thompson v. Trail*, 2 C. & P. 334; *Buckley v. Furniss*, 15 Wend. 137; s. c. 17 Wend. 504. The case of *Bolin v. Hufnagle*, 1 Rawle, 1, seems in direct conflict with these authorities, and we think cannot be supported. But see the opinion of *Parker, B.*, in *Van Casteel v. Booker*, 2 Exch. 708. See *Turner v. The Trustees of Liverpool Docks*, in the Exchequer Chamber, 6 E. L. & E. 507; s. c. 6 Exch. 543 (an important case); *Ellershaw v. Magniac*, 6 Exch. 570, n.; *Van Casteel v. Booker*, 2 Exch. 691; *Wait v. Baker*, id. 1; *Mitchel v. Ede*, 11 A. & E. 888; *Jenkyns v. Brown*, 14 Q. B. 496; *Key v. Cotesworth*, 14 E. L. & E. 435; s. c. 7 Exch. 595; *Aguirre v. Parmelee*, 22 Conn. 473; *Brindley v. Cilwyn Slate Co.*, 55 L. J. Q. B. 67; *Ex parte Rosevear Co.*, 11 Ch. D. 560. See note (*n*), *post*.

(*k*) *Wait v. Baker*, 2 Exch. 1.

(*kk*) *Berndtson v. Strang*, Law Rep. 4 Eq. 481.

(*l*) *Turner v. Trustees of Liverpool Docks*, 6 E. L. & E. 507; s. c. 6 Exch. 543.

(*m*) *Van Casteel v. Booker*, 2 Exch. 691; *Wilmshurst v. Bowker*, 7 Man. & G. 882; *Jenkyns v. Brown*, 14 Q. B. 406.

come into the actual possession of the charterer, then it would seem that a delivery on board of the vessel, whether owned or hired by the purchaser or not, has been held final, and the right of stoppage *in transitu* gone. (n) ¹

As the goods may pass *constructively* into the possession of the consignee, so they may be transferred by him before they reach him, in such a way as to destroy the consignor's right of stoppage *in transitu*. This may be done by an indorsement and delivery of the bill of lading. This instrument is now (as we had occasion to say in an earlier part of this work) (o) by the custom of merchants, which is adopted by the courts and made a rule of law, regarded as negotiable; or, more accurately speaking, as *quasi* negotiable, its indorsement and delivery operating as a symbolic delivery of the goods mentioned in it. (p) And such transfer, if it is in good faith and for a *valuable *607 consideration, passes the property to the second vendee, who holds it free from the right of the original vendor to stop

(n) This distinction is fully supported by *Fowler v. Kymer*, cited in 3 East, 396, and recognized in *Stubbs v. Lund*, 7 Mass. 457; *Newhall v. Vargas*, 13 Me. 93; and *Rowley v. Bigelow*, 12 Pick. 308, supports the same view. See also *Valpy v. Gibson*, 4 C. B. 837; *Cowas-jee v. Thompson*, 5 Moore, P. C. 165; *Schotsmans v. Lancashire R. R. Co.*, L. R. 2 Ch. 332.

(o) See *ante*, p. *289, and *post*, vol. ii. pp. *291, *292.

(p) *Small v. Moates*, 9 Bing. 574; *Dixon v. Yates*, 5 B. & Ad. 313; *Jenkyns v. Osborne*, 7 Man. & G. 678. The case of *Thompson v. Dominy*, 14 M. & W. 403, shows that the mere indorsement of a bill of lading does not authorize the indorsee to bring a suit in his own name against the signers for their failure to deliver the goods according to its terms. See also *Stollenwerck v. Thacher*, 115 Mass. 224, 226, 227; *Buffalo Bank v. Fiske*, 71 N. Y. 353; *Farmers' Bank v. Erie R. R. Co.*, 72 N. Y. 188; it would not be correct, therefore, to consider such bills *negotiable*, exactly, although they have sometimes been so called (see *Berkley v. Watling*, 7 A. & E. 29; *Bell v. Moss*, 5 Whart. 189, 205),

but rather that an indorsement of such bill would amount to a *symbolical delivery*. And if there were also a *bonâ fide* sale accompanying the transfer, the right of the vendor to stop *in transitu* is gone. *Newsom v. Thornton*, 6 East, 41, shows this. There Lord *Ellenborough*, C. J., said: "A bill of lading indeed shall pass the property upon a *bonâ fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. *But it cannot operate further.*" *Lawrence*, J., added: "In *Lickbarrow v. Mason*, some of the judges did indeed liken a bill of lading to a bill of exchange, and considered that the indorsement of the one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was drawn. But in the Exchequer Chamber there was much argument to show that, *in itself*, the indorsement of a bill of lading was no *transfer of the property*, though it might operate, as other instruments, as *evidence* of the transfer." See *Dows v. Cobb*, 12 Barb. 310.

¹ In *Bethell v. Clark*, 19 Q. B. D. 553; 20 Q. B. D. 615, goods were purchased by merchants in London of manufacturers in Wolverhampton, and directions were given to send them by rail to a ship then loading at London consigned to Melbourne, and this was done. It was held that the transit was not at an end till the ship reached Melbourne, and that the vendors had till then a right to stop *in transitu*. To the same effect is *Lyons v. Hoffnug*, 15 A. C. 391. — W.

the goods *in transitu*. (q) ¹ (x) But a second vendee, to whom the bill of lading is not transferred, or not so transferred as to carry

(q) The leading case is *Lickbarrow v. Mason*, first decided in the King's Bench, 1787, and reported in 2 T. R. 63; reversed in the Exchequer Chamber in 1790, and reported in 1 H. Bl. 357; which latter decision the House of Lords reversed, and awarded a *venire de novo* in June, 1793. *Buller's* able opinion before the House of Lords is reported in 6 East, 21, n. The cause was again tried before the King's Bench, in 1794, at the head of which Lord *Kenyon* had in the mean time been placed, and decided in the same manner as in 1787, when the case was first before them. If a writ of error was again brought, it was probably abandoned, as no further report of the case appears. A clear and succinct history of the law on this point is given in *Abbott on Shipping*, 471. *Lickbarrow v. Mason* is to be understood as deciding (y) only, that if there has been an actual and *bonâ fide* sale of goods by the consignee, the consignor cannot stop them, if the purchaser of the consignee has also taken an assignment to himself of the original bill of lading from the consignor to the consignee. The mere assignment of a bill of lading, not based on an actual sale of the goods, it is believed, would not destroy the vendor's right. The delivery of a bill

of lading merely, the same being in the hands of the original consignee, *undorsed*, will not, of course, interfere with the vendor's right of stoppage. *Tucker v. Humphrey*, 4 Bing. 516; s. c. 1 Mo. & P. 394, *Parke, J.* And *a fortiori*, the delivery to the vendee of a mere shipping note of the goods, or a delivery order for them instead of a bill of lading. *Jenkyns v. Osborne*, 7 Man. & G. 678; *Akerman v. Humphrey*, 1 C. & P. 53; *McEwan v. Smith*, 13 Jur. 265, 2 House of L. Cas. 309; *Townley v. Crump*, 4 A. & E. 58. See, however, *Hollingsworth v. Napier*, 3 Caines, 182. In *Walter v. Ross*, 2 Wash. C. C. 283, is an excellent summary of the law on this point. It is there *held*, that the indorsement and delivery of a bill of lading, or the delivery without indorsement, if by the terms of the bill the property is to be delivered to a particular person, amounts to a transfer of the *property*, but not to defeat the vendor's right of stoppage before the goods came actually into the possession of the vendee. But goods at sea may be sold, and if the bill of lading is indorsed, the right to stop *in transitu* is gone. See also *Ryberg v. Snell*, id. 403, and *Gurney v. Behrend*, 25 E. L. & E. 128; s. c. 3 E. & B. 622.

¹ A seller's right of stoppage is put an end to by a transfer of the bill of lading by the buyer to a third person who *bonâ fide* gives value for it. *Audenreid v. Randall*, 3 Clifford, 99; *Kemp v. Canavan*, 15 Ir. C. L. 216; *Loeb v. Peters*, 63 Ala. 248; *Newhall v. Central, &c. R. R.*, 51 Cal. 345. But not by the sale of the goods without delivery of possession or assignment of the bill of lading. *Ocean S. S. Co. v. Ehrlich*, 88 Ga. 502. In *Leask v. Scott*, 2 Q. B. D. 376, it was held that a transfer of a bill of lading for value to a *bonâ fide* transferee defeats the stoppage *in transitu* of an unpaid vendor, although the consideration of the transfer was past and not given at the time of the transfer. *Contra, Rodger v. Comptoir d'Escompte*, L. R. 2 P. C. 393. See also *Lee v. Kimball*, 45 Me. 172; *Loeb v. Peters*, 63 Ala. 248; *Clementson v. Grand Trunk Ry.*, 42 Up. Can. Q. B. 273. But if the original sale was procured by fraud of the buyer, the seller may exercise the right of stoppage against a *bonâ fide* purchaser and assignee of the bill of lading. *Dows v. Perrin*, 16 N. Y. 325; *Decan v. Shipper*, 35 Pa. 239. See also *Pollard v. Vinton*, 105 U. S. 7; *Bergeman v. Indianapolis, &c. Ry. Co.*, 104 Mo. 77. — W.

(x) The right to stop in transit is defeated by the indorsement and transfer of the bill of lading as collateral security, even though to secure an antecedent debt, until the debt so secured is paid. *St. Paul Roller-Mill Co. v. Gt. Western Despatch Co.*, 27 Fed. 434; *Mo. Pac. Ry. Co. v. Heidenheimer*, 82 Texas, 195, 17 S. W. 608. See *Phelps v. Comber*, 29 Ch. D. 813; *First Nat. Bank v. Schmidt*, 6 Col. App. 216, 40 Pac. 479. The right of stoppage may continue as to part of the goods in the carrier's possession at their destination, though the remainder of them

have been delivered to a *bonâ fide* purchaser. So held, under the Code of Georgia, in *Ocean S. S. Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164; and see *Branan v. Atlanta & W. P. R. Co.*, 108 Ga. 70, 33 S. E. 836.

(y) In *Commercial Nat. Bank v. Bemis*, 177 Mass. 95, 98, 58 N. E. 476, where this case is referred to with others, it is said: "The possession of a warehouse receipt, while conclusive of the right of the holder as against the receptor, did not at common law confer on the holder any greater power as against the true owner than the possession

good title, and who neglects to take actual or constructive * possession, is in no better position than the first vendee, * 608 under whom he claims; and the goods may be taken from him by the first vendor, on the insolvency of the first vendee. And if the bill of lading be so transferred and indorsed by way of pledge to secure the consignee's debt, the consignor does not lose entirely his right to stop the goods *in transitu*, but holds it subject to the rights of the pledgee. That is, he may enforce his claim to hold the surplus of the value of the goods, after the pledgee's claim is satisfied; and he holds this surplus to secure the debt of the consignor to him. (r) But the pledgee's claim, which the consignor is thus bound to recognize, would not be for a general balance of account, but only for the specific advances made upon the security of that particular bill of lading. And therefore, by paying or tendering that amount, the consignor acquires the right of retaking all the goods. (s) And if the pledgor had pledged some of his own goods, together with those of the consignee the latter would have a right to insist upon the appropriation of all the pledgor's own goods towards the claim of the pledgee, before any of the goods contained in the bill of lading. (t) ¹

It is said that the exercise of this right is an act so far adverse to the vendee, that if the goods be stopped by virtue of an agreement between the buyer and seller, it is no longer a stoppage *in transitu*, but either a cancelling of the sale by mutual consent, or a reconveyance by the buyer. (u) And it * then be- * 609

(r) *In re Westzinthus*, 5 B. & Ad. 817; *Kemp v. Falk*, 7 A. C. 573; *Chandler v. Fulton*, 10 Tex. 2.

(s) *Spalding v. Ruding*, 6 Beav. 376.

(t) *In re Westzinthus*, 5 B. & Ad. 817.

(u) See *Ash v. Putnam*, 1 Hill (N. Y.), 302. In *Naylor v. Dennie*, 8 Pick. 198, it was said, that although the right of stoppage *in transitu* is adverse to the consignee, that means only that it cannot be exercised under a title derived from the consignee; not that it must be exercised

in hostility to him. And this right of stoppage is not defeated, merely because the consignee gives the consignor a writing declaring that he revokes the order for the goods, and will not receive them, and requests the carrier to deliver them to the consignor. If the consignor, therefore, without regard to any such rescission of the sale by the consignee, duly exercise his right, no previous attachment by the creditors of the consignee, made during their transit, can be set up to defeat it.

¹ Attachment or execution by creditors of the vendee while the goods are in transit does not determine the vendor's right to stop them. *Blackman v. Pierce*, 23 Cal. 508; *Rucker v. Donovan*, 13 Kan. 251; *Wood v. Yeatman*, 15 B. Mon. 270; *Durgy Cement, &c. Co. v. O'Brien*, 123 Mass. 12, 14; *Farrell v. Richmond, &c. R. R. Co.*, 102 N. C. 390; *Mississippi Mills v. Union, &c. Bank*, 9 Lea, 314; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82; *Sherman v. Rugee*, 55 Wis. 346. — W.

of the goods themselves, and the rights arising out of it are said to correspond, not to those arising out of the indorsement of a negotiable promise for the payment of

money, but to those arising out of the actual delivery of the property itself under similar circumstances."

comes in some cases a question of considerable difficulty whether the buyer can dispossess himself of the goods, or of his right to them, for the benefit of the seller, or must hold them as a part of the funds to which his creditors generally may look. (v) The principle which must decide such a question would seem to be this: if the sale is so far complete that the property in the goods has passed to the buyer, and the seller has become his creditor for the price, the buyer can have no more right to give to the seller security or satisfaction or other benefit from those goods than from any others which he may possess. But so long as the transaction is incomplete, the buyer may warn the seller of the danger of going on with it, and may aid him in the use of all legal means to arrest the transaction where it stands, and so save to him his property. (w)

The consignor may rely upon his original property in the goods, and not upon any transfer or reconveyance by the vendee. — It is perfectly well settled that the mere sale of the goods by the vendee during their transit, unaccompanied with any indorsement or delivery of a bill of lading, &c., will not defeat the consignor's right of stoppage. See *Craven v. Ryder*, 6 Taunt. 433; *Whitehouse v. Frost*, 12 East, 614; *Stoveld v. Hughes*, 14 East, 308; *Miles v. Gorton*, 2 Cr. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 339; *Stanton v. Eager*, 16 Pick. 467. *A fortiori*, an attachment, or seizure, on execution, by the creditors of the vendee will not. They can take no more rights than the vendee himself had. *Smith v. Goss*, 1 Camp. 282; *Buckley v. Furniss*, 15 Wend. 137; *Naylor v. Dennie*, 8 Pick. 198.

(v) See *Heinecke v. Earle*, 20 Law Rep. 702.

(w) In *Smith v. Field*, 5 T. R. 402, it was said that a contract of sale might be rescinded by the consent of vendor and vendee, before the rights of others were concerned. But where the vendee wished to return the goods, and the vendor instituted an attachment to attach them in the hands of the packer as the property of the vendee, it was considered as an election by the former not to rescind the contract; and the vendee afterwards having become bankrupt, the vendor was not allowed to recover the goods in trover against the

packer. In *Salte v. Field*, id. 211, goods were bought by the vendee's agent, and lodged in the hands of the vendee's packer. While there, they were attached as the property of the vendee by some of his creditors. The vendee had in fact countermanded the purchase by letter to his agent, written before the delivery of the goods to the packer, though not received until afterwards. Held, the vendor assenting to take back the goods, that the property revested in him, and the attachment was avoided. See *Atkin v. Barwick*, 1 Stra. 165; *Harman v. Fisher*, 1 Cowp. 125; *Alderson v. Temple*, 4 Burr. 2239. The consent of the vendor to retake the goods is, however, essential, where the sale has been completed by actual delivery. *Salte v. Field*, 5 T. R. 211. See *Richardson v. Goss*, 3 B. & P. 119; *Bartram v. Farebrother*, Dan. & L. 42. Such consent may be inferred by the jury, if the vendor use and offer the property again for sale, although when he received it back, he said he would keep it "without prejudice." *Long v. Preston*, 2 Mo. & P. 262. In *Quincy v. Tilton*, 5 Greenl. (Bennett's ed.) 277, it is said, that where parties agree to rescind a sale, the same formalities of delivery, &c., are necessary to revest the property in the original vendor, which were necessary to pass it from him to the vendee. See also *Lanfair v. Sumner*, 17 Mass. 110; *Müller v. Smith*, 1 Mason, 437.

